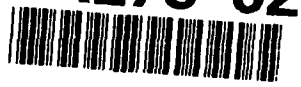

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DoD GRANT AND AGREEMENT REGULATIONS

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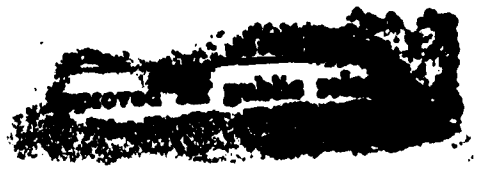

AD NUMBER	DATE 4-26-94	DTIC ACCESSION NOTICE
1. REPORT IDENTIFYING INFORMATION		REQUESTER:
A. ORIGINATING AGENCY OSD/WHS DIRECTIVES DIVISION		1. Put your mailing address on reverse of form. 2. Complete items 1 and 2 3. Attach form to reports mailed to DTIC. 4. Use unclassified information only. 5. Do not order document for 6 to 8 weeks.
B. REPORT TITLE AND/OR NUMBER DoD Grant and Agreement Regulations		
C. MONITOR REPORT NUMBER		
D. PREPARED UNDER CONTRACT NUMBER		
2. DISTRIBUTION STATEMENT UNCLASSIFIED, RELEASE UNLIMITED * 2/4/94 DRAFT VERSION		DTIC: 1. Assign AD Number. 2. Return to requester.

DTIC Form 50 DEC 91 PREVIOUS EDITIONS ARE OBSOLETE

DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING

WASHINGTON, DC 20301-3010

08 FEB 1994

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
ATTN: SERVICE ACQUISITION EXECUTIVES
DIRECTOR, ADVANCED RESEARCH PROJECTS AGENCY

SUBJECT: Grants, Cooperative Agreements, and Other Transactions

This memorandum provides interim guidance for use of grants, cooperative agreements, and "other transactions" (transactions other than grants, cooperative agreements, and procurement contracts). In doing so, it assigns certain responsibilities of the Secretary of Defense under 10 U.S.C. §2358 and §2371, as amended by section 827 of the National Defense Authorization Act for Fiscal Year 1994 (P.L. 103-160).

As amended, 10 U.S.C. §2358 authorizes the Secretary of Defense and Secretaries of the Military Departments to perform research and development projects by cooperative agreement or "other transaction," as well as by grant or contract. 10 U.S.C. §2371 provides additional authority that may be used in conjunction with cooperative agreements and "other transactions."

Use of grants, cooperative agreements, and "other transactions" should adhere to the interim guidance in the two attachments to this memorandum. Attachment 1 likely will become a DoD Instruction covering "other transactions" and 10 U.S.C. §2371. Attachment 2, the DoD Grant and Agreement Regulations, should be proposed for public comment this year.

Using the two attachments as interim guidance allows them to be tested in practice and refined before they are formalized. I will periodically update them, to incorporate lessons learned from their use. Therefore, I urge program and contracting offices to suggest ways to improve the guidance and to promptly bring to my attention any problems encountered in adhering to it.

I believe that grants, cooperative agreements, and "other transactions," if used appropriately, can be valuable tools to help meet program goals in the Technology Reinvestment Project and other Science and Technology programs.

Anita K. Jones

Attachments

ATTACHMENT 1

Attachment 1 -- INTERIM GUIDANCE FOR MILITARY DEPARTMENTS AND ADVANCED RESEARCH PROJECTS AGENCY ON GRANTS, COOPERATIVE AGREEMENTS AND "OTHER TRANSACTIONS"

SECTION I -- GENERAL

A. PURPOSE AND APPLICABILITY

1. This document, together with the "Interim-Guidance Draft of 3210.6-R, DoD Grant and Agreement Regulations" (Interim-Guidance Draft DoDGARs), provides interim guidance for:

a. "Other transactions" (other than grants, cooperative agreements, and contracts), which are instruments that:

(i) May be used for basic, applied, and advanced research projects under 10 U.S.C. §2358, or for other purposes consistent with Subsection C.1. of this section.

(ii) May use the funds-merger authority in 10 U.S.C. §2371(a).

(iii) Shall comply, except as provided in Subsection C.2. of this section, with the requirements of subsections (c) and (e) of 10 U.S.C. §2371, whether or not they utilize the funds-merger authority in 10 U.S.C. §2371(a).

b. A class of cooperative agreements (hereafter referred to as "cooperative agreements under 10 U.S.C. §2371") that:

(i) May be used for performing basic, applied, and advanced research projects under 10 U.S.C. §2358.

(ii) Shall be subject to the same provisions of 10 U.S.C. §2371 as "other transactions," [see subparagraphs (ii) and (iii) of paragraph A.1.a. of this section, above].

(iii) Are covered by provisions in Part 37 of the Interim-Guidance Draft DoDGARs that differ from provisions in other parts of the DoDGARs for all other cooperative agreements.

c. All other cooperative agreements (i.e., those that are not "cooperative agreements under 10 U.S.C. §2371"), including those for purposes other than research and development.

d. Grants for any purpose.

2. This guidance applies to the Military Departments and Advanced Research Projects Agency (hereafter referred to collectively as "awarding agencies"), the DoD Components authorized to use "other transactions" and "cooperative agreements under 10 U.S.C. §2371."

3. This document is in three sections:

a. This section, Section I, establishes policy and assigns authorities and responsibilities for "other transactions"

and for "cooperative agreements under 10 U.S.C. §2371."

b. Section II, which is based on the Interim-Guidance Draft DoDGARs, provides additional guidance for grants and for all cooperative agreements, including "cooperative agreements under 10 U.S.C. §2371."

c. Section III provides additional guidance specifically for "other transactions."

B. DEFINITIONS

1. Advanced Research. For the purpose of 10 U.S.C. §2358, advanced research is advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analagous to precompetitive technology development in the commercial sector. It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Budget Activity 2 ("6.3A" Advanced Technology Development), within Research, Development, Test and Evaluation (RDT&E).

2. Applied Research. Efforts, typically funded within the 6.2 Exploratory Development category of RDT&E, to determine and exploit the potential of science and engineering knowledge and understanding in technology such as new materials, devices, methods, and processes (also see definition at Subpart 36.2 of the Interim-Guidance Draft DoDGARs).

3. Basic Research. Efforts, typically funded in RDT&E's 6.1 Research category, intended to increase knowledge and understanding in science and engineering (also see definition at Subpart 36.2 of the Interim-Guidance Draft DoDGARs).

4. Cooperative Agreement. A legal instrument used to enter into the same kind of relationship as a grant (see definition in 6., below), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include "cooperative research and development agreements" as defined in 15 U.S.C. §3710a.

5. Development. Efforts (typically those funded in RDT&E categories other than 6.1 Research, 6.2 Exploratory Development, and "6.3A" Advanced Technology Development) to systematically use scientific and technical knowledge to design, develop, test, or evaluate potential new products, processes, or services to meet specific performance requirements or objectives (also see definition at Subpart 36.2 of Interim-Guidance Draft DoDGARs).

6. Grant. A legal instrument used to enter into a relationship, the principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States,

rather than to acquire property or services for the Department of Defense's direct benefit or use. Further, it is a relationship in which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

7. "Other transaction." A legal instrument authorized by 10 U.S.C. §2358 for performing research and development projects. In accordance with this interim guidance, "other transactions" are used almost exclusively for performing basic, applied, and advanced research, when it is not appropriate or feasible to use a procurement contract, grant, or cooperative agreement.

C. POLICY

1. "Other transactions" that are authorized by 10 U.S.C. §2358 for the performance of research and development projects and "cooperative agreements under 10 U.S.C. §2371" are appropriately used to perform basic research, applied research, and advanced research projects in accordance with this interim guidance. "Other transactions" may be used for other purposes only as authorized by laws other than 10 U.S.C. §2358 [e.g., section 845 of the National Defense Authorization Act for Fiscal Year 1994 (P.L. 103-160) and any DoD implementation thereof].

2. Awarding agencies shall comply with provisions of 10 U.S.C. §2371 with respect to all "other transactions" authorized by 10 U.S.C. §2358, except where subsection 845(b) of P.L. 103-160 specifically provides otherwise.

D. AUTHORITY FOR COOPERATIVE AGREEMENTS AND "OTHER TRANSACTIONS"

The Director, Advanced Research Projects Agency and the Secretaries of the Military Departments shall perform research and development projects by cooperative agreement or "other transaction" authorized by 10 U.S.C. §2358 in accordance with DoD Directive 3210.6, this interim guidance, and applicable portions of other DoD publications. The Director, Advanced Research Projects Agency, shall exercise the authority of the Secretary of Defense under 10 U.S.C. §2358 to perform research and development through such agreements and transactions, and the Secretaries of the Military Departments shall exercise their direct authorities under 10 U.S.C. §2358 to do so. Such authorities may be delegated in accordance with the Interim-Guidance Draft DoDGARs, without further restriction. However, approval levels for "other transactions" should be commensurate with the uncertain nature of the instruments (see B.3. in Section III of this document).

