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Part III

Department of Energy

10 CFR Parts 600 and 603
Assistance Regulations; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 600 and 603

RIN 1991–AB72

Assistance Regulations

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is adopting, with minor changes, the interim final rule published on November 15, 2005, that established a new part to the DOE assistance regulations and revised 10 CFR part 600, subpart A to conform with the new part. The new part establishes policies and procedures to implement the ''other transactions'' authority granted to the Secretary of Energy by Section 1007 of the Energy Policy Act of 2005. DOE is implementing this new authority through the award and administration of technology investment agreements (TIAs).

DATES: *Effective Date:* This final rule is effective on July 10, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Trudy Wood, Office of Procurement and Assistance Policy, Department of Energy, at 202–287–1336.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1007 of the Energy Policy Act of 2005 (Public Law 109–58) amends section 646 of the Department of Energy (DOE) Organization Act by adding a subsection (g) which authorizes the Secretary of Energy to enter into transactions other than contracts, cooperative agreements, and grants (''other transactions'') subject to the same terms and conditions as the Secretary of Defense under section 2371 of title 10, United States Code. On November 15, 2005 (70 FR 69250), DOE published an interim final rule to establish policies and procedures for technology investment agreements (TIAs) to implement the Department's ''other transactions'' authority. These regulations were developed on an expedited basis in order to comply with the statutory requirement to issue guidance within 90 days of enactment of the Energy Policy Act of 2005. In addition to considering public comments, DOE continued to evaluate transactions authorized and carried out by other Federal agencies under similar authority. This evaluation has been considered in formulating the final rule and in developing internal guidance on training and experience requirements for contracting officers, tracking of transactions, audit guidance for for-profit organizations and independent public accountants (IPA), and reporting to Congress.

DOE used the DoD TIA regulation as the basis for developing the new part 603, but tailored the regulation to fit DOE requirements and procedures. Today's final rule permits DOE to enter into a TIA, a special type of assistance instrument, with a for-profit firm or a consortium that includes a for-profit firm after a determination is made that a contract, grant, or cooperative agreement is not feasible or appropriate. A TIA can be either a type of cooperative agreement with more flexible provisions tailored to accommodate the financial management, property management, and purchasing systems of commercial firms, but with standard intellectual property provisions, or an ''other transaction'' if the intellectual property requirements vary from the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.) and the DOE patent statutes (42 U.S.C. 5908 and 42 U.S.C 2182). The two types of TIAs have similar requirements except for the intellectual property requirements.

II. Discussion of Public Comments

The majority of the commenters supported the creation of the new part 603 and considered it an important step forward for the Department. The following paragraphs summarize the significant comments, grouped by subject, and DOE's responses. Where appropriate, the responses explain how we have changed part 603 in the final rule.

General Comments

Comment: The proposed use of TIAs allows for little discretion on the part of the contracting officer. Lack of flexibility will deter non-traditional sources from participating.

Response: The rule establishes minimum requirements for proper stewardship of federal funds, including audits, financial systems that comply with Generally Accepted Accounting Principles and effectively control project funds, and reporting requirements. These requirements are similar to the requirements established by the Department of Defense for TIAs. Contracting officers have considerable latitude to negotiate TIA terms and conditions as long as they comply with the minimum requirements established by the rule.

Comment: The use of an ''other transaction'' may require substantial and burdensome negotiations since standard government administrative and financial requirements and terms and conditions may not apply.

Response: We understand that a TIA that is an ''other transaction,'' may require additional negotiations because the standard provisions do not automatically apply. The point of the ''other transactions'' authority is to permit DOE to enter into agreements that are not burdened by standard provisions that would serve as a disincentive to non-traditional Government contractors. While these agreements may require additional negotiations, the flexibility of the other transaction instrument will out weigh the burden of the additional negotiations. The ''other transactions'' authority granted to the Secretary requires that a written determination be made that a contract, grant, or cooperative agreement is not feasible or appropriate for a particular project. DOE will award a TIA only after such a determination is made.

Cost Sharing

Comment: No guidance is provided as to whether current independent research and development (IR&D) costs may be used for the cost share portion.

Response: We have added a paragraph to § 603.530(f) to explain that current IR&D costs may be used for cost sharing if they meet the criteria in paragraphs (a) through (e) of § 603.530.

Cost Accounting Standards

Comment: The goal of using a TIA is to attract ''non-traditional contractors'' which generally do not have United States Government contracts under the Federal Acquisition Regulations (FAR). ''Non-traditional contractors'' will likely not have cost accounting or CAS-compliant systems.

Response: For the purposes of a TIA, a non-traditional contractor is not

required to have CAS-compliant systems. The rule specifies in § 603.615(b) that a contracting officer is to allow and encourage each for-profit participant that does not currently perform under expenditure-based Federal procurement contracts or assistance awards (other than a TIA) to use its existing financial management system as long as the system complies with Generally Accepted Accounting Principles, effectively controls all project funds, and, if advance payments are authorized, includes procedures to minimize the time elapsing between the payment of funds by the Government and the firm's disbursement of the funds.

Flowdown Requirements for DOE FFRDC Contractors

Comment: DOE should require that any funds provided to a DOE FFRDC emanating from a TIA, be via a ''Funds-in-CRADA'' or ''Work for Others'' agreement and, notwithstanding any ''flowdown'' requirements contained in the TIA, the existing property, procurement, finance, accounting and audit systems in place for the FFRDC Prime Contract be used for performing work under a TIA.

Response: In accordance with § 603.650, the general policy for an expenditure-based TIA is to avoid requirements that force participants, including FFRDC contractors, to use different financial management, property management, and purchasing systems than they currently use for expenditure-based Federal procurement contracts and assistance awards. We have revised § 603.610 to identify the flowdown requirements for GOCO and FFRDC contractors. We have also revised § 603.650 to clarify that the Federal cognizant agency would perform audits of GOCO and FFRDC contractors. If a DOE FFRDC contractor is a member of a consortium or a subrecipient under a TIA award, the FFRDC work would normally be authorized under the DOE Work Authorization System for M&O contractors or other appropriate instrument that would specify the terms and conditions of the award.

Intellectual Property

Comment: Anticipated development costs to be paid by the contractor should be considered by the contracting officer in deciding appropriate invention rights arrangements.

Response: Section 603.860(b) has been modified to instruct the contracting officer to consider anticipated future investments of recipient to the development of the technology.

Comment: Regarding rights to inventions, it is recommended that model outcomes be provided to help guide the contracting officer in deciding what best represents a ''reasonable arrangement.''

Response: The regulation, at § 603.860(c)(2), addresses some typical ''outcomes'' for a TIA that is an ''other transaction.'' These include the retention by recipient/participant of title to subject inventions or the elimination or modification of a paid up government license in subject inventions. Section 603.865 addresses modification, or possible elimination, of march-in rights. Section 603.875(c) allows for waiver or modification of ''substantial U.S. manufacture'' requirements. Contracting officers will be guided by these provisions, and the requirement in § 603.860(b) that any changes to the standard patent rights provision must be approved by intellectual property counsel. Specifying ''model outcomes'' in more detail would result in less flexibility to accommodate a wide variety of anticipated or unforeseen circumstances.

Comment: It is unclear as to the need for the use of march-in rights, as the U.S. Government has yet to invoke this clause, and the use of march-in rights will likely deter non-traditional contractors. The example provided is not very specific.

Response: Preserving ''march-in rights'' is important as a safeguard against non-use of important technology made with U.S. Government assistance. We continue to believe that its elimination should be limited to relatively rare circumstances. However, DOE intends to be flexible in considering modifications to the Bayh-Dole ''march-in'' language.

Comment: No process is provided for the waiver of the requirement for substantial manufacture in the U.S. of products embodying subject inventions.

Response: DOE has not specified in the past, nor is it specifying in this regulation, a formal process for waiver of the ''substantial U.S. manufacture'' requirement. Instead, a written request for such a waiver may be made directly to the contracting officer, with reasons therefor, addressing one or more of the specified grounds for such a waiver or modification. DOE has used this approach for many years as part of its patent waiver process, and has demonstrated ample flexibility on this issue.

Comment: Only three reasons are specified as acceptable for granting a waiver of the ''substantial U.S. manufacture'' requirement. The ''alternative benefits'' requirement appears to be more stringent than that previously required by DOE, and more onerous than that of DoD.

Response: While three alternate reasons are specified, they can be applied very flexibly, in accordance with the ''informal'' procedure mentioned in response to the previous comment. The third specified reason, that under the circumstances domestic manufacture is not commercially feasible, is very broad and could accommodate a wide variety of circumstances, including unforeseen circumstances. As to the contention that this requirement is more stringent than previously, it is consistent with DOE's practice under its patent waiver authority at 10 CFR part 784, which allows DOE to include additional terms and conditions in its patent waiver determinations. DOE's programmatic mission and statutory authority, including patent waiver authority, are different from that of DoD. DOE has included, for many years, provisions addressing substantial U.S. manufacture that may be more comprehensive than those used by DoD.

Comment: Use of ''other transactions'' may erode the essential Bayh-Dole Act balancing of incentives and obligations, and public and private interests in rights to federally supported inventions. DoD policies provide that a TIA generally would include the patent rights clause (37 CFR 401.14) that implements Bayh-Dole requirements. There is no indication that the normal default should be to include Bayh-Dole rights.

Response: Unlike DoD, which is generally subject only to Bayh-Dole and ''other transactions'' authority regarding rights to federally supported inventions, DOE is also subject to 42 U.S.C. 2182 and 5908, which require title to inventions in Government, unless a patent waiver is approved. Therefore, DOE cannot simply follow the DoD practice of having a TIA generally include the Bayh-Dole government-wide patent rights clause at 37 CFR 401.14. However, for a TIA that is an ''other transaction'' as set forth in § 603.860(c)(2), the normal clause would be a patent waiver clause as required by 10 CFR 784, which provides for recipient to retain title to subject inventions in a fashion similar to that of 37 CFR 401.14.

Comments: In federally-funded university industry collaborations supported by ''other transactions,'' there is no requirement to flow down ''Bayh-Dole rights'' to nonprofit subcontractors. If a consortium includes nonprofits,

normal ''Bayh-Dole rights'' should be required to be flowed down to these nonprofit recipients.

Response: DOE anticipates that in most cases of TIAs involving nonprofits or small businesses, ''Bayh-Dole rights'' will be applicable. However, for situations involving industry-university collaborations such as consortia or teaming arrangements, DOE believes it is important to retain flexibility to vary normal ''Bayh-Dole rights.'' This would be the case, for example, in order to harmonize licensing rights to inventions among collaborating parties when some are nonprofits and others are large for-profit businesses who are providing substantial cost-sharing, or otherwise demonstrating a compelling reason for mutual access to license rights to inventions of a collaborating partner. This type of ''harmonization'' of rights among team members may serve to foster, rather than inhibit, the formation of effective industry-university collaborations. However, to address these concerns, DOE has included an additional paragraph at § 603.860(d) to provide further guidance for a subaward under a TIA that is an ''other transaction.''

Comment: It is unclear if FFRDC/GOCO's are to negotiate intellectual property rights based on the terms of the TIA, or on the terms of the FFRDC/GOCO's prime contract. We recommend that the invention rights requirements in the FFRDC/GOCO prime contract apply to a TIA subaward.

Response: DOE does not believe it is appropriate, or in keeping with the intent of the ''other transactions'' authority, to require that the terms of the FFRDC/GOCO prime contract dictate the terms of a FFRDC/GOCO subaward under a TIA that is an ''other transaction.'' However, as described in the response to the previous comment, DOE has added language at § 603.860(d) that provides flexibility to a contracting officer to consider circumstances where a FFRDC/GOCO subawardee (or other subawardee) may obtain title to, or other disposition of, inventions they make.

Reporting Requirements

Comment: Section 603.890 states that a TIA must require a final performance report that addresses all major accomplishments under the TIA. This requirement is in conflict with § 603.900, which begins, ''If a final report is required. . .''

Response: We have amended § 603.900 to delete the words, ''If a final report is required.''

Comment: Section 603.870, Marking of documents related to inventions, implies that contractors are required to report inventions, yet in § 603.880 there is no mention of disclosure of inventions only program performance and business/financial status.