E. PROCEDURES FOR "OTHER TRANSACTIONS" AND "COOPERATIVE AGREEMENTS UNDER 10 U.S.C. §2371"

1. In carrying out basic research, applied research, and advanced research projects, the Secretaries of the Military

Departments, and the Director, Advanced Research Projects Agency:

a. May enter into "other transactions" or "cooperative agreements under 10 U.S.C. §2371" that require the recipient, as a condition for receiving support under the agreement or transaction, to make payments to the Department of Defense or other Federal Agency. Such payments may be credited to the account established on the books of the U.S. Treasury Department by 10 U.S.C. §2371(d). Amounts credited are available for the same period for which other funds in such accounts are available and for the same purpose [i.e., support of research projects provided for in "other transactions" and "cooperative agreements under 10 U.S.C. §2371"]. The research projects that are supported shall be consistent with applicable, programmatic guidance from the Director, Defense Research and Engineering.

b. May determine that it is impracticable to ensure that funds provided by the Government under an "other transaction" or "cooperative agreement under 10 U.S.C. §2371" do not exceed the total amount provided by the other parties to the agreement or transaction, in accordance with 10 U.S.C. §2371(c)(2).

c. Shall ensure that "cooperative agreements under 10 U.S.C. §2371" or "other transactions," to the maximum extent practicable, do not provide for research that duplicates research being conducted under existing programs carried out by the Department of Defense, in accordance with 10 U.S.C. §2371(c)(1).

d. Shall ensure that "cooperative agreements under 10 U.S.C. §2371" are used only when it is not feasible or appropriate to use standard contracts or grants, in accordance with 10 U.S.C. §2371(c)(3).

e. Shall ensure that "other transactions" are used only when it is not feasible or appropriate to use standard contracts, grants, or cooperative agreements.

2. Each Military Department and the Advanced Research Projects Agency shall identify an office that will be responsible for reporting to the Defense Technical Information Center (DTIC) on all "other transactions" and "cooperative agreements under 10 U.S.C. §2371" entered into by that awarding agency. DTIC will compile the information in the Work Unit Information Summary Database, which is assigned report control symbol DD-A&T(A)1936, for use in preparing reports to Congress that are required by 10 U.S.C. §2371(e). Awarding agencies' reports shall:

a. Contain data requested by DTIC about each "cooperative agreement under 10 U.S.C. §2371" and "other transaction" [as a minimum, the information required by 10 U.S.C. §2371(e)].

b. Be provided to DTIC-OCP, Cameron Station, Alexandria, VA 22304-6145, in the format DTIC specifies and in accordance with a schedule DTIC establishes, to meet deadlines set by 10 U.S.C. 2371(e) for the annual reports to Congress.

SECTION II -- GRANTS AND COOPERATIVE AGREEMENTS

A. PURPOSE

This section provides guidance for grants and for all cooperative agreements, including those under 10 U.S.C. §2371.

B. GUIDANCE

Awarding agencies shall use the Interim-Guidance Draft DoDGARs when awarding and administering grants and cooperative agreements. Specifically, awarding agencies shall comply with:

1. Those parts of the DoDGARs that currently are in the Code of Federal Regulations (CFR). They are Governmentwide:

a. Requirements for nonprocurement debarment and suspension and for drug-free workplace, at 32 CFR Part 25. Currently, compliance with this Part is also directed by DoD Instruction 3210.5, which will be cancelled when DoD 3210.6-R takes effect.

b. Restrictions on lobbying, at 32 CFR Part 28.

c. Requirements for administering grants and agreements with State and local governments, at 32 CFR Part 33.

2. Statutory or regulatory requirements for DoD grants and cooperative agreements, several of which are implemented in the Interim-Guidance Draft DoDGARs. Those requirements include:

a. The Grant and Cooperative Agreement Act (31 U.S.C. Chapter 63), implemented in section §21.10 of the draft DoDGARs.

b. 31 U.S.C. Chapter 61, which requires reporting of program information and awards data, as provided for in Subpart D of Part 21 of the draft DoDGARs.

3. To the maximum extent practicable, other portions of the attached, draft DoDGARs. The intent is to:

a. Provide a framework for the award and administration of grants and cooperative agreements; and

b. Test the draft rules before they are formally proposed, to see which provisions may cause difficulties in practice and what additional provisions might be needed. To that end, awarding agencies may waive or apply flexibly provisions that cause problems, to the extent that such waiver or flexible application does not result in noncompliance with a statute or binding regulatory requirement. Agencies will report waivers or use of modified provisions, identify the problems that led to such waivers or modifications, and suggest solutions, through appropriate channels, to: ODDR&E(RLM); Room 3E-1049; Pentagon; Washington, D.C. 20301-3080.

SECTION III -- "OTHER TRANSACTIONS" UNDER 10 U.S.C. §2371

A. PURPOSE

This section supplements Section I of this document, by providing additional guidance specific to "other transactions."

B. GUIDANCE

1. In paragraph B.7. of Section I of this interim guidance, the term "other transaction" is defined by what it is not: a grant, cooperative agreement, or procurement contract. There is considerable uncertainty as to what precise form an "other transaction" might take. Therefore, awarding agencies should consider the authority to enter into "other transactions" as an opportunity to develop innovative approaches to carrying out basic, applied, or advanced research projects (or other programs where use of "other transactions" is consistent with Subsection I.C. of this interim guidance).

2. As awarding agencies gain experience with "other transactions," classes of these instruments may emerge that can be defined clearly. Awarding agencies shall identify such classes, as they are developed, to the Director, Defense Research and Engineering. To the extent that those classes of instruments can be standardized, it will facilitate using them more widely and on a routine basis.

3. Awarding agencies shall establish approval levels for "other transactions" that are commensurate with the uncertain nature of the instruments. Authority to approve "other transactions" should be delegated to officials whose level of responsibility, business acumen, and judgment enable them to operate in a relatively unstructured environment. Appropriate approval levels for "other transactions" therefore may be higher than those for cooperative agreements, which are reasonably well-defined instruments with an established framework for award and administration. This guidance applies only to "other transactions" under 10 U.S.C. §2358 and is not intended to require higher levels of approval for agreements under other statutory authorities.

4. Because the nature of "other transactions" is uncertain, approving officials will consult legal counsel to ensure that proposed instruments:

a. Are "other transactions" authorized by 10 U.S.C. §2358.

b. Conform with applicable legal requirements (e.g., particular "other transactions," depending upon their nature, may be subject to laws or Governmentwide rules that apply broadly to financial assistance or nonprocurement instruments).

ATTACHMENT 2

ATTACHMENT 2

INTERIM-GUIDANCE DRAFT OF

DoD 3210.6-R

DoD GRANT AND AGREEMENT REGULATIONS

INCORPORATING CHANGES AS OF
February 4, 1994

TABLE OF CONTENTS

PART 21-DoD GRANTS AND AGREEMENTS--GENERAL MATTERS

Subpart A-Defense Grant and Agreement Regulatory System

§21.1 Authority and issuance.

(a) DoD Directive 3210.6[1] established the Defense Grant and Agreement Regulatory System (DGARS). It also authorized publication of the DoD Grant and Agreement Regulations.

(b) On behalf of the Secretary of Defense, the Director, Defense Research and Engineering (DDR&E) develops and implements the policies and procedures of the DGARS. The DDR&E, or his or her designee, also issues the DoD Grant and Agreement Regulations, policy memoranda, and other DoD publications that comprise the DGARS.

§21.2 Purpose. The Defense Grant and Agreement Regulatory System was established to provide uniform policies and procedures for grants and cooperative agreements awarded by DoD Components. It is to be responsive to DoD needs for efficient program execution, effective program oversight, and proper stewardship of Federal funds.

§21.3 Applicability and relationship to acquisition regulations.

(a) *Applicability to grants and cooperative agreements*. The DoD Grant and Agreement Regulations (DoDGARs) apply to all DoD grants and cooperative agreements.

(b) *Applicability to other nonprocurement instruments*. Some portions of the DoDGARs apply to other nonprocurement instruments, in addition to grants and cooperative agreements. In such cases, the applicability is as stated in those portions of the DoDGARs. However, grants officers must exercise caution when determining the applicability of Governmentwide rules that have been included in the DoDGARs, because Governmentwide rules may define a term differently than the same term is defined elsewhere in the DoDGARs. For example, the Governmentwide implementation of the Drug-Free Workplace Act of 1988 (Subpart F of 32 CFR 25) states that it applies to grants, but defines "grants" to include cooperative agreements and other forms of financial assistance.

(c) *Relationship to acquisition regulations*. The Federal Acquisition Regulation (FAR), the Defense Federal Acquisition Regulation Supplement (DFARS), and DoD Component supplements to the FAR and DFARS apply to procurement contracts used to acquire

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[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. Authorized users may also obtain copies from the Defense Technical Information Center, Cameron Station, Alexandria, VA 22304-6145.

goods and services for the direct benefit or use of the Federal government. Policies and procedures in the FAR and DFARS do not apply to grants, cooperative agreements, and other nonprocurement transactions unless the DoDGARs specify that they apply.

§21.4 Compliance and implementation.

(a) The Heads of DoD Components are responsible for ensuring compliance with the DoD Grant and Agreement Regulations within their respective organizations.

(b) Heads of DoD Components may authorize the issuance of regulations that are consistent with and that implement or supplement the DoD Grant and Agreement Regulations to the extent that such regulations:

(1) Are necessary to:

(i) Implement DGARS policies and procedures within the DoD Component.

(ii) Supplement the DoD Grant and Agreement Regulations to satisfy needs that are specific to the DoD Component.

(2) Do not impose additional costs or administrative burdens on recipients or potential recipients.

§21.5 Publication and maintenance.

(a) The DoD Grant and Agreement Regulations are published as Chapter 1, Subchapter B of Title 32 of the Code of Federal Regulations (CFR) and in a separate loose-leaf edition. The loose-leaf edition is divided into parts, subparts, and sections, to parallel the CFR publication. Cross-references within the regulation are stated as CFR citations (e.g., a reference to Section 21.11 in Part 21 would be to 32 CFR 21.11).