Response: Section 603.880 states that a TIA must include requirements that, *as a minimum*, provide for periodic reports addressing program performance and, if it is an expenditure-based award, business/financial status. The DOE standard financial assistance patent invention provisions already include a requirement to report subject inventions. While § 603.860 allows the contracting officer to negotiate patent rights requirements that vary from that which the Bayh-Dole statute requires, such requirements will most likely include reporting subject inventions. The TIA award will identify all required reports and the submittal process for these reports.

III. Revisions Incorporated in This Final Rule

In addition to the changes made in response to public comments, we have:

1. Deleted the first sentence in § 603.405, which required the use of the government-wide standard format for program announcements, since a TIA may also be awarded under a broad agency announcement (BAA) or other similar announcement.

2. Revised § 603.515 by reordering the paragraphs and adding language to clarify that a consortium, which is not formally incorporated, must provide a collaboration agreement.

3. Revised § 603.860 by adding a new paragraph (e) that states ''Consortium members may allocate in their collaboration agreement invention rights, subject to the review of the contracting officer.''

4. Added the designation § 603.1200 to the paragraph immediately following the Subpart J heading.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be ''a significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Review Under Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking'' (67 FR 53461, August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.* DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This regulatory action will not have a significant adverse impact on a substantial number of small entities because under part 603, small entities are subject either to requirements that parallel government wide requirements that OMB Circular A–110 establishes for other assistance awards, or to less burdensome requirements that enable firms from the commercial marketplace to participate in DOE research, development, and demonstration. On the basis of the foregoing, DOE certifies that the rule does not have a significant economic impact on a substantial number of small entities. DOE did not prepare a regulatory flexibility analysis for this rulemaking.

C. Review Under the Paperwork Reduction Act of 1995

This regulatory action will not impose any additional reporting or recordkeeping requirements subject to approval under the Paperwork Reduction Act. Participant reporting and recordkeeping requirements in part 603 either are parallel to, or less burdensome than, government wide requirements already established in OMB Circular A–110.

D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule establishes guidelines and procedures for application and review, administration, audit and closeout of assistance instruments, and, therefore, is covered under the Categorical Exclusion

in paragraph A6 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Act of 1995

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of $100 million or more in any one year.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001, 44 U.S.C. 3516 note, provides for agencies to review most disseminations of information to the public under implementing guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Review Under the Small Business Regulatory Enforcement Fairness Act

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

V. Approval of the Office of the Secretary of Energy

The Office of the Secretary has approved the issuance of this rule.

List of Subjects

10 CFR Part 600

Administrative practice and procedure, Assistance programs.

10 CFR Part 603

Accounting, Administrative practice and procedure, Financial assistance programs, Grant programs, Reporting and recordkeeping requirements, Technology investments.

Issued in Washington, DC on April 26, 2006.

Edward R. Simpson,

Director, Office of Procurement and Assistance Management, Office of Management, Department of Energy.

Robert C. Braden,

Director, Office of Acquisition and Supply Management, National Nuclear Security Administration, Department of Energy.

■ Accordingly, the interim final rule amending part 600 of chapter II, title 10 of the Code of Federal Regulations and adding part 603 of chapter II, title 10 of the Code of Federal Regulations, which was published at 70 FR 69250 on November 15, 2005, is adopted as a final rule, with the following changes:

■ 1. Part 603 is revised to read as follows:

PART 603—TECHNOLOGY INVESTMENT AGREEMENTS

Authority: 42 U.S.C. 7101 *et seq.*; 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.*, unless otherwise noted.

Subpart A—General

§ 603.100 Purpose.

This part establishes uniform policies and procedures for the implementation of DOE's ''other transactions'' authority and for award and administration of a technology investment agreement (TIA).

§ 603.105 Description.

(a) A TIA is a special type of assistance instrument used to increase involvement of commercial firms in the Department of Energy's (DOE) research, development and demonstration (RD&D) programs. A TIA, like a cooperative agreement, requires substantial Federal involvement in the technical or management aspects of the project. A TIA may be either a type of cooperative agreement or a type of assistance transaction other than a cooperative agreement, depending on the intellectual property provisions. A TIA is either:

(1) A type of cooperative agreement with more flexible provisions tailored for commercial firms (as distinct from a cooperative agreement subject to all of the requirements in 10 CFR 600), but with intellectual property provisions in full compliance with the DOE intellectual property statutes (*i.e.*, Bayh-Dole statute and 42 U.S.C. 2182 and 5908, as implemented in 10 CFR 600.325). The authority to award this type of TIA is 42 U.S.C. 7256(a), as well as any program-specific statute that provides authority to award cooperative agreements; or

(2) An assistance transaction other than a cooperative agreement, if its intellectual property provisions vary from the Bayh-Dole statute and 42 U.S.C. 2182 and 5908, which require the Government to retain certain intellectual property rights and require differing treatment between large businesses and nonprofit organizations or small businesses. The authority to award this type of TIA is 42 U.S.C. 7256(g), as well as any program-specific statute that provides authority to award assistance agreements.

(b) The two types of TIAs have similar requirements, except for the intellectual property requirements. If the contracting officer determines there is a unique, exceptional need to vary from the standard intellectual property requirements in 10 CFR 600.325, the TIA becomes an assistance transaction other than a cooperative agreement.

§ 603.110 Use of TIAs.

The ultimate goal for using a TIA is to broaden the technology base available to meet DOE mission requirements and foster within the technology base new relationships and practices to advance the national economic and energy security of the United States, to promote scientific and technological innovation in support of that mission, and to ensure the environmental cleanup of the national nuclear weapons complex. A TIA therefore is designed to:

(a) Reduce barriers to participation in RD&D programs by commercial firms that deal primarily in the commercial marketplace. A TIA allows contracting officers to tailor Government requirements and lower or remove barriers if it can be done with proper stewardship of Federal funds.

(b) Promote new relationships among performers in the technology base. Collaborations among commercial firms that deal primarily in the commercial marketplace, firms that regularly perform on the DOE RD&D programs and nonprofit organizations can enhance overall quality and productivity.

(c) Stimulate performers to develop and use new business practices and disseminate best practices throughout the technology base.

§ 603.115 Approval requirements.

An officer of the Department who has been appointed by the President by and with the advice and consent of the Senate and who has been delegated the authority from the Secretary must approve the award of a TIA and may perform other functions of the Secretary as set forth in 42 U.S.C. 7256(g). This authority may not be re-delegated. The DOE or National Nuclear Security Administration (NNSA) Senior Procurement Executive also must concur in the award of a TIA.

§ 603.120 Contracting officer warrant requirements.

A contracting officer may award or administer a TIA only if the contracting officer's warrant authorizes the award or administration of a TIA.

§ 603.125 Applicability of other parts of the DOE Assistance Regulations.

(a) TIAs are explicitly covered in this part and 10 CFR part 600, subpart A—General. 10 CFR part 600, subpart A, addresses general matters that relate to assistance instruments.

(b) Three additional parts of the DOE Assistance Regulations apply to TIAs, although they do not mention a TIA explicitly. They are:

(1) 10 CFR part 601—lobbying restrictions apply by law (31 U.S.C. 1352) to a TIA that is a cooperative agreement and as a matter of DOE policy to a TIA that is an assistance transaction other than a cooperative agreement.

(2) 10 CFR part 606—debarment and suspension requirements apply because they cover nonprocurement instruments in general; and

(3) 10 CFR part 607—drug-free workplace (financial assistance) requirements apply because they cover all assistance instruments.

(c) Other portions of 10 CFR part 600 apply to a TIA as referenced in part 603.

Subpart B—Appropriate Use of Technology Investment Agreements

§ 603.200 Contracting officer se acquisition responsibilities.

Contracting officers may use a TIA only in appropriate situations. To do so, the use of a TIA must be justified based on:

(a) The nature of the project, as discussed in § 603.205;

(b) The type of recipient, addressed in § 603.210;

(c) The recipient's commitment and cost sharing, as described in § 603.215;

(d) The degree of involvement of the Government program official, as discussed in § 603.220; and

(e) The contracting officer's judgment that the use of a TIA could benefit the RD&D objectives in ways that likely would not happen if another type of instrument were used (i.e., a contract, grant or cooperative agreement is not feasible or appropriate). Answers to the four questions in § 603.225 form the basis for the contracting officer's judgment.

§ 603.205 Nature of the project.

Judgments relating to the nature of the project include:

(a) The principal purpose of the project is to carry out a public purpose of support or stimulation of RD&D (i.e., assistance), rather than acquiring goods or services for the benefit of the Government (i.e., acquisition);

(b) To the maximum extent practicable, the TIA does not support RD&D that duplicates other RD&D being conducted under existing programs carried out by the DOE; and

(c) The use of a standard contract, grant or cooperative agreement for the project is not feasible or appropriate (see questions in § 603.225).

§ 603.210 Recipients.

(a) A TIA requires one or more for-profit firms, not acting in their capacity

as the contractor of a FFRDC, to be involved either in the:

(1) Performance of the RD&D project; or

(2) The commercial application of the results.

(i) In those cases where there is only a non-profit performer or a consortium of non-profit performers or non-profit performers and FFRDC contractors, if and as authorized, the performers must have at least a tentative agreement with a specific for-profit partner or partners who plan on being involved in the commercial application of the results.

(ii) In consultation with legal counsel, the contracting officer should review the agreement between the performers and their for-profit partner to ensure that the for-profit partner is committed to being involved in the commercial application of the results.

(b) A TIA may be particularly useful for awards to consortia (a consortium may include one or more for-profit firms, as well as State or local government agencies, institutions of higher education, other nonprofit organizations, or FFRDC contractors, if and as authorized) because:

(1) If multiple performers are participating as a consortium, they may be more equal partners in the performance of the project than usually is the case with a prime recipient and subrecipients. All of the performers are more likely to be directly involved in developing and revising plans for the RD&D effort, reviewing technical progress, and overseeing financial and other business matters. That feature makes consortia well suited to building new relationships among performers in the technology base, a principal objective for the use of a TIA.

(2) In addition, interactions among the participants within a consortium potentially provide a self-governance mechanism. The potential for additional self-governance is particularly good when a consortium includes multiple for-profit participants that normally are competitors within an industry.

(c) A TIA may be used for carrying out RD&D performed by single firms or multiple performers (e.g., a teaming arrangement) in prime award-subaward relationships. In awarding a TIA in those cases, however, consideration should be given to providing for greater involvement of the program official or a way to increase self-governance (e.g., a prime award with multiple subawards arranged so as to give the subrecipients more insight into and authority and responsibility for the programmatic and business aspects of the overall project than they usually have).

§ 603.215 Recipient's commitment and cost sharing.

(a) The contracting officer should evaluate whether the recipient has a strong commitment to and self-interest in the success of the project and incorporating the technology into products and processes for the commercial marketplace. Evidence of that commitment and interest should be found in the proposal, in the recipient's management plan, or through other means.

(b) The contracting officer must seek cost sharing. The purpose of cost sharing is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success; the willingness to commit to meaningful cost sharing is a good indicator of a recipient's self-interest. The requirements are that:

(1) To the maximum extent practicable, the non-Federal parties carrying out a RD&D project under a TIA are to provide at least half of the costs of the project; and

(2) The parties must provide the cost sharing from non-Federal resources unless otherwise provided by law.

(c) The contracting officer may consider whether cost sharing is impracticable in a given case, unless there is a statutory requirement for cost sharing that applies to the particular program under which the award is to be made. Before deciding that cost sharing is impracticable, the contracting officer should carefully consider if there are other factors that demonstrate the recipient's self-interest in the success of the current project.

§ 603.220 Government participation.

A TIA is used to carry out cooperative relationships between the Federal Government and the recipient(s) which require substantial involvement of the Government in the execution of the RD&D. For example, program officials will participate in recipients' periodic reviews of progress and may be substantially involved with the recipients in the resulting revisions of plans for future effort.

§ 603.225 Benefits of using a TIA.

Before deciding that a TIA is appropriate, the contracting officer also must judge that using a TIA could benefit the RD&D objectives in ways that likely would not happen if another type of assistance instrument were used (e.g., a cooperative agreement subject to all of the requirements of 10 CFR part 600). The contracting officer, in conjunction with Government program officials, must consider the questions in paragraphs (a) through (d) of this section, to help identify the benefits that may justify using a TIA and reducing some of the usual requirements. The contracting officer must report the answers to these questions to help the DOE measure the benefits of using a TIA. Note full concise answers are required only to questions that relate to the benefits perceived for using the TIA, rather than another type of funding instrument, for the particular project. A simple ''no'' or ''not applicable'' is a sufficient response for other questions. The questions are:

(a) Will the use of a TIA permit the involvement of any commercial firms or business units of firms that would not otherwise participate in the project? If so:

(1) What are the expected benefits of those firms' or divisions' participation (e.g., is there a specific technology that could be better, more readily available, or less expensive)?

(2) Why would they not participate if an instrument other than a TIA were used? The contracting officer should identify specific provisions of the TIA or features of the TIA award process that enable their participation. For example, if the RD&D effort is based substantially on a for-profit firm's privately developed technology and the Government may be a major user of any commercial product developed as a result of the award, a for-profit firm may not participate unless the Government's intellectual property rights in the technology are modified.

(b) Will the use of a TIA allow the creation of new relationships among participants in a consortium, at the prime or subtier levels, among business units of the same firm, or between non-Federal participants and the Federal Government that will foster better technology? If so:

(1) Why do these new relationships have the potential for fostering technology that is better, more affordable, or more readily available?

(2) Are there provisions of the TIA or features of the TIA award process that enable these relationships to form? If so, the contracting officer should be able to identify specifically what they are. If not, the contracting officer should be able to explain specifically why the relationships could not be created if another type of assistance instrument were used. For example, a large business firm may not be willing to participate in a consortium or teaming arrangement with small business firms and nonprofit firms under a standard cooperative agreement because those entities have invention rights under the Bayh-Dole statute that are not available to large businesses. A large business

firm may be willing to participate in a consortium or teaming arrangement only if all partners are substantially equal with regard to the allocation of intellectual property rights.

(c) Will the use of a TIA allow firms or business units of firms that traditionally accept Government awards to use new business practices in the execution of the RD&D project that will foster better technology, new technology more quickly or less expensively, or facilitate partnering with commercial firms? If so:

(1) What specific benefits result from the use of these new practices? The contracting officer should be able to explain specifically the potential for those benefits.

(2) Are there provisions of the TIA or features of the TIA award process that enable the use of the new practices? If so, the contracting officer should be able to identify those provisions or features and explain why the practices could not be used if the award were made using another type of assistance instrument.

(d) Are there any other benefits of the use of a TIA that could help DOE meet its objectives in carrying out the project? If so, the contracting officer should be able to identify specifically what they are, how they can help meet the objectives, what features of the TIA or award process enable DOE to realize them, and why the benefits likely would not be realized if an assistance instrument other than a TIA were used.

§ 603.230 Fee or profit.

The contracting officer may not use a TIA if any participant is to receive fee or profit. Note that this policy extends to all performers of the project, including any subawards for substantive program performance, but it does not preclude participants' or subrecipients' payment of reasonable fee or profit when making purchases from suppliers of goods (e.g., supplies and equipment) or services needed to carry out the RD&D.

Subpart C—Requirements for Expenditure-Based and Fixed-Support Technology Investment Agreements

§ 603.300 Difference between an expenditure-based and a fixed-support TIA.

The contracting officer may negotiate expenditure-based or fixed-support award terms for either types of TIA subject to the requirements in this subpart. The fundamental difference between an expenditure-based and a fixed-support TIA is:

(a) For an expenditure-based TIA, the amounts of interim payments or the total amount ultimately paid to the recipient are based on the amounts the recipient expends on project costs. If a recipient completes the project specified at the time of award before it expends all of the agreed-upon Federal funding and recipient cost sharing, the Federal Government may recover its share of the unexpended balance of funds or, by mutual agreement with the recipient, amend the agreement to expand the scope of the RD&D project. An expenditure-based TIA, therefore, is analogous to a cost-type procurement contract or grant.

(b) For a fixed-support TIA, the amount of assistance is established at the time of award and is not meant to be adjusted later. In that sense, a fixed-support TIA is somewhat analogous to a fixed-price procurement contract.

§ 603.305 Use a fixed-support TIA.

The contracting officer may use a fixed-support TIA if:

(a) The agreement is to support or stimulate RD&D with outcomes that are well defined, observable, and verifiable;

(b) The resources required to achieve the outcomes can be estimated well enough to ensure the desired level of cost sharing (see example in § 603.560(b)); and

(c) The agreement does not require a specific amount or percentage of recipient cost sharing. In cases where the agreement does require a specific amount or percentage of cost sharing, a fixed-support TIA is not practicable because the agreement has to specify cost principles or standards for costs that may be charged to the project; require the recipient to track the costs of the project; and provide access for audit to allow verification of the recipient's compliance with the mandatory cost sharing. A fixed-support TIA may not be used if there is:

(1) A requirement (e.g., in statute or policy determination) for a specific amount or percentage of recipient cost sharing; or

(2) The contracting officer, in consultation with the program official, otherwise elects to include in the TIA a requirement for a specific amount or percentage of cost sharing.

§ 603.310 Use of an expenditure-based TIA.

In general, the contracting officer must use an expenditure-based TIA under conditions other than those described in § 603.305. Reasons for any exceptions to this general rule must be documented in the award file and must be consistent with the policy in § 603.230 that precludes payment of fee or profit to participants.

§ 603.315 Advantages of a fixed-support TIA.

In situations where the use of a fixed-support TIA is permissible (see §§ 603.305 and 603.310), its use may encourage some commercial firms' participation in the RD&D. With a fixed-support TIA, the contracting officer can eliminate or reduce some post-award requirements that sometimes are cited as disincentives for those firms to participate. For example, a fixed-support TIA need not:

(a) Specify minimum standards for the recipient's financial management system;

(b) Specify cost principles or standards stating the types of costs the recipient may charge to the project;

(c) Provide for financial audits by Federal auditors or independent public accountants of the recipient's books and records;

(d) Set minimum standards for the recipient's purchasing system; or

(e) Require the recipient to prepare financial reports for submission to the Federal Government.

Subpart D—Competition Phase

§ 603.400 Competitive procedures.

DOE policy is to award a TIA using competitive procedures and a merit-based selection process, as described in 10 CFR 600.6 and 600.13, respectively:

(a) In every case where required by statute; and

(b) To the maximum extent feasible, in all other cases. If it is not feasible to use competitive procedures, the contracting officer must comply with the requirements in 10 CFR 600.6(c).

§ 603.405 Announcement format.

If the contracting officer, in consultation with the program official, decides that a TIA is among the types of instruments that may be awarded, the additional elements described in §§ 603.410 through 603.420 should be included in the announcement.

§ 603.410 Announcement content.

Once the contracting officer, in consultation with the program official, considers the factors described in Subpart B of this part and decides that a TIA is among the types of instruments that may be awarded pursuant to a program announcement, it is important to state that fact in the announcement. The announcement also should state that a TIA is more flexible than a traditional financial assistance agreement and that requirements are negotiable in areas such as audits and intellectual property rights that may cause concern for commercial firms.

Doing so should increase the likelihood that commercial firms will be willing to submit proposals.

§ 603.415 Cost sharing.

To help ensure a competitive process that is fair and equitable to all potential proposers, the announcement should state clearly:

(a) That, to the maximum extent practicable, the non-Federal parties carrying out a RD&D project under a TIA are to provide at least half of the costs of the project (see § 603.215(b));

(b) The types of cost sharing that are acceptable;

(c) How any in-kind contributions will be valued, in accordance with §§ 603.530 through 603.555; and

(d) Whether any consideration will be given to alternative approaches a proposer may offer to demonstrate its strong commitment to and self-interest in the project's success, in accordance with § 603.215.

§ 603.420 Disclosure of information.

The announcement should tell potential proposers that:

(a) For all TIAs, information described in paragraph (b) of this section is exempt from disclosure requirements of the Freedom of Information Act (FOIA)(codified at 5 U.S.C. 552) for a period of five years after the date on which the DOE receives the information from them; and

(b) As provided in 42 U.S.C. 7256(g) incorporating certain provisions of 10 U.S.C. 2371, disclosure is not required, and may not be compelled, under FOIA during that period if:

(1) A proposer submits the information in a competitive or noncompetitive process that could result in the award of a TIA; and

(2) The type of information is among the following types that are exempt:

(i) Proposals, proposal abstracts, and supporting documents; and

(ii) Business plans and technical information submitted on a confidential basis.

(c) If proposers desire to protect business plans and technical information for five years from FOIA disclosure requirements, they must mark them with a legend identifying them as documents submitted on a confidential basis. After the five-year period, information may be protected for longer periods if it meets any of the criteria in 5 U.S.C. 552(b) (as implemented by the DOE in 10 CFR part 1004) for exemption from FOIA disclosure requirements.

Subpart E—Pre-Award Business Evaluation

§ 603.500 Pre-award business evaluation.

(a) The contracting officer must determine the qualification of the recipient, as described in §§ 603.510 and 603.515.

(b) As the business expert working with the program official, the contracting officer also must address the financial aspects of the proposed agreement. The contracting officer must:

(1) Determine that the total amount of funding for the proposed effort is reasonable, as addressed in § 603.520.

(2) Assess the value and determine the reasonableness of the recipient's proposed cost sharing contribution, as discussed in §§ 603.525 through 603.555.

(3) If contemplating the use of a fixed-support rather than expenditure-based TIA, ensure that its use is justified, as explained in §§ 603.560 and 603.565.

(4) Determine amounts for milestone payments, if used, as discussed in § 603.570.

§ 603.505 Program resources.

Program officials can be a source of information for determining the reasonableness of proposed funding (e.g., on labor rates, as discussed in § 603.520) or establishing observable and verifiable technical milestones for payments (see § 603.570).

Recipient Qualification

§ 603.510 Recipient qualifications.

Prior to award of a TIA, the contracting officer's responsibilities for determining that the recipient is qualified are the same as those for awarding a grant or cooperative agreement. If the recipient is a consortium that is not formally incorporated, the contracting officer has the additional responsibility described in § 603.515.

§ 603.515 Qualification of a consortium.

(a) A consortium that is not formally incorporated must provide a collaboration agreement, commonly referred to as the articles of collaboration, which sets out the rights and responsibilities of each consortium member. This agreement binds the individual consortium members together and should discuss, among other things, the consortium's

(1) Management structure;

(2) Method of making payments to consortium members;

(3) Means of ensuring and overseeing members' efforts on the project;

(4) Provisions for members' cost sharing contributions; and

(5) Provisions for ownership and rights in intellectual property developed previously or under the agreement.

(b) If the prospective recipient of a TIA is a consortium that is not formally incorporated, the contracting officer must, in consultation with legal counsel, review the management plan in the consortium's collaboration agreement to ensure that the management plan is sound and that it adequately addresses the elements necessary for an effective working relationship among the consortium members. An effective working relationship is essential to increase the project's chances of success.

Total Funding

§ 603.520 Reasonableness of total project funding.

In cooperation with the program official, the contracting officer must assess the reasonableness of the total estimated budget to perform the RD&D that will be supported by the agreement.

(a) *Labor.* Much of the budget likely will involve direct labor and associated indirect costs, which may be represented together as a ''loaded'' labor rate. The program official is an essential advisor on reasonableness of the overall level of effort and its composition by labor category. The contracting officer also may rely on experience with other awards as the basis for determining reasonableness.

(b) *Real property and equipment.* In almost all cases, the project costs should normally include only depreciation or use charges for real property and equipment of for-profit participants, in accordance with § 603.680. Remember that the budget for an expenditure-based TIA may not include depreciation of a participant's property as a direct cost of the project if that participant's practice is to charge the depreciation of that type of property as an indirect cost, as many organizations do.

Cost Sharing

§ 603.525 Value and reasonableness of the recipient's cost sharing contribution.

The contracting officer must:

(a) Determine that the recipient's cost sharing contributions meet the criteria for cost sharing and determine values for them, in accordance with §§ 603.530 through 603.555. In doing so, the contracting officer must:

(1) Ensure that there are affirmative statements from any third parties identified as sources of cash contributions, and

(2) Include in the award file an evaluation that documents how the values of the recipient's contributions to

the funding of the project were determined.

(b) Judge that the recipient's cost sharing contribution, as a percentage of the total budget, is reasonable. To the maximum extent practicable, the recipient must provide at least half of the costs of the project, in accordance with § 603.215.

§ 603.530 Acceptable cost sharing.

The contracting officer may accept any cash or in-kind contributions that meet all of the following criteria.

(a) In the contracting officer's judgment, they represent meaningful cost sharing that demonstrates the recipient's commitment to the success of the RD&D project. Cash contributions clearly demonstrate commitment and they are strongly preferred over in-kind contributions.

(b) They are necessary and reasonable for accomplishment of the RD&D project's objectives.