(b) Updates to the DoD Grant and Agreement Regulations are published as Defense Grant and Agreement Circulars. Updates also are published in the Federal Register, with an opportunity for the public to submit written comments, when they have a significant:

(1) Cost or administrative impact on recipients or potential recipients; or

(2) Effect beyond internal DoD operating procedures.

(c) Revisions to the DoD Grant and Agreement Regulations are recommended to the Director, Defense Research and Engineering (DDR&E) by a standing working group. The DDR&E, Director of Defense Procurement, and each Military Department shall be represented on the working group. Other DoD Components that use

grants or cooperative agreements may also nominate representatives. The working group meets when necessary.

§21.6 Deviations.

(a) *Definition*. A "deviation" is the issuance or use of a policy or procedure that is inconsistent with the DoD Grant and Agreement Regulations.

(b) *Individual deviations*. Individual deviations affect only one grant or agreement. Except where prohibited by statute, executive order or regulation, the Head of the DoD Component or his or her designee may authorize individual deviations from the DoD Grants Regulations. A copy of the justification and agency approval shall be furnished to:

Deputy Director, Defense Research and Engineering
ATTN: Research and Laboratory Management
The Pentagon, Room 3E-1049
Washington D.C. 20301-3080

(c) *Class deviations*. Class deviations affect more than one grant or agreement. Class deviations must be approved in advance by the Director, Defense Research and Engineering (DDR&E) or his or her designee. Requests for such approval shall be submitted in writing to the DDR&E through the Deputy Director, Defense Research and Engineering at the address given in paragraph (b) of this section. Requests for approval shall contain a full description of the deviation desired, the circumstances in which it will be used, the rationale for requesting the deviation, and the period of time for which it is needed.

(d) *Documentation*. Copies of requests and approvals for individual and class deviations shall be maintained in award files.

§21.7 Definitions. The following are definitions of terms as used in this part or in other parts of the DoD Grant and Agreement Regulations that refer to this section:

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

(b) *Assistance*. In accordance with 31 U.S.C. 6101(3), 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. Grants and cooperative agreements are examples of legal instruments used to provide assistance.

(c) *Contract*. A legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal government and a State, a local government, or other person when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal government. Also referred to as a "procurement contract." A more detailed definition of the term appears at 48 CFR 2.101 [in the "Federal Acquisition Regulation" (FAR)].

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

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

(f) *Cooperative agreement*. A legal instrument as described in section 21.10(a) of this part. The term does not include "cooperative research and development agreements," as defined in 15 U.S.C. 3710a.

(g) *DoD Components*. The Office of the Secretary of Defense, the Military Departments, the Defense Agencies, and DoD Field Activities.

(h) *Grant*. A legal instrument as described in section 21.10(a) of this part.

(i) *Grants officer*. An official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.

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

(k) *Recipient*. The person (e.g., organization or other entity) to which a DoD Component awards a grant or with which a DoD Component enters into a cooperative agreement.

Subpart B-Appropriate Use of Grants and Cooperative Agreements.

§21.10 The Grant and Cooperative Agreement Act.

(a) *General*. In accordance with 31 U.S.C. Chapter 63 (the Grant and Cooperative Agreement Act), DoD Components shall use grants and cooperative agreements as legal instruments reflecting assistance relationships between the United States Government and recipients.

(1) Grants may be used when substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated in the agreement. Additional guidance on what constitutes "substantial involvement" for research and development awards may be found at 32 CFR 36.4(b)(2)(ii). Grants officers may also refer to 43 FR 36860 (August 18, 1978) for supplementary interpretative guidelines published by the Office of Management and Budget for 31 U.S.C. Chapter 63.

(2) Cooperative agreements may be used when substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated in the agreement. Under no circumstances are cooperative agreements to be used solely to obtain the stricter controls typical of a contract.

(b) *Exemptions*. Under 31 U.S.C. 6307, the Director of the Office of Management and Budget (OMB) is authorized to exempt an agency transaction or program from the requirements of 31 U.S.C. Chapter 63. DoD Components shall request such exemptions only in exceptional circumstances. The request shall specify for which individual transaction or program the exemption is sought; the reasons for requesting an exemption; the anticipated consequences if the exemption is not granted; and the implications for other transactions and programs if the exemption is granted. The procedures for requesting exemptions shall be:

(1) In cases where 31 U.S.C. Chapter 63 would require use of a contract and the DoD Component wishes an exemption from that requirement, the DoD Component shall submit a request for exemption through appropriate channels to the Director of Defense Procurement (DDP). The DDP, after coordination with the Director of Defense Research and Engineering (DDR&E), shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

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

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

§21.11 Fee or profit. Payment of fee or profit is consistent with a relationship whose principal purpose is the acquisition of property or services for the direct benefit or use of the United States Government, rather than assistance. Procurement contracts are the appropriate instruments to reflect such relationships. Therefore, grants and cooperative agreements shall not:

(a) Provide for the payment of fee or profit to the recipient.

(b) Be used to carry out programs where fee or profit is necessary to achieving program objectives.

Subpart C-Authorities and Responsibilities

§21.20 DoD Components

(a) *Statutory authorities*. DoD Components may award grants and enter into agreements under a number of statutory authorities, which fall into three categories:

(1) Authorities that statutes provide to the Secretary of Defense. These authorities generally are delegated by the Secretary of Defense to Heads of DoD Components, usually through DoD Directives, Instructions, or policy memoranda that are not part of the DoD Grant and Agreement Regulatory System. The statutory authorities in this category include:

(i) Authority under 10 U.S.C. 2391 to make grants or conclude cooperative agreements to assist State and local governments in planning and carrying out community adjustments and economic diversification required by changes in military installations or in DoD contracts or spending that may have a direct and significant adverse consequence on the affected community.

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

(2) Authorities that statutes may provide directly to the Heads of DoD Components. These authorities need no delegation by the Secretary of Defense. For example, 10 U.S.C. 2358 authorizes the Secretaries of the Military Departments, in addition to the Secretary of Defense, to perform research and development projects through grants and cooperative agreements.

(3) Authorities that arise indirectly as the result of statute. For example, authority to use a grant or cooperative agreement may result from:

(i) A federal statute authorizing a program that is consistent with an assistance relationship (i.e., the support or stimulation of a public purpose, rather than the acquisition of a good or service for the direct benefit of the Department of Defense). In accordance with the program statute and 31 U.S.C. Chapter 63, such a program would appropriately be carried out through the use of grants or cooperative agreements.

(ii) Exemptions requested by the Department of Defense and granted by OMB under 31 U.S.C. 6307, as described in section 21.10(b) of this part.

(b) *Vesting and delegation of Components' authority*.

(1) The authority and responsibility for awarding

grants and entering into cooperative agreements is vested in the Head of each DoD Component that has such authority.

(2) The Head of each such DoD Component may delegate to the heads of contracting activities (HCAs) within that Component authority to award grants or enter into cooperative agreements, to appoint grants officers (see section 21.22 of this part), and to broadly manage the DoD Component's functions related to grants and agreements. An HCA is the same official (or officials) designated as the head of the contracting activity for procurement contracts, as defined at 48 CFR 2.101.

§21.21 Contracting activities. The HCA is responsible for the grants and cooperative agreements made by or assigned to that activity. Those responsibilities include:

(a) Reporting of data required by Subpart D of this part.

(b) Ensuring that the terms and conditions of the grants and agreements provide for compliance with applicable statutes, executive orders, and Federal regulations. A list of such requirements for research and development grants and agreements is published pursuant to 32 CFR 36.3.

§21.22 Grants officers.

(a) *Authority*. Grants officers are individuals authorized, pursuant to 21.20(b) and 21.22(c), to enter into, administer, or terminate grants and/or cooperative agreements. Only grants officers shall sign such legal instruments on behalf of the Department of Defense. Grants officers may bind the Government only to the extent of the authority delegated to them. Appointing authorities shall give grants officers clear, written instructions regarding the limits of their authority [see 21.22(c)(2)]. Information on the limits of grants officers' authority shall be readily available to the public and agency personnel.

(b) *Responsibilities*. Grants officers should be allowed wide latitude to exercise judgment in performing their responsibilities. Grants officers are responsible for:

(1) Ensuring that all necessary actions are performed to achieve:

(i) Effective use of grants and cooperative agreements in the execution of Department of Defense programs.

(ii) Proper stewardship of Federal funds.

(iii) Compliance with the terms and conditions of the grant or cooperative agreement.

(2) Ensuring that the recipents of grants and

cooperative agreements receive impartial, fair, and equitable treatment.

(3) Ensuring that sufficient funds are available for obligation.

(4) Requesting and considering the advice of specialists in audit, law, science and engineering, and other fields, as appropriate.

(c) *Selection, appointment and termination of appointment of grants officers*. Each DoD Component that awards grants or enters into cooperative agreements shall have a formal process whereby the Head of the DoD Component or his or her designees [see 21.20(b)] select and appoint grants officers and terminate their appointments. DoD Components are not required to maintain a selection process for grants officers separate from the selection process for contracting officers, and written statements of appointment or termination for grants officers may be integrated into the necessary documentation for contracting officers, as appropriate.

(1) Selection. In selecting grants officers, appointing officials shall consider the complexity and dollar value of the grants and agreements to be assigned and judge whether candidates possess the necessary experience, training, education, business acumen, judgement, and knowledge of contracts and assistance instruments to function effectively as grants officers.