(c) They are costs that may be charged to the project under § 603.625 and § 603.635, as applicable to the participant making the contribution.

(d) They are verifiable from the recipient's records.

(e) They are not included as cost sharing contributions for any other Federal award.

(f) They are not paid by the Federal Government under another award, except:

(1) Costs that are authorized by Federal statute to be used for cost sharing.

(2) Independent research and development (IR&D) costs, as described in 48 CFR part 31.208–18, that meet all of the criteria in paragraphs (a) through (e) of this section. IR&D is acceptable as cost sharing, even though it may be reimbursed by the Government through other awards. It is standard business practice for all for-profit firms, including commercial firms, to recover their IR&D costs through prices charged to their customers. Thus, the cost principles at 48 CFR part 31 allow a for-profit firm that has expenditure-based, Federal procurement contracts to recover through those procurement contracts the allocable portion of its research and development costs associated with a technology investment agreement. Contracting officers should note that in accordance with section 603.545, they may not count participant's costs of prior research, including IR&D, as a cost sharing contribution.

§ 603.535 Value of proposed real property or equipment.

The contracting officer rarely should accept values for cost sharing contributions of real property or equipment that are in excess of depreciation or reasonable use charges, as discussed in § 603.680 for for-profit participants. The contracting officer may accept the full value of a donated capital asset if the real property or equipment is to be dedicated to the project and the contracting officer expects that it will have a fair market value that is less than $5,000 at the project's end. In those cases, the contracting officer should value the donation at the lesser of:

(a) The value of the property as shown in the recipient's accounting records (*i.e.*, purchase price less accumulated depreciation); and

(b) The current fair market value. The contracting officer may accept the use of any reasonable basis for determining the fair market value of the property. If there is a justification to do so, the contracting officer may accept the current fair market value even if it exceeds the value in the recipient's records.

§ 603.540 Acceptability of fully depreciated real property or equipment.

The contracting officer should limit the value of any contribution of a fully depreciated asset to a reasonable use charge. In determining what is reasonable, the contracting officer must consider:

(a) The original cost of the asset;

(b) Its estimated remaining useful life at the time of the negotiations;

(c) The effect of any increased maintenance charges or decreased performance due to age; and

(d) The amount of depreciation that the participant previously charged to Federal awards.

§ 603.545 Acceptability of costs of prior RD&D.

The contracting officer may not count any participant's costs of prior RD&D as a cost sharing contribution. Only the additional resources that the recipient will provide to carry out the current project (which may include pre-award costs for the current project, as described in § 603.830) are to be counted.

§ 603.550 Acceptability of intellectual property.

(a) In most instances, the contracting officer should not count costs of patents and other intellectual property (*e.g.*, copyrighted material, including software) as cost sharing because:

(1) It is difficult to assign values to these intangible contributions;

(2) Their value usually is a manifestation of prior research costs, which are not allowed as cost share under § 603.545; and

(3) Contributions of intellectual property rights generally do not represent the same cost of lost opportunity to a recipient as contributions of cash or tangible assets. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success.

(b) The contracting officer may include costs associated with intellectual property if the costs are based on sound estimates of market value of the contribution. For example, a for-profit firm may offer the use of commercially available software for which there is an established license fee for use of the product. The costs of the development of the software would not be a reasonable basis for valuing its use.

§ 603.555 Value of other contributions.

For types of participant contributions other than those addressed in §§ 603.535 through 603.550, the general rule is that the contracting officer is to value each contribution consistently with the cost principles or standards in § 603.625 and § 603.635 that apply to the participant making the contribution. When valuing services and property donated by parties other than the participants, the contracting officer may use as guidance the provisions of 10 CFR 600.313(b)(2) through (b)(5).

Fixed-Support or Expenditure-Based Approach

§ 603.560 Estimate of project expenditures.

(a) To use a fixed-support TIA, rather than an expenditure-based TIA, the contracting officer must have confidence in the estimate of the expenditures required to achieve well-defined outcomes. Therefore, the contracting officer must work carefully with program officials to select outcomes that, when the recipient achieves them, are reliable indicators of the amount of effort the recipient expended. However, the estimate of the required expenditures need not be a precise dollar amount, as illustrated by the example in paragraph (b) of this section, if:

(1) The recipient is contributing a substantial share of the costs of achieving the outcomes, which must meet the criteria in § 603.305(a); and

(2) The contracting officer is confident that the costs of achieving the outcomes will be at least a minimum amount that can be specified and the recipient is willing to accept the possibility that its cost sharing percentage ultimately will

be higher if the costs exceed that minimum amount.

(b) To illustrate the approach, consider a project for which the contracting officer is confident that the recipient will have to expend at least $800,000 to achieve the specified outcomes. The contracting officer must determine, in conjunction with program officials, the minimum level of recipient cost sharing required to demonstrate the recipient's commitment to the success of the project. For purposes of this illustration, let that minimum recipient cost sharing be 60% of the total project costs. In that case, the Federal share should be no more than 40% and the contracting officer could set a fixed level of Federal support at $320,000 (40% of $800,000). With that fixed level of Federal support, the recipient would be responsible for the balance of the costs needed to complete the project.

(c) Note, however, that the level of recipient cost sharing negotiated should be based solely on the level needed to demonstrate the recipient's commitment. The contracting officer may not use a shortage of Federal Government funding for the program as a reason to try to persuade a recipient to accept a fixed-support TIA, rather than an expenditure-based instrument, or to accept responsibility for a greater share of the total project costs than it otherwise is willing to offer. If there is insufficient funding to provide an appropriate Federal Government share for the entire project, the contracting officer should re-scope the effort covered by the agreement to match the available funding.

§ 603.565 Use of a hybrid instrument.

For a RD&D project that is to be carried out by a number of participants, the contracting officer may award a TIA that provides for some participants to perform under fixed-support arrangements and others to perform under expenditure-based arrangements. This approach may be useful, for example, if a commercial firm that is a participant will not accept an agreement with all of the post-award requirements of an expenditure-based award. Before using a fixed-support arrangement for that firm's portion of the project, the agreement must meet the criteria in § 603.305.

Accounting, Payments, and Recovery of Funds

§ 603.570 Determining milestone payment amounts.

(a) If the contracting officer selects the milestone payment method (see § 603.805), the contracting officer must assess the reasonableness of the estimated amount for reaching each milestone. This assessment enables the contracting officer to set the amount of each milestone payment to approximate the Federal share of the anticipated resource needs for carrying out that phase of the RD&D effort.

(b) The Federal share at each milestone need not be the same as the Federal share of the total project. For example, the contracting officer might deliberately set payment amounts with a larger Federal share for early milestones if a project involves a start-up company with limited resources.

(c) For an expenditure-based TIA, if the contracting officer establishes minimum cost sharing percentages for each milestone, those percentages should be indicated in the agreement.

(d) For a fixed-support TIA, the milestone payments should be associated with the well-defined, observable, and verifiable technical outcomes (*e.g.*, demonstrations, tests, or data analysis) that are established for the project in accordance with §§ 603.305(a) and 603.560(a).

§ 603.575 Repayment of Federal cost share.

In accordance with the Energy Policy Act of 2005 (Public Law 109–58), section 988(e), the contracting officer may not require repayment of the Federal share of a cost-shared TIA as a condition of making an award, unless otherwise authorized by statute.

Subpart F—Award Terms Affecting Participants' Financial, Property, and Purchasing Systems

§ 603.600 Administrative matters.

This subpart addresses ''systemic'' administrative matters that place requirements on the operation of a participant's financial management, property management, or purchasing system. Each participant's systems are organization-wide and do not vary with each agreement. Therefore, a TIA should address systemic requirements in a uniform way for each type of participant organization.

§ 603.605 General policy.

The general policy for an expenditure-based TIA is to avoid requirements that would force participants to use different financial management, property management, and purchasing systems than they currently use for:

(a) Expenditure-based Federal procurement contracts and assistance awards in general, if they receive them; or

(b) Commercial business, if they have no expenditure-based Federal procurement contracts and assistance awards.

§ 603.610 Flow down requirements.

If it is an expenditure-based award, the TIA must require participants to provide the same financial management, property management, and purchasing systems requirements to a subrecipient that would apply if the subrecipient were a participant. For example, a for-profit participant would require a university subrecipient to comply with requirements that apply to a university participant and would require a GOCO or FFRDC subrecipient to comply with standards that conform as much as practicable with the requirements in the GOCO/FFRDC procurement contract. Note that this policy applies to subawards for substantive performance of portions of the RD&D project supported by the TIA and not to participants' purchases of goods or services needed to carry out the RD&D.

Financial Matters

§ 603.615 Financial management standards for-profit firms.

(a) To avoid causing needless changes in participants' financial management systems, an expenditure-based TIA will make for-profit participants that currently perform under other expenditure-based Federal procurement contracts or assistance awards subject to the same standards for financial management systems that apply to those other awards. Therefore, if a for-profit participant has expenditure-based DOE assistance awards other than a TIA, the TIA must apply the standards in 10 CFR 600.311. The contracting officer may grant an exception and allow a for-profit participant that has other expenditure-based Federal Government awards to use an alternative set of standards that meets the minimum criteria in paragraph (b) of this section, if there is a compelling programmatic or business reason to do so. For each case in which an exception is granted, the contracting officer must document the reason in the award file.

(b) For an expenditure-based TIA, the contracting officer is to allow and encourage each for-profit participant that does not currently perform under expenditure-based Federal procurement contracts or assistance awards (other than a TIA) to use its existing financial management system as long as the system, as a minimum:

(1) Complies with Generally Accepted Accounting Principles.

(2) Effectively controls all project funds, including Federal funds and any required cost share. The system must have complete, accurate, and current

records that document the sources of funds and the purposes for which they are disbursed. It also must have procedures for ensuring that project funds are used only for purposes permitted by the agreement (see § 603.625).

(3) Includes, if advance payments are authorized under § 603.805, procedures to minimize the time elapsing between the payment of funds by the Government and the firm's disbursement of the funds for program purposes.

§ 603.620 Financial management standards for nonprofit participants.

So as not to force system changes for any State, local government, institution of higher education, or other nonprofit organization, expenditure-based TIA requirements for the financial management system of any nonprofit participant are to be the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 10 CFR 600.220 for State and local governments; and

(b) 10 CFR 600.121(b) for other nonprofit organizations, with the exception of nonprofit Government-owned, contractor-operated (GOCO) facilities and Federally Funded Research and Development Centers (FFRDCs) that are excepted from the definition of ''recipient'' in 10 CFR 600.101. If a GOCO or FFRDC is a participant, the contracting officer must specify appropriate standards that conform as much as practicable with requirements in their procurement contract.

§ 603.625 Cost principles or standards applicable to for-profit participants.

(a) So as not to require any firm to needlessly change its cost accounting system, an expenditure-based TIA is to apply the Government cost principles in 48 CFR part 31 to for-profit participants that currently perform under expenditure-based Federal procurement contracts or assistance awards (other than a TIA) and therefore have existing systems for identifying allowable costs under those principles. If there are programmatic or business reasons to do otherwise, the contracting officer may grant an exception from this requirement and use alternative standards as long as the alternative satisfies the conditions described in paragraph (b) of this section; if an exception is granted the reasons must be documented in the award file.

(b) For other for-profit participants, the contracting officer may establish alternative standards in the agreement as long as that alternative provides, as a minimum, that Federal funds and funds counted as recipients' cost sharing will be used only for costs that:

(1) A reasonable and prudent person would incur in carrying out the RD&D project contemplated by the agreement. Generally, elements of cost that appropriately are charged are those identified with RD&D activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, ''Accounting for Research and Development Costs,'' October 1974). Moreover, costs must be allocated to DOE and other projects in accordance with the relative benefits the projects receive. Costs charged to DOE projects must be given consistent treatment with costs allocated to the participants' other RD&D activities (e.g., activities supported by the participants themselves or by non-Federal sponsors).

(2) Are consistent with the purposes stated in the governing Congressional authorizations and appropriations. The contracting officer is responsible for ensuring that provisions in the award document address any requirements that result from authorizations and appropriations.

§ 603.630 Use Federally approved indirect cost rates for for-profit firms.

In accordance with the general policy in § 603.605, the contracting officer must require a for-profit participant that has federally approved indirect cost rates for its Federal procurement contracts to use those rates to accumulate and report costs under an expenditure-based TIA. This includes both provisional and final rates that are approved up until the time that the TIA is closed out.

§ 603.635 Cost principles for nonprofit participants.

So as not to force financial system changes for any nonprofit participant, an expenditure-based TIA will provide that costs to be charged to the RD&D project by any nonprofit participant must be determined to be allowable in accordance with:

(a) OMB Circular A–87, if the participant is a State or local governmental organization;

(b) OMB Circular A–21, if the participant is an institution of higher education;

(c) 45 CFR Part 74, Appendix E, if the participant is a hospital; or

(d) OMB Circular A–122, if the participant is any other type of nonprofit organization (the cost principles in 48 CFR parts 31 and 231 are to be used by any nonprofit organization that is identified in Circular A–122 as being subject to those cost principles).

§ 603.640 Audits of for-profit participants.

If the TIA is an expenditure-based award, the contracting officer must include in it an audit provision that addresses, for each for-profit participant:

(a) Whether the for-profit participant must have periodic audits, in addition to any award-specific audits, as described in § 603.645;

(b) Whether the Defense Contract Audit Agency (DCAA) or an independent public accountant (IPA) will perform required audits, as discussed in § 603.650;

(c) How frequently any periodic audits are to be performed, addressed in § 603.655; and

(d) Other matters described in § 603.660, such as audit coverage, allowability of audit costs, auditing standards, and remedies for noncompliance.

§ 603.645 Periodic audits and award-specific audits of for-profit participants.

The contracting officer needs to consider requirements for both periodic audits and award-specific audits (as defined in § 603.1295 and § 603.1220, respectively). The way that an expenditure-based TIA addresses the two types of audits will vary, depending upon the type of for-profit participant.

(a) For for-profit participants that are audited by the DCAA or other Federal auditors, as described in §§ 603.650(b) and 603.655, specific requirements for periodic audits need not be added because the Federal audits should be sufficient to address whatever may be needed. The inclusion in the TIA of the standard access-to-records provision for those for-profit participants, as discussed in § 603.910(a), gives the necessary access in the event that the contracting officer later needs to request audits to address award-specific issues that arise.

(b) For each other for-profit participant, the contracting officer:

(1) Should require that the participant have an independent auditor (i.e., the DCAA or an independent public accountant (IPA)) conduct periodic audits of its systems if it expends $500,000 or more per year in TIAs and other Federal assistance awards. A prime reason for including this requirement is that the Federal Government, for an expenditure-based award, necessarily relies on amounts reported by the participant's systems when it sets payment amounts or adjusts performance outcomes. The

periodic audit provides some assurance that the reported amounts are reliable.

(2) Must ensure that the award provides an independent auditor the access needed for award-specific audits, to be performed at the request of the contracting officer if issues arise that require audit support. However, consistent with the government-wide policies on single audits that apply to nonprofit participants (see § 603.665), the contracting officer should rely on periodic audits to the maximum extent possible to resolve any award-specific issues.

§ 603.650 Designation of auditor for for-profit participants.

The auditor identified in an expenditure-based TIA to perform periodic and award-specific audits of a for-profit participant depends on the circumstances, as follows:

(a) The Federal cognizant agency or an IPA will be the auditor for a for-profit participant that does not meet the criteria in paragraph (b) of this section. Note that the allocable portion of the costs of the IPA's audit may be reimbursable under the TIA, as described in § 603.660(b). The IPA should be the one that the participant uses to perform other audits (e.g., of its financial statement), to minimize added burdens and costs.

(b) Except as provided in paragraph (c) of this section, the Federal cognizant agency (e.g., DCAA) must be identified as the auditor for a GOCO or FFRDC and for any for-profit participant that is subject to Federal audits because it is currently performing under a Federal award that is subject to the:

(1) Cost principles in 48 CFR part 31 of the Federal Acquisition Regulation (FAR); or

(2) Cost Accounting Standards in 48 CFR Chapter 99.

(c) If there are programmatic or business reasons that justify the use of an auditor other than the Federal cognizant agency for a for-profit participant that meets the criteria in paragraph (b) of this section, the contracting officer may provide that an IPA will be the auditor for that participant in which case the reasons for this decision must be documented in the award file.

§ 603.655 Frequency of periodic audits of for-profit participants.

If an expenditure-based TIA provides for periodic audits of a for-profit participant by an IPA, the contracting officer must specify the frequency for those audits. The contracting officer should consider having an audit performed during the first year of the award, when the participant has its IPA do its next financial statement audit, unless the participant already had a systems audit due to other Federal awards within the past two years. The frequency thereafter may vary depending upon the dollars the participant is expending annually under the award, but it is not unreasonable to require an updated audit every two to three years to verify that the participant's systems continue to be reliable (the audit then would cover the two or three-year period between audits).

§ 603.660 Other audit requirements.

If an expenditure-based TIA provides for audits of a for-profit participant by an IPA, the contracting officer also must specify:

(a) What periodic audits are to cover. It is important to specify audit coverage that is only as broad as needed to provide reasonable assurance of the participant's compliance with award terms that have a direct and material effect on the RD&D project.

(b) Who will pay for periodic and award-specific audits. The allocable portion of the costs of any audits by IPAs may be reimbursable under the TIA. The costs may be direct charges or allocated indirect costs, consistent with the participant's accounting system and practices.

(c) The auditing standards that the IPA will use. The contracting officer must provide that the IPA will perform the audits in accordance with the Generally Accepted Government Auditing Standards.

(d) The available remedies for noncompliance. The agreement must provide that the participant may not charge costs to the award for any audit that the contracting officer determines was not performed in accordance with the Generally Accepted Government Auditing Standards or other terms of the agreement. It also must provide that the Government has the right to require the participant to have the IPA take corrective action and, if corrective action is not taken, that the agreements officer has recourse to any of the remedies for noncompliance identified in 10 CFR 600.352(a).

(e) Where the IPA is to send audit reports. The agreement must provide that the IPA is to submit audit reports to the contracting officer. It also must require that the IPA report instances of fraud directly to the Office of Inspector General (OIG), DOE.

(f) The retention period for the IPA's working papers. The contracting officer must specify that the IPA is to retain working papers for a period of at least three years after the final payment, unless the working papers relate to an audit whose findings are not fully resolved within that period or to an unresolved claim or dispute (in which case, the IPA must keep the working papers until the matter is resolved and final action taken).

(g) Who will have access to the IPA's working papers. The agreement must provide for Government access to working papers.

§ 603.665 Periodic audits of nonprofit participants.

An expenditure-based TIA is an assistance instrument subject to the Single Audit Act (31 U.S.C. 7501–7507), so nonprofit participants are subject to the requirements under that Act and OMB Circular A–133. Specifically, the requirements are those in:

(a) 10 CFR 600.226 for State and local governments; and

(b) 10 CFR 600.126 for other nonprofit organizations.

§ 603.670 Flow down audit requirements to subrecipients.

(a) In accordance with § 603.610, an expenditure-based TIA must require participants to flow down the same audit requirements to a subrecipient that would apply if the subrecipient were a participant.

(b) For example, a for-profit participant that is audited by the DCAA:

(1) Would flow down to a university subrecipient the Single Audit Act requirements that apply to a university participant;

(2) Could enter into a subaward allowing a for-profit participant, under the circumstances described in § 603.650(a), to use an IPA to do its audits.

(c) This policy applies to subawards for substantive performance of portions of the RD&D project supported by the TIA, and not to participants' purchases of goods or services needed to carry out the RD&D.

§ 603.675 Reporting use of IPA for subawards.

An expenditure-based TIA should require participants to report to the contracting officer when they enter into any subaward allowing a for-profit subawardee to use an IPA, as described in § 603.670(b)(2).

Property

§ 603.680 Purchase of real property and equipment by for-profit firms.

(a) With the two exceptions described in paragraph (b) of this section, the contracting officer must require a for-profit firm to purchase real property or

equipment with its own funds that are separate from the RD&D project. The contracting officer should allow the firm to charge to an expenditure-based TIA only depreciation or use charges for real property or equipment (and the cost estimate for a fixed-support TIA only would include those costs). Note that the firm must charge depreciation consistently with its usual accounting practice. Many firms treat depreciation as an indirect cost. Any firm that usually charges depreciation indirectly for a particular type of property must not charge depreciation for that property as a direct cost to the TIA.

(b) In two situations, the contracting officer may grant an exception and allow a for-profit firm to use project funds, which includes both the Federal Government and recipient shares, to purchase real property or equipment (i.e., to charge to the project the full acquisition cost of the property). The two circumstances, which should be infrequent for equipment and extremely rare for real property, are those in which either:

(1) The real property or equipment will be dedicated to the project and has a current fair market value that is less than $5,000 by the time the project ends; or

(2) The contracting officer gives prior approval for the firm to include the full acquisition cost of the real property or equipment as part of the cost of the project (see § 603.535).

(c) If the contracting officer grants an exception in either of the circumstances described in paragraphs (b)(1) and (2) of this section, the real property or equipment must be subject to the property management standards in 10 CFR 600.321(b) through (e). As provided in those standards, the title to the real property or equipment will vest conditionally in the for-profit firm upon acquisition. A TIA, whether it is a fixed-support or expenditure-based award, must specify that any item of equipment that has a fair market value of $5,000 or more at the conclusion of the project also will be subject to the disposition process in 10 CFR 600.321(f), whereby the Federal Government will recover its interest in the property at that time.

§ 603.685 Management of real property and equipment by nonprofit participants.

For nonprofit participants, a TIA's requirements for vesting of title, use, management, and disposition of real property or equipment acquired under the award are the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 10 CFR 600.231 and 600.232, for participants that are States and local governmental organizations; and

(b) 10 CFR 600.132 and 600.134, for other nonprofit participants, with the exception of nonprofit GOCOs and FFRDCs that are exempted from the definition of ''recipient'' in 10 CFR 600.101. If a GOCO or FFRDC is a participant, the contracting officer must specify appropriate standards that conform as much as practicable with the requirements in its procurement contract. Note also that:

(1) If the TIA is a cooperative agreement, 31 U.S.C. 6306 provides authority to vest title to tangible personal property in a nonprofit institution of higher education or in a nonprofit organization whose primary purpose is conducting scientific research, without further obligation to the Federal Government; and

(2) A TIA therefore must specify any conditions on the vesting of title to real property or equipment acquired by any such nonprofit participant.

§ 603.690 Requirements for Federally-owned property.

If DOE provides Federally-owned property to any participant for the performance of RD&D under a TIA, the contracting officer must require that participant to account for, use, and dispose of the property in accordance with:

(a) 10 CFR 600.322, if the participant is a for-profit firm.

(b) 10 CFR 600.232(f), if the participant is a State or local governmental organization. Note that 10 CFR 600.232(f) contains additional requirements for managing the property.

(c) 10 CFR 600.133(a) and 600.134(f), if the participant is a nonprofit organization other than a GOCO or FFRDC (requirements for GOCOs and FFRDCs should conform with the property standards in their procurement contracts).

§ 603.695 Requirements for supplies.

An expenditure-based TIA's provisions should permit participants to use their existing procedures to account for and manage supplies. A fixed-support TIA should not include requirements to account for or manage supplies.

Purchasing

§ 603.700 Standards for purchasing systems of for-profit firms.

(a) If the TIA is an expenditure-based award, it should require for-profit participants that currently perform under DOE assistance instruments subject to the purchasing standards in 10 CFR 600.331 to use the same requirements for the TIA, unless there are programmatic or business reasons to do otherwise (in which case the reasons must be documented in the award file).

(b) Other for-profit participants under an expenditure-based TIA should be allowed to use their existing purchasing systems, as long as they flow down the applicable requirements in Federal statutes, Executive Orders or Government-wide regulations (see Appendices A and B to this part for a list of those requirements).

§ 603.705 Standards for purchasing systems of nonprofit organizations.

So as not to force system changes for any nonprofit participant, an expenditure-based TIA should provide that each nonprofit participant's purchasing system comply with:

(a) 10 CFR 600.236, if the participant is a State or local governmental organization.

(b) 10 CFR 600.140 through 10 CFR 600.149, if the participant is a nonprofit organization other than a GOCO or FFRDC that is excepted from the definition of ''recipient'' in 10 CFR 600.101. If a GOCO or FFRDC is a participant, the TIA must specify appropriate standards that conform as much as practicable with requirements in its procurement contract.

Subpart G—Award Terms Related to Other Administrative Matters

§ 603.800 Scope.