(2) Appointment. Statements of appointment shall be in writing and shall clearly state the limits of grants officers' authority, other than limits contained in applicable laws or regulations.

(3) Termination. Written statements of termination are required, unless the written statement of appointment provides for automatic termination. No termination shall be retroactive.

Subpart D-Grants Information

§21.30 Purpose. This subpart prescribes policies and procedures for compiling and reporting data related to grants, cooperative agreements, and other nonprocurement instruments subject to information reporting requirements of 31 U.S.C. Chapter 61.

§21.31 Individual Grants Action Reporting System.

(a) *Purposes of the system*. Data from the Individual Grants Action Reporting System (IGARS) are used to provide:

(1) DoD inputs to meet statutory requirements for Federal Governmentwide reporting of data related to obligations of funds by grant, cooperative agreement, or other nonprocurement instrument.

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

(3) Information to support policy formulation and implementation and to meet management oversight requirements related to the use of grants, cooperative agreements, and other nonprocurement instruments.

(b) *Responsibilities*.

(1) The Deputy Director, Defense Research and Engineering (DDDR&E), or his or her designee, shall issue the manual described in paragraph (b)(2)(ii) of this section.

(2) The Directorate for Information Operations and Reports, Washington Headquarters Services (DIOR, WHS) shall, consistent with guidance issued by the DDDR&E:

(i) Process IGARS information on a quarterly basis and prepare recurring and special reports using such information.

(ii) Prepare, update, and disseminate "Department of Defense Individual Grants Action Reporting System," an instruction manual for reporting information to IGARS. The manual, which shall be issued by the DDDR&E, shall specify procedures, formats, and editing processes to be used by DoD Components, including magnetic tape layout and error correction schedules.

(3) The following offices shall serve as central points for collecting IGARS information from contracting activities within the DoD Components:

(i) For the Army: U.S. Army Contracting Support Agency; ATTN: SFRD-KS; 5109 Leesburg Pike, Suite 916; Falls Church, VA 22041-3201.

(ii) For the Navy: As directed by ONR.

(iii) For the Air Force: As directed by SAF/AQCP.

(iv) For the Office of the Secretary of Defense, Defense Agencies, and DoD Field Activities: Each Defense Agency shall identify a central point for collecting and reporting IGARS information to the DIOR, WHS, at the address given in paragraph 21.31(c)(2) of this section. DIOR, WHS shall serve as the central point for offices and activities within the Office of the Secretary of Defense and for DoD Field Activities.

(4) The office that serves, in accordance with paragraph (b)(3) of this section, as the central point for collecting IGARS information from contracting activities within each DoD Component shall:

(i) Establish internal procedures to ensure reporting by contracting activities that use grants, cooperative agreements or other nonprocurement instruments subject to 31 U.S.C. Chapter 61.

(ii) Collect information required by DD Form 2566, "Individual Grant Action Report," from those contracting activities, and report it to DIOR, WHS, in accordance with paragraph (d) of this section.

(iii) Submit to the DDDR&E any recommended changes to the IGARS or to the instruction manual described in paragraph (b)(2)(ii) of this section.

(c) *Reporting procedures*. The data required by the DD Form 2566 shall be:

(1) Collected for each individual grant, cooperative agreement, or other nonprocurement action that is subject to 31 U.S.C. Chapter 61 and involves the obligation or deobligation of Federal funds.

(2) Reported on a quarterly basis to DIOR, WHS by the offices that are designated pursuant to paragraph (b)(3) of this section. For the first three quarters of the Federal fiscal year, the data are due by close-of-business (COB) on the 15th day after the end of the quarter (i.e., first-quarter data are due by COB on January 15th, second-quarter data by COB April 15th, and third-quarter data by COB July 15th). Fourth-quarter data are due by COB October 25th, the 25th day after the end of the quarter. If any due date falls on a weekend or holiday, the data are due on the next regular workday. The mailing address for

DIOR, WHS is 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302.

(3) Reported on a computer tape, floppy diskette or by other means permitted by the instruction manual described in paragraph (b)(2)(ii) of this section. The data shall be reported in the format specified in the instruction manual.

(d) *Report control symbol*. DoD Components' reporting of IGARS data is used by DoD to satisfy Governmentwide requirements to report to the Federal Assistance Awards Data System, which is assigned Interagency Report Control Number 0252-DOC-QU.

§21.32 Catalog of Federal Domestic Assistance.

(a) *Purpose and scope of the reporting requirement*.

(1) Under the Federal Program Information Act (Pub. L. 95-220), as implemented through OMB Circular A-89[2] of August 17, 1984, the Department of Defense is required to provide certain information about its domestic assistance programs to OMB and the General Services Administration (GSA). GSA makes this information available to the public by publishing it in the Catalog of Federal Domestic Assistance (CFDA) and maintaining the Federal Assistance Programs Retrieval System, a computerized data base of the information.

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

(b) *Responsibilities*.

(1) Each DoD Component that provides domestic financial assistance shall:

(i) Report to the Directorate for Information Operations and Reports, Washington Headquarters Services (DIOR, WHS) all new programs and changes as they occur, or as DIOR, WHS requests annual updates to existing CFDA information.

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

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[2] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

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

§21.33 Uniform grants numbering system. DoD Components shall assign identifying numbers to all nonprocurement instruments subject to this subpart, including grants and cooperative agreements. The numbering system parallels the the procurement instrument identification (PII) numbering system specified in 48 CFR 204.70 (in the "Defense Federal Acquisition Regulation Supplement"), as follows:

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

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

(c) The 9th position shall be a number: "1" for grants; "2" for cooperative agreements; and "3" for other nonprocurement instruments.

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

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PART 22-DoD GRANTS AND AGREEMENTS--RECIPIENT QUALIFICATIONS

Subpart A-General

§22.1 General requirement.

(a) *Policy*. DoD Components shall award grants or enter into cooperative agreements only with qualified recipients. The grants officer's signing of a grant or cooperative agreement constitutes a judgment that the prospective recipient is qualified with respect to that grant or cooperative agreement.

(b) *Standards*. To be qualified, a potential recipient must:

(1) Be judged to have adequate financial and technical resources, given those that would be made available through the grant or cooperative agreement, to execute the program of activities envisioned under the grant or cooperative agreement.

(2) Have no known, recent record of lack of responsibility or serious deficiency in executing such programs of activities.

(3) Have no known, recent record indicating a lack of integrity or business ethics.

(4) Be otherwise qualified and eligible to receive a grant or cooperative agreement under applicable laws and regulations.

§22.2 Definitions. Other than the terms defined by the following paragraphs, terms used in this part are defined in 32 CFR 21.7.

(a) *Administrative costs*. Additional costs incurred in processing and handling a grant debt because it became delinquent.

(b) *Administrative offset*. Withholding money payable by the United States Government to, or held by the Government for, a recipient to satisfy a delinquent grant debt the recipient owes the Government.

(c) *Delinquent debt*. A debt that the debtor fails to pay by the date specified in the initial written notification from the agency owed the debt or in any other applicable agreement, unless other satisfactory payment arrangements have been made by that date. In accordance with OMB Circular A-129[1], grant debts, as defined in (d) of this section, are delinquent

[1] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

when the debtor does not pay or resolve the debt within 30 days of the due date or 30 days after the notification of the debt is mailed to the debtor, and when the debtor has elected not to exercise any available appeals or has exhausted all agency appeal processes.

(d) *Grant debt*. Any overpayment, audit disallowance or other breach of the terms or conditions of a grant or cooperative agreement that results in a debt owed to the Federal Government.

(e) *Write-off*. When an agency official determines, after all appropriate recovery tools have been used, that a debt is uncollectible. Action to recover the debt ceases and the debt is removed from the agency's receivables.

Subpart B-Grant Debt

§22.10 Recipient responsibility and Pre-Award Actions.

(a) *Recipient responsibility*. In accordance with OMB Circular A-129, a recipient shall be held accountable for its grant debts.

(b) *Pre-award actions*.

(1) Grants officers shall obtain recipients' Taxpayer Identification Numbers (these may be Social Security Numbers for individuals and Employer Identification Numbers for business or non-profit entities) to facilitate later collection of delinquent grant debts, if necessary.

(2) Grants officers may obtain pre-award credit reports as indicators of recipients' financial responsibility. If such reports or other pre-screening information disclose that a potential recipient is delinquent on a grant debt to an agency of the United States Government, the grants officer may:

(i) Take such information into account when determining whether the potential recipient is responsible with respect to that grant or agreement.

(ii) Consider not awarding the grant or entering into the cooperative agreement until payment is made or satisfactory arrangements are made with the agency to which the grant debt is owed.

§22.11 Post-award actions.

(a) *Administrative offset*. DoD Components may use administrative offset to recover delinquent grant debts owed the United States Government by a recipient. In using administrative offset, DoD Components shall follow the due process provided in 31 U.S.C. 3716 and 4 CFR 102.2 and 102.3, where that statute and those regulations are applicable.

(1) DoD Components are not required to use offset in every instance in which there is an available source of funds, but shall make case-by-case judgments whether offset is appropriate. The rationale for the judgment shall be documented in the award file.

(2) Recovery of grant debt by administrative offset shall not be used where the grants officer determines that offset will substantially interfere with, or defeat the purpose of, the program for which the offset is contemplated.

(3) Grants and cooperative agreements that are paid in advance (e.g., payment is made in advance of program execution or before costs are incurred) shall not be subject to offset. DoD Components may unilaterally convert the method of payment to a reimbursement basis to enable use of administrative offset, if that is deemed to be in the best interest of the United States Government.