This subpart addresses administrative matters that do not impose organization-wide requirements on a participant's financial management, property management, or purchasing system. Because an organization does not have to redesign its systems to accommodate award-to-award variations in these requirements, TIAs may differ in the requirements that they specify for a given participant, based on the circumstances of the particular RD&D project. To eliminate needless administrative complexity, the contracting officer should handle some requirements, such as the payment method, in a uniform way for the agreement as a whole.

Payments

§ 603.805 Payment methods.

A TIA may provide for:

(a) *Reimbursement,* as described in 10 CFR 600.312(a)(1), if it is an expenditure-based award.

(b) *Advance payments,* as described in 10 CFR 600.312(a)(2), subject to the conditions in 10 CFR 600.312(b)(2)(i) through (iii).

(c) *Payments based on payable milestones.* These are payments made according to a schedule that is based on predetermined measures of technical progress or other payable milestones. This approach relies upon the fact that, as the RD&D progresses throughout the term of the agreement, observable activity will be taking place. The recipient is paid upon the accomplishment of a predetermined measure of progress. A fixed-support TIA must use this payment method (this does not preclude use of an initial advance payment, if there is no alternative to meeting immediate cash needs). Payments based on payable milestones is the preferred method of payment for an expenditure-based TIA if well-defined outcomes can be identified.

§ 603.810 Method and frequency of payment requests.

The procedure and frequency for payment requests depend upon the payment method, as follows:

(a) For either reimbursements or advance payments, the TIA must allow recipients to submit requests for payment at least monthly. The contracting officer may authorize the recipients to use the forms or formats described in 10 CFR 600.312(d).

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

§ 603.815 Withholding payments.

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

§ 603.820 Interest on advance payments.

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

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

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

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

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

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

Revision of Budget and Program Plans

§ 603.825 Government approval of changes in plans.

If it is an expenditure-based award, a TIA must require the recipient to obtain the contracting officer's prior approval if there is to be a change in plans that may result in a need for additional Federal funding (this is unnecessary for a fixed-support TIA because the recipient is responsible for additional costs of achieving the outcomes). Other than that, the program official's substantial involvement in the project should ensure that the Government has advance notice of changes in plans.

§ 603.830 Pre-award costs.

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

Program Income

§ 603.835 Program income requirements.

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

Intellectual Property

§ 603.840 Negotiating data and patent rights.

(a) The contracting officer must confer with program officials and assigned intellectual property counsel to develop an overall strategy for intellectual property that takes into account inventions and data that may result from the project and future needs the Government may have for rights in them. The strategy should take into account program mission requirements and any special circumstances that would support modification of standard patent and data terms, and should include considerations such as the extent of the recipient's contribution to the development of the technology; expected Government or commercial use of the technology; the need to provide equitable treatment among consortium or team members; and the need for the DOE to engage non-traditional Government contractors with unique capabilities.

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

§ 603.845 Data rights requirements.

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

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

§ 603.850 Marking of data.

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

§ 603.855 Protected data.

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

§ 603.860 Rights to inventions.

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

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

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

(b) The contracting officer may negotiate Government rights that vary from the statutorily-required patent rights requirements described in paragraph (a)(2) of this section when necessary to accomplish program objectives and foster the Government's interests. Doing so would make the TIA an assistance transaction other than a cooperative agreement. The contracting officer must decide, with the help of the program manager and assigned intellectual property counsel, what best represents a reasonable arrangement considering the circumstances, including past investments and anticipated future investments of the recipient to the development of the technology, contributions under the current TIA, and potential commercial and Government markets. Any change to the standard patent rights provisions must be approved by assigned intellectual property counsel.

(c) Taking past investments as an example, the contracting officer should consider whether the Government or the recipient has contributed more substantially to the prior RD&D that provides the foundation for the planned effort. If the predominant past contributor to the particular technology has been:

(1) The Government, then the TIA's patent rights provision should be the standard provision as set forth in 10 CFR 600.325(b) or (c), or 10 CFR 600.136, as applicable.

(2) The recipient, then less restrictive patent requirements may be appropriate, which would make the TIA an assistance transaction other than a cooperative agreement. The contracting officer normally would, with the concurrence of intellectual property counsel, allow the recipient to retain title to subject inventions without going through the process of obtaining a patent waiver as required by 10 CFR 784. For example, with the concurrence of intellectual property counsel, the contracting officer also could eliminate or modify the nonexclusive paid-up license for practice by or on behalf of the Government to allow the recipient to benefit more directly from its investments.

(d) For subawards under a TIA that is other than a cooperative agreement, the TIA should normally specify that subrecipients' invention rights are to be negotiated between recipient and subrecipient; that subrecipients will get title to inventions they make; or some other disposition of invention rights. Factors to be considered by the contracting officer in addressing subrecipient's invention rights include: the extent of cost sharing by parties at all tiers; a subrecipient's status as a small business, nonprofit, or FFRDC; and whether an appropriate field of use licensing requirement would meet the needs of the parties.

(e) Consortium members may allocate invention rights in their collaboration agreement, subject to the review of the contracting officer (See § 603.515). The contracting officer, in performing such review, should consider invention rights to be retained by the Government and rights that may be obtained by small business, nonprofit or FFRDC consortium members.

§ 603.865 March-in rights.

A TIA's patent rights provision should include the Bayh-Dole march-in rights set out in paragraph (j) of the Patent Rights (Small Business Firms and Nonprofit Organization) provision in Appendix A to subpart D of 10 CFR 600, or an equivalent clause, concerning actions that the Government may take to obtain the right to use subject inventions, if the recipient fails to take effective steps to achieve practical application of the subject inventions within a reasonable time. The march-in provision may be modified to best meet the needs of the program. However, only infrequently should the march-in provision be entirely removed (*e.g.*, if a recipient is providing most of the funding for a RD&D project, with the Government providing a much smaller share).

§ 603.870 Marking of documents related to inventions.

To protect the recipient's interest in inventions, the TIA should require the recipient to mark documents disclosing inventions it desires to protect by obtaining a patent. The recipient should mark the documents with a legend identifying them as intellectual property subject to public release or public disclosure restrictions, as provided in 35 U.S.C. 205.

§ 603.875 Foreign access to technology and U.S. competitiveness provisions.

(a) Consistent with the objective of enhancing national security and United States competitiveness by increasing the public's reliance on the United States commercial technology, the contracting officer must include provisions in a TIA that addresses foreign access to technology developed under the TIA.

(b) A provision must provide, as a minimum, that any transfer of the technology must be consistent with the U.S. export laws, regulations and the Department of Commerce Export Regulation at Chapter VII, Subchapter C, Title 15 of the CFR (15 CFR parts 730–774), as applicable.

(c) A provision should also provide that any products embodying, or produced through the use of, any created intellectual property, will be manufactured substantially in the United States, and that any transfer of the right to use or sell the products must, unless the Government grants a waiver, require that the products will be manufactured substantially in the United States. In individual cases, the contracting officer, with the approval of the program official and intellectual property counsel, may waive or modify the requirement of substantial manufacture in the United States at the time of award, or subsequent thereto, upon a showing by the recipient that:

(1) Alternative benefits are being secured for the United States taxpayer

(*e.g.*, increased domestic jobs notwithstanding foreign manufacture);

(2) Reasonable but unsuccessful efforts have been made to transfer the technology under similar terms to those likely to manufacture substantially in the United States; or

(3) Under the circumstances domestic manufacture is not commercially feasible.

Financial and Programmatic Reporting

§ 603.880 Reports requirements.

A TIA must include requirements that, as a minimum, provide for periodic reports addressing program performance and, if it is an expenditure-based award, business/financial status. The contracting officer must require submission of the reports at least annually, and may require submission as frequently as quarterly (this does not preclude a recipient from electing to submit more frequently than quarterly the financial information that is required to process payment requests if the award is an expenditure-based TIA that uses reimbursement or advance payments under § 603.810(a)). The requirements for the content of the reports are as follows:

(a) The program portions of the reports must address progress toward achieving performance goals and milestones, including current issues, problems, or developments.

(b) The business/financial portions of the reports, applicable only to expenditure-based awards, must provide summarized details on the status of resources (federal funds and non-federal cost sharing), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations. The contracting officer may require a recipient to separately identify in these reports the expenditures for each participant in a consortium and for each programmatic milestone or task, if the contracting officer, after consulting with the program official, judges that those additional details are needed for good stewardship.

§ 603.885 Updated program plans and budgets.

In addition to reports on progress to date, a TIA may include a provision requiring the recipient to annually prepare an updated technical plan for future conduct of the research effort and a revised budget if there is a significant change from the initial budget.

§ 603.890 Final performance report.

A TIA must require a final performance report that addresses all major accomplishments under the TIA.

§ 603.895 Protection of information in programmatic reports.

If a TIA is awarded under the authority of 42 U.S.C. 7256(g) (*i.e.*, it is a type of assistance transaction ''other than'' a contract, grant or a cooperative agreement), the contracting officer may inform a participant that the award is covered by a special protected data statute, which provides for the protection from public disclosure, for a period of up to 5 years after the date on which the information is developed, any information developed pursuant to this transaction that would be trade secret, or commercial or financial information that is privileged or confidential, if the information had been obtained from a non-Federal party.

§ 603.900 Receipt of final performance report.

The TIA should make receipt of the final report a condition for final payment. If the payments are based on payable milestones, the submission and acceptance of the final report by the Government representative will be incorporated as an event that is a prerequisite for one of the payable milestones.

Records Retention and Access Requirements

§ 603.905 Record retention requirements

A TIA must require participants to keep records related to the TIA (for which the agreement provides Government access under § 603.910) for a period of three years after submission of the final financial status report for an expenditure-based TIA or final program performance report for a fixed-support TIA, with the following exceptions:

(a) The participant must keep records longer than three years after submission of the final financial status report if the records relate to an audit, claim, or dispute that begins but does not reach its conclusion within the 3-year period. In that case, the participant must keep the records until the matter is resolved and final action taken.

(b) Records for any real property or equipment acquired with project funds under the TIA must be kept for three years after final disposition.

§ 603.910 Access to a for-profit participant's records.

(a) If a for-profit participant currently grants access to its records to the DCAA or other Federal Government auditors, the TIA must include for that participant the standard access-to-records requirements at 10 CFR 600.342(e). If the agreement is a fixed-support TIA, the language in 10 CFR 600.342(e) may be modified to provide access to records concerning the recipient's technical performance, without requiring access to the recipient's financial or other records. Note that any need to address access to technical records in this way is in addition to, not in lieu of, the need to address rights in data (see § 603.845).

(b) For other for-profit participants that do not currently give the Federal Government direct access to their records and are not willing to grant full access to records pertinent to the award, the contracting officer may negotiate limited access to the recipient's financial records. For example, if the audit provision of an expenditure-based TIA gives an IPA access to the recipient's financial records for audit purposes, the Federal Government must have access to the IPA's reports and working papers and the contracting officer need not include a provision requiring direct Government access to the recipient's financial records. For both fixed-support and expenditure-based TIAs, the TIA must include the access-to-records requirements at 10 CFR 600.342(e) for records relating to technical performance.

§ 603.915 Access to a nonprofit participant's records.

A TIA must include for any nonprofit participant the standard access-to-records requirement at:

(a) 10 CFR 600.242(e), for a participant that is a State or local governmental organization;

(b) 10 CFR 600.153(e), for a participant that is a nonprofit organization. The same requirement applies to any GOCO or FFRDC, even though nonprofit GOCOs and FFRDCs are exempted from the definition of ''recipient'' in 10 CFR 600.101.

Termination and Enforcement

§ 603.920 Termination and enforcement requirements.

(a) *Termination.* A TIA must include the following conditions for termination:

(1) An award may be terminated in whole or in part by the contracting officer, if a recipient materially fails to comply with the terms and conditions of the award.

(2) Subject to a reasonable determination by either party that the project will not produce beneficial results commensurate with the expenditure of resources, that party may terminate in whole or in part the

agreement by providing at least 30 days advance written notice to the other party, provided such notice is preceded by consultation between the parties. The two parties will negotiate the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated. If either party determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purpose for which the award was made, the award may be terminated in its entirety.

(3) Unless otherwise negotiated, for terminations of an expenditure based TIA, DOE's maximum liability is the lesser of:

(i) DOE's share of allowable costs incurred up to the date of termination, or

(ii) The amount of DOE funds obligated to the TIA.

(4) Unless otherwise negotiated, for terminations of a fixed-support based TIA, DOE shall pay the recipient a proportionate share of DOE's financial commitment to the project based on the percent of project completion as of the date of termination.

(5) Notwithstanding paragraphs (3) and (4) of this section, if the award includes milestone payments, the Government has no obligation to pay the recipient beyond the last completed and paid milestone if the recipient decides to terminate.

(b) Enforcement. The standards of 10 CFR 600.352 (for enforcement) and the procedures in 10 CFR 600.22 (for disputes and appeals) apply.

Subpart H—Executing the Award

§ 603.1000 Contracting officer's responsibilities at time of award.

At the time of the award, the contracting officer must:

(a) Ensure that the award document contains the appropriate terms and conditions and is signed by the appropriate parties, in accordance with §§ 603.1005 through 603.1015.

(b) Document the analysis of the agreement in the award file, as discussed in § 603.1020.

(c) Provide information about the award to the office responsible for reporting on TIAs.

The Award Document

§ 603.1005 General responsibilities.

The contracting officer is responsible for ensuring that the award document is complete and accurate. The document should:

(a) Address all issues;

(b) State requirements directly. It is not helpful to readers to incorporate statutes or rules by reference, without sufficient explanation of the requirements. The contracting officer generally should not incorporate clauses from the Federal Acquisition Regulation (48 CFR parts 1–53) or Department of Energy Acquisition Regulation (48 CFR parts 901–970) because those provisions are designed for procurement contracts that are used to acquire goods and services, rather than for a TIA or other assistance instruments.

(c) Be written in clear and concise language, to minimize potential ambiguity.

§ 603.1010 Substantive issues.

Each TIA is designed and negotiated individually to meet the specific requirements of the particular project, so the list of substantive issues that will be addressed in the award document may vary. Every award document must address:

(a) *Project scope.* The scope is an overall vision statement for the project, including a discussion of the project's purpose, objectives, and detailed commercial goals. It is a critical provision because it provides a context for resolving issues that may arise during post-award administration. In a fixed-support TIA, the well-defined outcomes that reliably indicate the amount of effort expended and serve as the basis for the level of the fixed support must be clearly specified (see §§ 603.305 and 603.560(a)).

(b) *Project management.* The TIA should describe the nature of the relationship between the Federal Government and the recipient; the relationship among the participants, if the recipient is an unincorporated consortium; and the overall technical and administrative management of the project. A TIA is used to carry out collaborative relationships between the Federal Government and the recipient. Consequently, there must be substantial involvement of the DOE program official (see § 603.220) and usually the contracting officer. The program official provides technical insight, which differs from the usual technical oversight of a project. The management provision also should discuss how modifications to the TIA are made.

(c) *Termination, enforcement, and disputes.* A TIA must provide for termination, enforcement remedies, and disputes and appeals procedures, in accordance with § 603.920.

(d) *Funding.* The TIA must:

(1) Show the total amount of the agreement and the total period of performance.

(2) If the TIA is an expenditure-based award, state the Government's and recipient's agreed-upon cost shares for the project period and for each budget period. The award document should identify values for any in-kind contributions, determined in accordance with §§ 603.530 through 603.555, to preclude later disagreements about them.

(3) Specify the amount of Federal funds obligated and the performance period for those obligated funds.

(4) State, if the agreement is to be incrementally funded, that the Government's obligation for additional funding is contingent upon the availability of funds and that no legal obligation on the part of the Government exists until additional funds are made available and the agreement is amended. The TIA also must include a prior approval requirement for changes in plans requiring additional Government funding, in accordance with § 603.825.

(e) *Payment.* The TIA must identify the payment method and tell the recipient how, when, and where to submit payment requests, as discussed in §§ 603.805 through 603.815. The payment method must take into account sound cash management practices by avoiding unwarranted cash advances. For an expenditure-based TIA, the payment provision must require the return of interest should excess cash balances occur, in accordance with § 603.820. For any TIA using the milestone payment method described in § 603.805(c), the TIA must include language notifying the recipient that the contracting officer may adjust amounts of future milestone payments if a project's expenditures fall too far below the projections that were the basis for setting the amounts (see § 603.575(c) and § 603.1105(c)).

(f) *Records retention and access to records.* The TIA must include the records retention requirement at § 603.910. The TIA also must provide for access to for-profit and nonprofit participants' records, in accordance with § 603.915 and § 603.920.

(g) *Patents and data rights.* In designing the patents and data rights provision, the TIA must set forth the minimum required Federal Government rights in intellectual property generated under the award and address related matters, as provided in §§ 603.840 through 603.875. It is important to define all essential terms in the patent rights provision.

(h) *Foreign access to technology and U.S. competitiveness.* The TIA must include provisions, in accordance with § 603.875, concerning foreign access and domestic manufacture of products using technology generated under the award.

(i) *Title to, management of, and disposition of tangible property.* The property provisions for for-profit and nonprofit participants must be in accordance with §§ 603.685 through 603.700.

(j) *Financial management systems.* For an expenditure-based award, the TIA must specify the minimum standards for financial management systems of both for-profit and nonprofit participants, in accordance with §§ 603.615 and 603.620.

(k) *Allowable costs.* If the TIA is an expenditure-based award, it must specify the standards that both for-profit and nonprofit participants are to use to determine which costs may be charged to the project, in accordance with §§ 603.625 through 603.635, as well as § 603.830.

(l) *Audits.* If a TIA is an expenditure-based award, it must include an audit provision for both for-profit and nonprofit participants and subrecipients, in accordance with §§ 603.640 through 603.670 and § 603.675.

(m) *Purchasing system standards.* The TIA should include a provision specifying the standards in §§ 603.700 and 603.705 for purchasing systems of for-profit and nonprofit participants, respectively.

(n) *Program income.* The TIA should specify requirements for program income, in accordance with § 603.835.

(o) *Financial and programmatic reporting.* The TIA must specify the reports that the recipient is required to submit and tell the recipient when and where to submit them, in accordance with §§ 603.880 through 603.900.

(p) *Assurances for applicable national policy requirements.* The TIA must incorporate assurances of compliance with applicable requirements in Federal statutes, Executive Orders, or regulations (except for national policies that require certifications). Appendix A to this part contains a list of commonly applicable requirements that should be augmented with any specific requirements that apply to a particular TIA (e.g., general provisions in the appropriations act for the specific funds that are being obligating).

(q) *Other matters.* The agreement should address any other issues that need clarification, including the name of the contracting officer who will be responsible for post-award administration and the statutory authority or authorities for entering into the TIA. In addition, the agreement must specify that it takes precedence over any inconsistent terms and conditions in collateral documents such as attachments to the TIA or the recipient's articles of collaboration.

§ 603.1015 Execution.

(a) If the recipient is a consortium that is not formally incorporated and the consortium members prefer to have the agreement signed by all of them individually, the agreement may be executed in that manner.

(b) If they wish to designate one consortium member to sign the agreement on behalf of the consortium as a whole, the determination whether to execute the agreement in that way should not be made until the contracting officer reviews the consortium's articles of collaboration with legal counsel.

(1) The purposes of the review are to:

(i) Determine whether the articles properly authorize one participant to sign on behalf of the other participants and are binding on all consortium members with respect to the RD&D project; and

(ii) Assess the risk that otherwise could exist when entering into an agreement signed by a single member on behalf of a consortium that is not a legal entity. For example, the contracting officer should assess whether the articles of collaboration adequately address consortium members' future liabilities related to the RD&D project (e.g., whether they will have joint and severable liability).

(2) After the review, in consultation with legal counsel, the contracting officer should determine whether it is better to have all of the consortium members sign the agreement individually or to allow them to designate one member to sign on all members' behalf.

Reporting Information About the Award

§ 603.1020 File documents.

The award file should include an analysis which:

(a) Briefly describes the program and details the specific commercial benefits that should result from the project supported by the TIA. If the recipient is a consortium that is not formally incorporated, a copy of the signed articles of collaboration should be attached.

(b) Describes the process that led to the award of the TIA, including how DOE solicited and evaluated proposals and selected the one supported through the TIA.

(c) Explains the basis for the decision that a TIA was the most appropriate instrument, in accordance with the factors in Subpart B of this part. The explanation must include the answers to the relevant questions in § 603.225(a) through (d).

(d) Explains how the recipient's cost sharing contributions was valued in accordance with §§ 603.530 through 603.555. For a fixed-support TIA, the file must document the analysis required (see § 603.560) to set the fixed level of Federal support; the documentation must explain how the recipient's minimum cost share was determined and how the expenditures required to achieve the project outcomes were estimated.

(e) Documents the results of the negotiation, addressing all significant issues in the TIA's provisions.

Subpart I—Post-Award Administration

§ 603.1100 Contracting officer's post-award responsibilities.

Generally, the contracting officer's post-award responsibilities are the same responsibilities as those for any cooperative agreement. Responsibilities for a TIA include:

(a) Participating as the business partner to the DOE program official to ensure the Government's substantial involvement in the RD&D project. This may involve attendance with program officials at kickoff meetings or post-award conferences with recipients. It also may involve attendance at the consortium management's periodic meetings to review technical progress, financial status, and future program plans.

(b) Tracking and processing of reports required by the award terms and conditions, including periodic business status reports, programmatic progress reports, and patent reports.

(c) Handling payment requests and related matters. For a TIA using advance payments, that includes reviews of progress to verify that there is continued justification for advancing funds, as discussed in § 603.1105(b). For a TIA using milestone payments, it includes making any needed adjustments in future milestone payment amounts, as discussed in § 603.1105(c).

(d) Making continuation awards for subsequent budget periods, if the agreement includes separate budget periods. See 10 CFR 600.26(b). Any continuation award is contingent on availability of funds, satisfactory progress towards meeting the performance goals and milestones, submittal of required reports, and compliance with the terms and conditions of the award.

(e) Coordinating audit requests and reviewing audit reports for both single audits of participants' systems and any award-specific audits that may be

needed, as discussed in §§ 603.1115 and 603.1120.

(f) Responding, after coordination with program officials and intellectual property counsel, to recipient requests for permission to assign or license intellectual property to entities that do not agree to manufacture substantially in the United States, as described in § 603.875(b). Before granting approval for any technology, the contracting officer must secure assurance that any such assignment is consistent with license rights for Government use of the technology, and that other conditions for any such transfer are met.

§ 603.1105 Advance payments or payable milestones.

The contracting officer must:

(a) For any expenditure-based TIA with advance payments or payable milestones, forward to the responsible payment office any interest that the recipient remits in accordance with § 603.820(b). The payment office will return the amounts to the Department of the Treasury's miscellaneous receipts account.

(b) For any expenditure-based TIA with advance payments, consult with the program official and consider whether program progress reported in periodic reports, in relation to reported expenditures, is sufficient to justify the continued authorization of advance payments under § 603.805(b).

(c) For any expenditure-based TIA using milestone payments, work with the program official at the completion of each payable milestone or upon receipt of the next business status report to:

(1) Compare the total amount of project expenditures, as recorded in the payable milestone report or business status report, with the projected budget for completing the milestone; and

(2) Adjust future payable milestones, as needed, if expenditures lag substantially behind what was originally projected and the contracting officer judges that the recipient is receiving Federal funds sooner than necessary for program purposes. Before making adjustments, the contracting officer should consider how large a deviation is acceptable at the time of the milestone. For example, suppose that the first milestone payment for a TIA is $50,000, and that the awarding official set the amount based on a projection that the recipient would have to expend $100,000 to reach the milestone (*i.e.*, the original plan was for the recipient's share at that milestone to be 50% of project expenditures). If the milestone payment report shows $90,000 in expenditures, the recipient's share at this point is 44% ($40,000 out of the total $90,000 expended, with the balance provided by the $50,000 milestone payment of Federal funds). For this example, the contracting officer should adjust future milestones if a 6% difference in the recipient's share at the first milestone is judged to be too large, but not otherwise. Remember that milestone payment amounts are not meant to track expenditures precisely at each milestone and that a recipient's share will increase as it continues to perform RD&D and expend funds, until it completes another milestone to trigger the next Federal payment.

§ 603.1110 Other payment responsibilities.

Regardless of the payment method, the contracting officer should ensure that:

(a) The request complies with the award terms;

(b) Available funds are adequate to pay the request;

(c) The recipient will not have excess cash on hand, based on expenditure patterns; and

(d) Payments are not withheld, except in one of the circumstances described in 10 CFR 600.312(g).

§ 603.1115 Single audits.