(b) *Other Debt Collection Mechanisms*. In addition to administrative offset, DoD Components may recover delinquent grant debts using other means that are available pursuant to Volume 5 of DoD 7000.14-R,[2] which implements OMB Circular A-129.

(c) *Interest, penalties and administrative costs*. DoD Components shall apply interest, penalties, and administrative costs to delinquent grant debt, consistent with OMB Circular A-129 and 4 CFR 102.13, except where applicable statutes or regulations prohibit or explicitly set such charges (or where 4 CFR 102 provides other exemptions).

(d) *Write-off procedures*. Any grant debt that is determined to be uncollectible shall be written off in accordance with Volume 5 of DoD 7000.14-R.

Subpart C-Other Qualification Matters

§22.20 Certifications and representations. [Reserved].

§22.21 Debarment and suspension.

(a) *Qualification requirements*. Debarment and suspension aspects of qualification are addressed in Subparts A through E of 32 CFR 25, which is the Governmentwide implementation of Executive Order 12549, "Debarment and Suspension" (51 FR 6370, 3 CFR, 1986 Comp., p.189).

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[2] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. Authorized users may also obtain copies from the Defense Technical Information Center, Cameron Station, Alexandria, VA 22304-6145.

(b) *Debarring and suspending officials*. DoD debarring and suspending officials for nonprocurement transactions, including grants and cooperative agreements, shall be the debarring and suspending officials for procurement contracts, identified at 48 CFR 209.4, in the "Defense Federal Acquisition Regulation Supplement."

(c) *Procedures*. Debarment and suspension procedures for nonprocurement transactions shall be the same as those specified by 48 CFR 209.4 for procurement contracts.

§22.22 Drug-free workplace.

(a) *Qualification requirements*. Drug-free workplace requirements are addressed in Subpart F of 32 CFR 25, which is the Governmentwide implementation of the Drug-Free Workplace Act of 1988, as it applies to grants, cooperative agreements, and other nonprocurement awards.

(b) *Authority to make determinations concerning recipient qualifications*. Directors of the Defense Agencies or their designees shall exercise the authority of the Secretary of Defense to make determinations required under 32 CFR 25.610(b) and 25.615.

§22.23 Lobbying restrictions.

(a) *Qualification requirements*. Requirements are specified in 32 CFR 28, "New Restrictions on Lobbying." 32 CFR 28 is the Governmentwide implementation of 31 U.S.C. 1352, as it applies to grants, cooperative agreements, and other nonprocurement awards.

(b) *Submission of disclosures*. The Office of the Director of Defense Procurement (Contract Policy and Administration), or ODDP(CPA), will compile disclosure reports received under 32 CFR 28.600. Those reports are submitted to Congress and the Inspector General, DoD, by May 31 and November 30 of each calendar year. DoD Components shall submit nonprocurement disclosure reports:

(1) Received during the six-month period ending on March 31 of each year no later than May 2 of that year and those received in the six-month period ending on September 30 no later than November 2.

(2) To ODDP(CPA) through the same channels established for submission of lobbying disclosures required for procurement contracts under 48 CFR 3.8, "Limitation on the Payment of Funds to Influence Federal Transactions."

§22.24 Nondiscrimination assurances.

(a) Before signing a grant, cooperative agreement, or other instrument providing financial assistance, the grants officer

shall ensure that the intended recipient has provided the written assurances required by:

(1) 32 CFR 195, the Department of Defense implementation of Title VI of the Civil Rights Act of 1964. 32 CFR 195.6 requires written assurances of compliance with that part, which prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving financial assistance from the Department of Defense.

(2) 32 CFR 56, the Department of Defense implementation of section 504 of the Rehabilitation Act of 1973 and related statutes. 32 CFR 56.9(b) requires written assurances of compliance with that part, which states that a recipient's programs and activities, including but not limited to those under the grant or agreement, must be accessible to and usable by people with disabilities.

(b) In ensuring that recipients have provided such written assurances, grants officers should utilize methods that minimize administrative and paperwork burdens on recipients. If no less burdensome method is available, grants officers may include a certification in the grant or agreement. [For example, such a certification may state: "By signing the agreement or accepting funds under the agreement, the recipient certifies that it is complying with the requirements of: (1) Title VI of the Civil Rights Act of 1964, as implemented by 32 CFR 195, concerning nondiscrimination in activities under the agreement based on race, color, or national origin; and (2) section 504 of the Rehabilitation Act of 1973, as implemented by 32 CFR 56, concerning access for people with disabilities in recipient programs and activities, including but not limited to those under the agreement."]

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PART 25--GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations, Part 25 has full legal effect and is already codified in the Code of Federal Regulations (CFR). Users of this draft may find this part at 32 CFR 25, in the July, 1992, and later editions of Title 32 of the CFR (in earlier editions, before being redesignated as Part 25, it appeared at 32 CFR 280).

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PART 28--NEW RESTRICTIONS ON LOBBYING

Unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations, Part 28 has full legal effect and is already codified in the Code of Federal Regulations (CFR). Users of this draft may find this part at 32 CFR 28, in the July, 1992, and later editions of Title 32 of the CFR (in earlier editions, before being redesignated as Part 28, it appeared at 32 CFR 282).

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PART 31-ADMINISTRATION OF DoD GRANTS AND AGREEMENTS

Subpart A-General Matters and Field Administration Services

§31.1 Scope. This part prescribes policies and procedures for administering grants and cooperative agreements.

§31.2 Policy.

(a) DoD policy is to minimize unnecessary duplication of field administration services, and relieve the concomitant increased burdens on recipients, when recipients of grants and agreements also perform Federal contracts. Therefore, DoD offices assigned cognizance over the performance of contract administration services for selected organizations or classes of organizations shall also perform administration services for grants and cooperative agreements with such organizations. These offices, referred to in this part as "grants administration offices," are (see the "DoD Directory of Contract Administration Services Components," DLAH 4105.4,[1] for specific addresses of regional offices):

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

(i) Institutions of higher education and laboratories affiliated with such institutions, to the extent they are treated in accordance with the university cost principles in OMB Circular A-21.[2]

(ii) Nonprofit organizations that are subject to the nonprofit cost principles in OMB Circular A-122,[3] if their principal business with the Department of Defense is research and development.

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

(i) Commercial organizations.

(ii) Nonprofit organizations identified in Attachment C of OMB Circular A-122 that are subject to commercial cost principles in 48 CFR 31.

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[1] Copies may be obtained from Defense Logistics Agency, Publications Distribution Division (DASC-WP), Cameron Station, Alexandria, VA 22304-6100.

[2] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

[3] See footnote 2 to section 31.2(a)(1)(i).

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

(iv) State and local governments.

(b) Contracting activities shall use cross-servicing arrangements whenever practicable and, to the maximum extent possible, delegate responsibility to the cognizant grants administration offices for field administration of grants and cooperative agreements. This will minimize the extent to which recipients of grants and agreements are unnecessarily subjected to duplicative reviews by multiple contracting activities.

§31.3 Grants administration office functions. Responsibilities of cognizant grants administration offices shall be:

(a) Performing pre-award surveys, when requested by grants officers.

(b) Performing property administration services.

(c) Reviewing recipients' financial management, property management and purchasing systems.

(d) Determining that recipients have drug-free workplace programs, as required under 32 CFR 25.

(e) Ensuring timely submission of required reports.

(f) Executing administrative closeout procedures.

(g) Performing other administration functions as delegated by applicable cross-servicing agreements or letters of delegation.

Subpart B-Administrative Requirements

§31.10 Requirements in other parts. In addition to the procedures in this part, administrative requirements for grants and cooperative agreements are specified in the following portions of the DoD Grant and Agreement Regulations:

(a) *Domestic recipients*.

(1) Standard administrative requirements for grants and cooperative agreements with domestic recipients are specified by:

(i) The previous version of OMB Circular A-110[4] (issued July 30, 1976), for grants and agreements performed by

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[4] See footnote 2 to section 31.2(a)(1)(i).

domestic institutions of higher education and nonprofit organizations, pending formal Department of Defense implementation of the recently issued update of that OMB Circular (58 FR 62992, November 29, 1993). In the interim, grants officers may, if the recipient consents, incorporate terms and conditions providing for administration of awards in accordance with the updated Circular A-110.

(ii) 32 CFR 33, the Department of Defense implementation of OMB Circular A-102,[5] for grants and cooperative agreements performed by State or local governments.

(iii) 32 CFR 34 for commercial organizations, for those DoD Components' programs where awards to commercial organizations are permitted.

(2) Special requirements are specified in Subpart B of 32 CFR 37 for use on an exception basis to administer cooperative agreements under 10 U.S.C. 2371.

(b) *Foreign recipients*. DoD Components shall use the administrative requirements specified in paragraph (a)(1) of this section, to the maximum extent practicable, for grants and cooperative agreements with foreign recipients.

§31.11 Metric system of measurement. [Reserved].

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[5] See footnote 2 to section 31.2(a)(1)(i).

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PART 33--UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations, Part 33 has full legal effect and is already codified in the Code of Federal Regulations (CFR). Users of this draft may find this part at 32 CFR 33, in the July, 1992, and later editions of Title 32 of the CFR (in earlier editions, before being redesignated as Part 33, it appeared at 32 CFR 278).

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PART 34-ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH COMMERCIAL ORGANIZATIONS

§34.1 Purpose. This part prescribes standard administrative requirements for grants and cooperative agreements with commercial organizations, for DoD programs where awards to commercial organizations are permitted.

§34.2 Policy.

(a) *General*. Pending formal Department of Defense implementation of the recently issued update of OMB Circular A-110[1] (58 FR 62992), grants officers shall apply the administrative requirements in the provisions of the previous version of OMB Circular A-110 (issued July 30, 1976) to grants and cooperative agreements with commercial organizations, with the following clarifications, additions, and exceptions:

(1) Cash depositories, bonding and insurance, records retention, and program income. Grants officers shall apply the provisions of Attachments A, B, C, and D of OMB Circular A-110.

(2) Cost sharing and matching. Grants officers shall apply the requirements of Attachment E of OMB Circular A-110, except that:

(i) Recipients may use their independent research and development (IR&D) funds as cost sharing or matching for a grant or cooperative agreement. In such cases, the IR&D contributions must meet all criteria other than paragraph 3.b.(5) in Attachment E to OMB Circular A-110. Use of IR&D as cost sharing is permitted, whether or not the Government decides at a later date to reimburse any of the IR&D as allowable indirect costs under the commercial cost principles in 48 CFR 31.

(ii) Real property or nonexpendable personal property purchased with recipients' funds may be included as recipients' cost sharing or matching, if recipients notify grants officers in advance that such property is being included. To be included, the property must meet the general requirement for recipients' contributions--they may count as cost sharing or matching to the extent that they are used for authorized purposes of the agreement, consistent with applicable cost principles.

(3) Standards for financial management systems. The standards in Attachment F of OMB Circular A-110 shall apply. To the extent that they comply with these minimum standards, recipients shall be allowed and encouraged to use financial

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[1] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

management systems already established for doing business in the commercial marketplace.

(4) Financial reporting, program monitoring, and program reporting. Grants officers may apply the provisions of Attachments G and H of OMB Circular A-110, or may include equivalent technical and financial reporting requirements that ensure reasonable oversight of the expenditure of appropriated funds. As a minimum, equivalent requirements must include:

(i) Periodic reports (at least annually, and no more frequently than quarterly) addressing both program status and business status.

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

(B) The business portions of the reports shall provide summarized details on the status of resources (federal funds and non-federal cost sharing or matching), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original grant or agreement; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations.

(C) When grants officers previously authorized advance payments [pursuant to paragraph (a)(5) of this section], they should consult with the program manager and consider whether program progress reported in the periodic report, in relation to reported expenditures, is sufficient to justify continued authorization of advance payments.

(ii) A final report that addresses all major accomplishments under the agreement.

(5) Payment requirements. Attachment I of OMB Circular A-110 shall apply, except that reimbursements, not advance payments, are the preferred method of payment for commercial organizations (notwithstanding paragraphs 3, 4 and 5 of Attachment I). Advance payments may be used in exceptional circumstances, subject to the following conditions:

(i) The grants officer, in consultation with the program manager, judges that advance payments are necessary or will materially contribute to the probability of success of the project contemplated under the agreement (e.g., as startup funds for a project being performed by a newly formed company). The rationale for the judgment shall be documented in the award file.

(ii) Recipients and the DoD Component maintain procedures to ensure that minimum time elapses between the

recipients' receipt of cash advances and their disbursements of the funds for program purposes.

(iii) Recipients maintain cash advances in interest-bearing accounts and remit annually the interest earned to the awarding DoD Component. A recipient may retain interest amounts up to $250 per year on such advance payments, to defray administrative expenses. The DoD Component shall return funds received from these interest payments to the Department of the Treasury's miscellaneous receipts account.

(6) Revision of financial plans and cost principles. The standards of Attachment J of OMB Circular A-110[1] shall apply, except where that Attachment refers to cost principles applicable to institutions of higher education. The commercial cost principles in 48 CFR 31 and 48 CFR 231 (in the "Federal Acquisition Regulation" and "Defense Federal Acquisition Regulation Supplement," respectively) shall be used to determine the allowability of costs charged to the Government under grants and cooperative agreements with commercial organizations.

(7) Closeout, suspension and termination. Grants officers shall apply the provisions of Attachments K and L of OMB Circular A-110.

(8) Standard application forms. For grants and cooperative agreements with commercial organizations, compliance with Attachment M of OMB Circular A-110 is optional.

(9) Property management standards. Attachment N of OMB Circular A-110 shall apply, except that title to all real property and nonexpendable tangible personal property that is purchased by the recipient with federal funds under the grant or agreement shall be vested in the Government, unless statute authorizes otherwise (notwithstanding paragraphs 3, 5, and 6 of Attachment N). Recipients must obtain the prior approval of the cognizant grants officer before making any such purchases of real property or nonexpendable tangible personal property with federal funds under the award.

(10) Patents. Grants and cooperative agreements entered into with commercial organizations shall comply with:

(i) 35 U.S.C. Chapter 18, as implemented by 37 CFR 401, which applies to inventions made under cooperative agreements with small businesses for research and development. 37 CFR 401.14 provides a standard clause that is required in such cooperative agreements in most cases, 37 CFR 401.3 specifies when the clause shall be included, and 37 CFR 401.5 specifies how the clause may be modified and tailored.

(ii) Executive Order 12591 (52 FR 13414, 3 CFR, 1987 Comp., p. 220), which codifies a Presidential Memorandum on Government Patent Policy (dated February 18, 1983). The

executive order extends the applicability of 35 U.S.C. Chapter 18, to the extent permitted by law, to commercial organizations other than small businesses (i.e., as a matter of policy, cooperative agreements should grant to all commercial organizations, regardless of size, title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the Government).

(11) Procurement standards. Grants officers may use Attachment O of OMB Circular A-110 as guidance and need not specifically incorporate its provisions into grants or cooperative agreements with commercial organizations, particularly those organizations whose procurement systems are approved as the result of a Contractors' Purchasing Systems Review under 48 CFR 44.3 (in the "Federal Acquisition Regulation"). In all cases, awards should include terms to ensure that recipients:

(i) Follow basic principles of business intended to produce rational decisions and fair treatment in contracts entered into by them under the agreements.

(ii) Comply with federal statutes, executive orders, regulations, and other legal requirements applicable to contracts that recipients enter into under federal assistance agreements.

(12) Fee or profit. In accordance with 32 CFR 21.11, grants and cooperative agreements shall not:

(i) Provide for the payment of fee or profit to the recipient.

(ii) Be used to carry out programs where fee or profit is necessary to achieving program objectives.

(13) Disputes.

(i) The Department of Defense's policy is to try to resolve all issues concerning grants and cooperative agreements by mutual agreement at the grants officer's level. Contracting activities are encouraged to use alternate dispute resolution (ADR) procedures to the maximum extent practicable. These procedures are any voluntary means used to resolve issues in controversy without the need to resort to litigation. Examples of the many procedures that may be used include settlement negotiations, mediation, and fact finding.

(ii) Whenever a recipient submits, in writing, a disputed claim or issue to the government, the grants officer shall consider the claim or disputed issue and, within 60 days of receipt of the claim or issue in dispute, either:

(A) Prepare a written decision, which shall

include the basis for the decision and shall be documented in the award file; or

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

(iii) In the event the recipient decides to appeal the decision, the grants officer shall make every effort to encourage the recipient to enter into ADR procedures with the grants officer. Terms of the ADR procedures to be used should be established at that time between the government and the recipient.

(iv) If the recipient refuses to participate in, or does not accept the results of the ADR procedures, they may bring such formal claims as are authorized by 28 U.S.C. §1491 or other applicable statutes.

(b) *Exception*. In accordance with of 32 CFR 37, subpart B, cooperative agreements under 10 U.S.C. 2371 that are awarded to commercial organizations may incorporate different administrative requirements than those provided for in paragraph (a) of this section.

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PART 35--[RESERVED]

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PART 36-RESEARCH AND DEVELOPMENT GRANTS AND AGREEMENTS

§36.1 Purpose and scope. This part prescribes policies and procedures for grants and cooperative agreements for the performance of research and development. Additional policies and procedures that are unique to cooperative agreements under 10 U.S.C. 2371 are contained in 32 CFR 37.

§36.2 Definitions. Other than the terms defined by the following paragraphs, terms used in this part are defined in 32 CFR 21.7.

(a) *Applied research*. Efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology such as new materials, devices, methods and processes. Applied research normally follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition; these efforts are within the definition of "development."

(b) *Basic research*. Efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. For the purposes of this part, it includes:

(1) Fellowships, research traineeships, and other research-related, science and engineering education.

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

(c) *Broad agency announcement*. An announcement of research interests of one or more DoD Components that:

(1) Solicits proposals from all potential recipients that meet the eligibility criteria for the program(s) covered by the announcement.

(2) States those eligibility criteria.

(3) States the evaluation criteria by which proposals will be selected for funding.

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

(e) *Historically Black colleges and universities*. Institutions determined by the Secretary of Education to meet the

requirements of 34 CFR 608.2.

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

(g) *Research*. Basic and applied research.

§36.3 Publication of a list of applicable requirements.

(a) The Office of Naval Research shall prepare, maintain, issue, and disseminate "A List of Requirements Applicable to DoD Grants and Cooperative Agreements for Research and Development."[1] This document shall list statutes; Executive orders; OMB, Treasury and other Circulars; DoD Directives and Instructions; and other federal regulations that are relevant to DoD grants and cooperative agreements for research and development.

(b) Grants officers or heads of contracting activities that are aware of applicable statutes, Executive orders, or regulations that are not listed in the compendium described in paragraph (a) of this section shall so notify the Acquisition Directorate, Code 02, Office of Naval Research, 800 North Quincy Street, Arlington, Virginia 22217-5000.