For audits of for-profit participant's systems, under §§ 603.640 through 603.660, the contracting officer is the focal point for ensuring that participants submit audit reports and for resolving any findings in those reports. The contracting officer's responsibilities regarding single audits of nonprofit participant's systems are identified in the DOE ''Guide to Financial Assistance.''

§ 603.1120 Award-specific audits.

Guidance on when and how the contracting officer should request additional audits for an expenditure-based TIA is identical to the guidance in 10 CFR 600.316(d). If the contracting officer requires an award-specific examination or audit of a for-profit participant's records related to a TIA, the contracting officer must use the auditor specified in the award terms and conditions, which should be the same auditor who performs periodic audits of the participant.

Subpart J—Definitions of Terms Used in this Part

§ 603.1200 Definitions

The terms defined in 10 CFR 600.3 apply to all DOE financial assistance, including a TIA. In addition to those terms, the following terms are used in this part.

§ 603.1205 Advance.

A payment made to a recipient before the recipient disburses the funds for program purposes. Advance payments may be based upon a recipient's request or a predetermined payment schedule.

§ 603.1210 Articles of collaboration.

An agreement among the participants in a consortium that is not formally incorporated as a legal entity, by which they establish their relative rights and responsibilities (see § 603.515).

§ 603.1215 Assistance.

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

§ 603.1220 Award-specific audit.

An audit of a single TIA, usually done at the cognizant contracting officer's request, to help resolve issues that arise during or after the performance of the RD&D project. An award-specific audit of an individual award differs from a periodic audit of a participant (as defined in § 603.1295).

§ 603.1225 Cash contributions.

A recipient's cash expenditures made as contributions toward cost sharing, including expenditures of money that third parties contributed to the recipient.

§ 603.1230 Commercial firm.

A for-profit firm or segment of a for-profit firm (*e.g.*, a division or other business unit) that does a substantial portion of its business in the commercial marketplace.

§ 603.1235 Consortium.

A group of RD&D-performing organizations that either is formally incorporated or that otherwise agrees to jointly carry out a RD&D project (see definition of ''articles of collaboration,'' in § 603.1210).

§ 603.1240 Cooperative agreement.

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of ''grant,'' in § 603.1270), except that substantial involvement is expected between the DOE and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

§ 603.1245 Cost sharing.

A portion of project costs from non-Federal sources that are borne by the recipient or non-Federal third parties on behalf of the recipient, rather than by the Federal Government.

§ 603.1250 Data.

Recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. It does not include information incidental to administration, such as financial, administrative, cost or pricing, or other management information related to the administration of a TIA.

§ 603.1255 Equipment.

Tangible property, other than real property, that has a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

§ 603.1260 Expenditure-based award.

A Federal Government assistance award for which the amounts of interim payments or the total amount ultimately paid (*i.e.*, the sum of interim payments and final payment) are subject to redetermination or adjustment, based on the amounts expended by the recipient in carrying out the purposes for which the award was made, as long as the redetermination or adjustment does not exceed the total Government funds obligated to the award. Most Federal Government grants and cooperative agreements are expenditure-based awards.

§ 603.1265 Expenditures or outlays.

Charges made to the project or program. They may be reported either on a cash or accrual basis, as shown in the following table:

If reports are prepared on a . . .	Expenditures are the sum of . . .
(a) Cash basis	(1) Cash disbursements for direct charges for goods and services; (2) The amount of indirect expense charge; (3) The value of third party in-kind contributions applied; and (4) The amount of cash advances and payments made to any other organizations for the performance of a part of the RD&D effort.
(b) Accrual basis	(1) Cash disbursements for direct charges for goods and services; (2) The amount of indirect expense incurred; (3) The value of in-kind contributions applied; and (4) The net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, and other payees and other amounts becoming owed under programs for which no current services or performance are required.

§ 603.1270 Grant.

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

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

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

§ 603.1275 In-kind contributions.

The value of non-cash contributions made by a recipient or non-Federal third parties toward cost sharing.

§ 603.1280 Institution of higher education.

An educational institution that:

(a) Meets the criteria in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001); and

(b) Is subject to the provisions of OMB Circular A–110, ''Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' as implemented by the Department of Energy at 10 CFR 600, Subpart B.

§ 603.1285 Intellectual property.

Patents, trademarks, copyrights, mask works, protected data, and other forms of comparable property protected by Federal law and foreign counterparts.

§ 603.1290 Participant.

A consortium member or, in the case of an agreement with a single for-profit entity, the recipient. Note that a for-profit participant may be a firm or a segment of a firm (*e.g.*, a division or other business unit).

§ 603.1295 Periodic audit.

An audit of a participant, performed at an agreed-upon time (usually a regular time interval), to determine whether the participant as a whole is managing its Federal awards in compliance with the terms of those awards. Appendix A to this part describes what such an audit may cover. A periodic audit of a participant differs from an award-specific audit of an individual award (as defined in § 603.1220).

§ 603.1300 Procurement contract.

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

§ 603.1305 Program income.

Gross income earned by the recipient or a participant that is generated by a supported activity or earned as a direct result of a TIA. Program income includes but is not limited to: income from fees for performing services; the use or rental of real property, equipment, or supplies acquired under a TIA; the sale of commodities or items fabricated under a TIA; and license fees and royalties on patents and copyrights. Interest earned on advances of Federal funds is not program income.

§ 603.1310 Program official.

A Federal Government program manager, project officer, scientific officer, or other individual who is responsible for managing the technical program being carried out through the use of a TIA.

§ 603.1315 Property.

Real property, equipment, supplies, and intellectual property, unless stated otherwise.

§ 603.1320 Real property.

Land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

§ 603.1325 Recipient.

An organization or other entity that receives a TIA from DOE. Note that a for-profit recipient may be a firm or a

segment of a firm (*e.g.*, a division or other business unit).

§ 603.1330 Supplies.

Tangible property other than real property and equipment. Supplies have a useful life of less than one year or an acquisition cost of less than $5,000 per unit.

§ 603.1335 Termination.

The cancellation of a TIA, in whole or in part, at any time prior to either:

(a) The date on which all work under the TIA is completed; or

(b) The date on which Federal sponsorship ends, as given in the award document or any supplement or amendment thereto.

§ 603.1340 Technology investment agreement.

A TIA is a special type of assistance instrument used to increase involvement of commercial firms in the DOE research, development and demonstration (RD&D) programs. A TIA, like a cooperative agreement, requires substantial Federal involvement in the technical or management aspects of the project. A TIA may be either a type of cooperative agreement or a type of assistance transaction other than a cooperative agreement, depending on the intellectual property provisions. A TIA is either:

(a) A type of cooperative agreement with more flexible provisions tailored for involving commercial firms (as distinct from a cooperative agreement subject to all of the requirements in 10 CFR Part 600), but with intellectual property provisions in full compliance with the DOE intellectual property statutes (*i.e.*, Bayh-Dole statute and 42 U.S.C. §§ 2182 and 5908, as implemented in 10 CFR 600.325); or

(b) An assistance transaction other than a cooperative agreement, if its intellectual property provisions vary from the Bayh-Dole statute and 42 U.S.C. §§ 2182 and 5908, which require the Government to retain certain intellectual property rights, and require differing treatment between large businesses and nonprofit organizations or small businesses.

Appendix A to Part 603—Applicable Federal Statutes, Executive Orders, and Government-wide Regulations

Whether the TIA is a cooperative agreement or a type of assistance transaction other than a cooperative agreement, the terms and conditions of the agreement must provide for recipients' compliance with applicable Federal statutes, Executive Orders and Government-wide regulations. This appendix lists some of the more common requirements to aid in identifying ones that apply to a specific TIA. The list is not intended to be all-inclusive, however; the contracting officer may need to consult legal counsel to verify whether there are others that apply (*e.g.*, due to a provision in the appropriations act for the specific funds in use or due to a statute or rule that applies to a particular program or type of activity).

A. Certifications

All financial assistance applicants, including applicants requesting a TIA must comply with the prohibitions concerning lobbying in a Government-wide common rule that the DOE has codified at 10 CFR part 601. The ''List of Certifications and Assurances for SF 424(R&R)'' on the DOE Applicant and Recipient page at *http://grants.pr.doe.gov* includes the Government-wide certification that must be provided with a proposal for a financial assistance award, including a TIA.

B. Assurances That Apply to a TIA

Currently the DOE approach to communicating Federal statutes, Executive Orders and Government-wide regulations is to provide potential applicants a list of ''National Policies Assurances to be Incorporated as Award Terms'' in the program announcement (This list is available on the Applicant and Recipient Page at *http://grants.pr.doe.gov* under Award Terms). The contracting officer should follow this approach for announcements that allow for the award of a TIA. The contracting officer should normally incorporate by reference or attach the list of national policy assurances to a TIA award. Of these requirements, the following four assurances apply to all TIA:

1. Prohibitions on discrimination on the basis of race, color, or national origin in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*) as implemented by DOE regulations at 10 CFR part 1040. These apply to all financial assistance. They require recipients to flow down the prohibitions to any subrecipients performing a part of the substantive RD&D program (as opposed to suppliers from whom recipients purchase goods or services).

2. Prohibitions on discrimination on the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*) as implemented by DOE regulations at 10 CFR part 1040. They apply to all financial assistance and require flow down to subrecipients.

3. Prohibitions on discrimination on the basis of handicap, in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) as implemented by DOE regulations at 10 CFR part 1041. They apply to all financial assistance and require flow down to subrecipients.

4. Preferences for use of U.S.-flag air carriers in the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118), which apply to uses of U.S. Government funds.

C. Other Assurances

Additional assurance requirements may apply in certain circumstances, as follows:

1. If construction work is to be done under a TIA or its subawards, it is subject to the prohibitions in Executive Order 11246 on discrimination on the basis of race, color, religion, sex, or national origin.

2. If the RD&D involves human subjects or animals, it is subject to the requirements codified by the Department of Health and Human Services at 45 CFR part 46 and implemented by DOE at 10 CFR part 745 and rules on animal acquisition, transport, care, handling and use in 9 CFR parts 1 through 4, Department of Agriculture rules and rules of the Department of Interior at 50 CFR parts 10 through 24 and Commerce at 50 CFR parts 217 through 277, respectively. See item a. or b., respectively, under the heading ''Live organisms'' included on the DOE ''National Policy Assurances To Be Incorporated As Award Terms'' on the Applicant and Recipient Page.

3. If the RD&D involves actions that may affect the environment, it is subject to the National Environmental Policy Act, and may also be subject to national policy requirements for flood-prone areas, coastal zones, coastal barriers, wild and scenic rivers, and underground sources of drinking water.

4. If the project may impact a historic property, it is subject to the National Historic Preservation Act of 1966 (16 U.S.C. 470, *et seq.*).

Appendix B to Part 603—Flow Down Requirements for Purchases of Goods and Services

A. As discussed in § 603.705, the contracting officer must inform recipients of any requirements that flow down to their purchases of goods or services (e.g., supplies or equipment) under their TIA. Note that purchases of goods or services differ from subawards, which are for substantive RD&D program performance.

B. Appendix A to 10 CFR part 600, subpart D lists eight requirements that commonly apply to firms' purchases under grants or cooperative agreements. Of those eight, two that apply to all recipients' purchases under a TIA are:

1. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).* A contractor submitting a bid to the recipient for a contract award of $100,000 or more must file a certification with the recipient that it has not and will not use Federal appropriations for certain lobbying purposes. The contractor also must disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. For further details, see 10 CFR part 601, the DOE's codification of the Government-wide common rule implementing this amendment.

2. *Debarment and suspension.* Recipients may not make contract awards that exceed the simplified acquisition threshold (currently $100,000) and certain other contract awards may not be made to parties listed on the General Services Administration (GSA) ''List of Parties Excluded from Federal Procurement and Nonprocurement Programs.'' The GSA list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and parties declared ineligible under statutory or regulatory authority other than Executive Orders 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3

CFR, 1989 Comp., p. 235). For further details, see subparts A through E of 10 CFR part 606, which is the DOE's codification of the Government-wide common rule implementing Executive Orders 12549 and 12689.

C. One other requirement applies only in cases where construction work is to be performed under the TIA with Federal funds or recipient funds counted toward required cost sharing:

1. *Equal Employment Opportunity.* If the TIA includes construction work, the contracting officer should inform the recipient that Department of Labor regulations at 41 CFR 60–1.4(b) prescribe a clause that must be incorporated into construction awards and subawards. Further details are provided in Appendix B to 10 CFR 600 subpart D, item 1.

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