§36.4 General authorities and responsibilities. Except where statute requires otherwise, DoD Components may perform research and development projects by grant or cooperative agreement when:

(a) The recipient is a:

(1) Domestic institution of higher education or other nonprofit organization governed by OMB Circular A-110.[2]

(2) Domestic governmental organization subject to 32 CFR 33.

(3) Foreign institution of higher education, other foreign nonprofit organization, or foreign government, such as those domestic recipients covered in paragraphs (a)(1) and (a)(2) of this section.

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[1] Contact the Office of Naval Research, Code 02, 800 North Quincy Street, Arlington, VA 22217-5000.

[2] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

(b) Such performance is consistent with:

(1) 10 U.S.C. 2358 (whether or not that is the statutory authority under which the award is made). In the opinion of the Head of the DoD Component or his or her designee, the projects must be:

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

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

(2) 31 U.S.C. Chapter 63, as implemented in 32 CFR 21.10. For research and development:

(i) The appropriate use of grants and cooperative agreements is almost exclusively limited to the performance of selected basic and applied research projects and would be appropriate only in exceptional instances for the performance of hardware or system development projects. System development nearly always shall be performed by contract because its principal purpose is the acquisition of specific deliverable items (e.g., prototypes or other hardware) for the benefit of the Department of Defense.

(ii) The usual relationship between the responsible government program manager and the principal investigator of the recipent of a research award does not generally constitute "substantial involvement," for purposes of deciding whether a grant or cooperative agreement is the legally appropriate instrument under 31 U.S.C. Chapter 63. The use of cooperative agreements should be limited to situations where the DoD Component determines that the project would not be possible without extensive collaboration between the Department of Defense and the recipient. Cooperative agreements would be appropriate, for instance, where a recipient's investigator works for a substantial amount of time at a DoD laboratory (or a DoD investigator works at the recipient's facility) or when the collaboration is such that it will lead to a jointly authored report. The government's "substantial involvement" should be of a technical nature (a technical consultation relationship may suffice in some cases). Before entering a cooperative agreement, the DoD Component should clearly define the nature of the collaboration without which the project would not be possible.

§36.5 Competition.

(a) *General*. Grants officers shall ensure that competitive procedures, as described in paragraph (c) of this section, are used to the maximum extent practicable in the award of all grants and cooperative agreements for research and development.

(b) *Specific requirement for grants to universities and colleges*.

(1) In accordance with 10 U.S.C. 2361(b), no DoD Component may award a grant by other than competitive procedures to a college or university for the performance of research and development or for the construction of research or other facilities unless:

(i) The provision of law authorizing or requiring award by other than competitive procedures specifically:

(A) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361.

(B) Identifies the particular college or university involved.

(C) States that the grant to be made pursuant to such provision of law is being made in contravention of 10 U.S.C. 2361(a).

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

(2) Because subsequently enacted statutes may, by their terms, require different results than provided in paragraph (b)(1) of this section, grants officers will consult legal counsel on a case-by-case basis.

(3) The limitation in paragraph (b)(1) of this section applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989.

(c) *Competitive Procedures*. Competitive procedures are methods that encourage participation in defense research and development by a broad base of the most highly qualified performers in science and engineering areas of interest. Grants officers are responsible for ensuring that broad competition (i.e., competition among as many eligible proposers as possible, with a published or widely disseminated notice) is used to the maximum extent feasible and practicable. Competitive procedures include, as a minimum:

(1) At least two eligible, prospective proposers.

(2) Actual notice to prospective proposers. The notice may be by publication in the Commerce Business Daily (which may

be accompanied by listings on electronic bulletin boards), or it may take the form of a specific notice that is distributed by the DoD Component to eligible proposers (a specific notice must be distributed to at least two eligible proposers to be considered as part of a competitive procedure). Notices must include:

(i) The area of research and development interest in which proposals are sought.

(ii) The class(es) of potential recipients that are eligible to compete, if the competition is a special competition as described in paragraph (e) of this section.

(iii) The criteria for selecting proposals to be funded and the method for conducting the evaluation.

(iv) Other information needed by prospective proposers in order to prepare and submit proposals, including deadlines for proposal submission.

(3) Impartial review of the merits of proposals received in response to the notice, using the evaluation method and selection criteria described in the notice. In order to be considered as part of a competitive procedure, the selection criteria must be consistent with paragraph (d) of this section.

(d) *Principal selection criteria*. Except where statute provides otherwise, the two principal evaluation and selection criteria for the award of research and development grants and cooperative agreements shall be:

(1) The technical merits of the proposed research and development.

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

(e) *Special competitions*.

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

(2) Historically Black colleges and universities (HBCUs) and other minority institutions (MIs). Increasing the ability of HBCUs and MIs to participate in federally funded, university programs is an objective of Executive Order 12876

(58 FR 58735) and 10 U.S.C. 2323. Whenever practicable, grants officers shall reserve appropriate areas of research interest for exclusive competition among HBCUs and MIs when preparing Broad Agency Announcements or other solicitations for university research programs in which grants or cooperative agreements are to be awarded.

PART 37-"COOPERATIVE AGREEMENTS UNDER 10 U.S.C. 2371"

Subpart A-General

§37.1 Purpose and scope and relation to other parts.

(a) This part prescribes policies and procedures for award and administration of a class of cooperative agreements (hereafter referred to as "cooperative agreements under 10 U.S.C. 2371") that:

(1) May be used for performing basic, applied, and advanced research projects as authorized by 10 U.S.C. 2358, or for other purposes consistent with paragraph 37.3(a)(3) of this part.

(2) May use the funds-merger authority in 10 U.S.C. 2371(a).

(3) Shall comply with the requirements of subsections (c) and (e) of 10 U.S.C. 2371, whether or not the agreement uses the funds-merger authority in 10 U.S.C. 2371(a).

(b) To use such instruments, a grants officer must have been delegated authority pursuant to DoD Directive 3210.6[1] and the "Interim Guidance for Military Departments and Advanced Research Projects Agency on Grants, Cooperative Agreements and Other Transactions" issued by the Director, Defense Research and Engineering.

(c) Many provisions in other parts of the DoD Grant and Agreement Regulations state their applicability to cooperative agreements, or to financial assistance or nonprocurement generally. Those provisions apply to "cooperative agreements under 10 U.S.C. 2371," unless specific exceptions to those provisions are stated in this part.

§37.2 Definitions. Other than the terms defined by the following paragraphs, terms used in this part are defined in 32 CFR 21.7 and 32 CFR 36.2.

(a) *Advanced Research*. For the purpose of 10 U.S.C. 2358, advanced research is advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analagous to precompetitive technology development in the commercial sector. It does not

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. Authorized users may also obtain copies from the Defense Technical Information Center, Cameron Station, Alexandria, VA 22304-6145.

include development of military systems and hardware where specific requirements have been defined. It is typically funded in Budget Activity 2 ("6.3A" Advanced Technology Development), within Research, Development, Test and Evaluation (RDT&E).

(b) *Agreement Administrator*. The grants officer designated to administer a "cooperative agreement under 10 U.S.C. 2371."

(c) *Technical data*. Recorded information, regardless of the form or method of the recording, that is of a scientific or technical nature. The term includes computer software documentation, including computer listings and printouts, that are in or may be converted into human-readable form and document the design or details of computer software, explain the capabilities of the software, or provide operating instructions for using the software. The term does not include computer software or data incidental to administration of an agreement, such as financial and/or management information.

§37.3 Policy.

(a) "Cooperative agreements under 10 U.S.C. 2371" may be used to carry out:

(1) Advanced research, as defined in this part.

(2) Basic and applied research, as defined in 32 CFR 36.2.

(3) Programs for which a statute authorizes the use of agreements under 10 U.S.C. 2371. For instance, the use of 10 U.S.C. 2371 agreements is cited in a number of program statutes, such as 10 U.S.C. 2524 authorizing the defense dual-use assistance extension program.

(b) The use of "cooperative agreements under 10 U.S.C. 2371" shall comply with the following conditions:

(1) To the maximum extent practicable, "cooperative agreements under 10 U.S.C. 2371" shall not provide for research that duplicates other research being conducted under existing programs carried out by the Department of Defense.

(2) To the maximum extent practicable, the funds provided by the Government under the cooperative agreement shall not exceed the total amount provided by the other parties to the cooperative agreement. If it is determined for any agreement that this cost matching requirement is impracticable, a grants officer may waive the requirement if approval is obtained in accordance with section 37.4(c) of this part.

(3) "Cooperative agreements under 10 U.S.C. 2371" may be used only when it is not feasible or appropriate to use contracts; grants; or cooperative agreements under other

statutory authorities.

(c) If approved in accordance with section 37.4(c) of this part, a "cooperative agreement under 10 U.S.C. 2371" may require the recipient, as a condition for receiving support under the agreement, to make payments to the Department of Defense or other Federal Agency. Such payments may be credited to the accounts established on the books of the U.S. Treasury Department by 10 U.S.C. 2371(d). Amounts so credited shall be available for:

(1) The same period for which other funds in such accounts are available. Payments received under an agreement should be credited to currently available appropriation accounts, even if the funds that were obligated and expended under the agreement were from fiscal-year appropriations no longer available for obligation. Amounts credited to each currently available appropriation account are available for the same time period as other funds in that account.

(2) The same purpose for which other funds in such accounts are available (i.e., support of advanced research projects provided for in cooperative agreements and other transactions under 10 U.S.C. 2371). Such advanced research projects shall be consistent with applicable programmatic guidance from the Director, Defense Research and Engineering.

§37.4 Responsibilities. Grants officers within a Military Department or the Advanced Research Projects Agency who are authorized to approve cooperative agreements shall:

(a) In accordance with 10 U.S.C. 2371(c), ensure that the conditions in paragraphs (b)(1) through (b)(3) of section 37.3 of this part are met, prior to entering into such agreements.

(b) Ensure that information is reported to the Defense Technical Information Center, in accordance with section 37.6 of this part, on all "cooperative agreements under 10 U.S.C. 2371."

(c) Obtain approval from officials to whom the head of that DoD Component delegated authority (pursuant to paragraphs E.1.a. and E.1.b. in Section I of the "Interim Guidance for Military Departments and Advanced Research Projects Agency on Grants, Cooperative Agreements and Other Transactions" issued by the Director, Defense Research and Engineering), prior to:

(1) Waiving the cost-matching requirement of 10 U.S.C. 2371(c)(2) [see section 37.3(b)(2) of this part].

(2) Entering into an agreement that would require the recipient, as a condition for receiving support under the agreement, to make payments to the Department of Defense or other Federal Agency [see section 37.3(c) of this part].

§37.5 Recipients.

(a) *Commercial organizations*. An intent of 10 U.S.C. 2371 is to stimulate development of technology with potential for both military and commercial application, and to help remove barriers to integrating the defense and civilian sectors of the nation's technology and industrial bases. In keeping with that intent, the Military Departments and Advanced Research Projects Agency may enter into "cooperative agreements under 10 U.S.C. 2371" with commercial organizations. The potential for awards to commercial organizations constitutes a key difference between "cooperative agreements under 10 U.S.C. 2371" and grants or cooperative agreements for research and development that are entered into under other statutory authorities [the latter may be entered into with educational, nonprofit and governmental organizations, in accordance with 32 CFR 36.4(a)].

(b) *Consortia*. Another possible use of "cooperative agreements under 10 U.S.C. 2371" is with consortia of legal entities (which may be various combinations of commercial organizations, academic institutions, other nonprofit organizations, and governmental entities). Some consortia may not be legally incorporated, and grants officers should review memoranda of understanding or other documents establishing such consortia, to ensure that terms and conditions of cooperative agreements with such consortia are consistent with the assignment of responsibilities among consortia members. A cooperative agreement with a consortium must either be awarded to the consortium as a single entity that is legally responsible for the advanced research effort to be performed, or all members of the consortium must sign.

§37.6 Reporting.

(a) *Requirement for report*. The "Interim Guidance for Military Departments and Advanced Research Projects Agency on Grants, Cooperative Agreements and Other Transactions" issued by the Director, Defense Research and Engineering requires each Military Department and the Advanced Research Projects Agency to designate an office to report information on "cooperative agreements under 10 U.S.C. 2371" and "other transactions" under 10 U.S.C. 2358. These reports are in addition to program information and awards data reported in accordance with Subpart D of 32 CFR 21.

(b) *Procedures*. The office designated by each Military Department and the Advanced Research Projects Agency shall submit reports to the Defense Technical Information Center (DTIC), DTIC-OCP, Cameron Station, Alexandria, VA 22304-6145:

(1) With information specified by DTIC, to compile the report to Congress that is required by 10 U.S.C. 2371(e). As a minimum, this will include, with respect to each agreement:

(i) A general description of the cooperative agreement or other transaction, including the technologies for which advanced research is provided for under such agreement.

(ii) The potential military and, if any, commercial utility of such technologies.

(iii) The reasons for using a cooperative agreement or other transaction, rather than a contract or grant, to provide support for such advanced research.

(iv) With respect to payments, if any, under the authority of 10 U.S.C. 2371(a):

(A) The amounts that were received by the Federal Government in connection with such cooperative agreement or other transaction during the fiscal year covered by the report.

(B) The amounts that were credited to each account established under 10 U.S.C. 2371(d).

(2) In the format specified by DTIC.

(3) In accordance with the schedule specified by DTIC.

(c) *Report control symbol*. The information required by 10 U.S.C. 2371(e) and the "Interim Guidance for Military Departments and Advanced Research Projects Agency on Grants, Cooperative Agreements and Other Transactions" is reported to the the Work Unit Information Summary Database at DTIC, which is assigned report control symbol DD-A&T(A)1936.

Subpart B-Administration of Agreements Under 10 U.S.C. 2371

§37.10 Purpose of this subpart. This subpart prescribes administrative requirements for "cooperative agreements under 10 U.S.C. 2371."

§37.11 Consortia. A cooperative agreement with a consortium of legal entities (which may be any combination of commercial organizations, academic institutions, other nonprofit organizations, and/or governmental entities), shall be administered as follows:

(a) If the consortium is incorporated or otherwise a legally responsible entity and the agreement is with the consortium, the agreement shall be admistered in accordance with the requirements in section 37.12 or 37.13 of this subpart applicable for the particular type of entity (e.g., a nonprofit organization).

(b) If the consortium is not a legally responsible entity and the agreement is signed by each consortium member [see section 37.5(b) of this part], each consortium member shall administer its portion of the agreement in accordance with the applicable requirements in section 37.12 or 37.13 of this subpart.

§37.12 Universities, other nonprofit organizations, and State and local governments.

(a) "Cooperative agreements under 10 U.S.C. 2371" shall be administered in accordance with 32 CFR 31.10(a), which specifies that:

(1) Agreements with universities and other nonprofit organizations shall be administered in accordance with the previous version of OMB Circular A-110[2] (issued July 30, 1976), pending formal Department of Defense implementation of the recently issued update of that OMB Circular (58 FR 62992, November 29, 1993). In the interim, grants officers may, if the recipient consents, incorporate terms and conditions providing for administration of awards in accordance with the updated Circular A-110.

(2) Agreements with State and local governmental organizations shall be administered in accordance with 32 CFR 33, the Department of Defense implementation of OMB Circular A-102[3].

§37.13 Commercial organizations. To the maximum extent practicable, "cooperative agreements under 10 U.S.C. 2371" shall

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[2] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

[3] See footnote 2 to section 37.12(a)(1).

be administered in accordance with 32 CFR 34. In keeping with the intent of 10 U.S.C. 2371 to help remove barriers to integrating the defense and civilian sectors of the nation's technology and industrial bases, grants officers may, in some cases, use alternative provisions described in this section when those specified in 32 CFR 34 would force changes in a commercial organizations's normal business practices, without adding commensurate value in terms of improved stewardship for appropriated funds. The provisions in 32 CFR 34 may be tailored by use of the following (Note that references to OMB Circular A-110 are to the previous version, issued in 1976, pending Department of Defense implementation of the 1993 update of that Circular. Also note that, for those subjects not specifically addressed below, administration shall be in accordance with 32 CFR 34):

(a) *Program Income*. Provisions of Attachment D to OMB Circular A-110 apply, as provided in 32 CFR 34.1(a)(1). Grants officers must use care in selecting one of the three methodologies for use of program income that are described in Attachment D (deduction, addition, or augmentation of recipients' cost sharing), to ensure that recipients continue to comply throughout the project with cost sharing or matching requirements established in accordance with section 37.3(b)(2) of this part.

(b) *Cost sharing and matching*. Provisions of 32 CFR 34.2(a)(2) apply. Recipients' contributions may count as cost sharing or matching only to the extent that they are used for authorized purposes of the agreement, consistent with applicable cost principles [see paragraph 37.13(g) of this section].

(c) *Standards for financial management systems*. Whenever possible, grants officers shall apply the standards for financial management systems in 32 CFR 34.2(a)(3) (i.e., Attachment F of OMB Circular A-110) to agreements under 10 U.S.C. 2371 with commercial organizations. Where application of those financial management standards would require changes to recipients' established accounting systems, grants officers may use alternative approaches in "cooperative agreements under 10 U.S.C. 2371." As a minimum, such alternative approaches shall, as conditions of the cooperative agreement, provide that:

(1) Recipients have and maintain established accounting systems that:

(i) Comply with Generally Accepted Accounting Principles.

(ii) Control and properly document all cash receipts and disbursements.

(2) Recipients maintain adequate records to account for Federal funds received and recipients' cost sharing or matching

that is required under the agreement.

(d) *Financial reporting, program monitoring, and program reporting*. Grants officers may use the alternative provided in 32 CFR 34.2(a)(4) to the standard approach in Attachments G and H of OMB Circular A-110. In addition, when a "cooperative agreement under 10 U.S.C. 2371" has been structured around payable milestones, the agreement may also require submission of reports that describe the successful completion of payable events [see paragraph 37.13(e)(3) of this section], to serve as the basis for aproval of payments by the agreement administrator.

(e) *Payment methods*. The agreement may provide for:

(1) Cost reimbursement.

(2) Advance payments, under the conditions specified in of 32 CFR 34.2(a)(5)(i), (ii), and (iii).

(3) Payments based on payable milestones. These are payments according to a schedule that is based on predetermined measures of technical progress or other payable milestones. This approach relies upon the fact that, as research progresses throughout the term of the agreement, observable activity will be taking place. At the completion of each predetermined activity, the recipient will submit a report or other evidence of accomplishment to the program manager. The agreement administrator may approve payment to the recipient, after receiving validation from the program manager that the milestone was successfully reached.

(f) *Revision of financial plans*. For agreements under 10 U.S.C. 2371, grants officers may waive all but two of the requirements in Attachment J of OMB Circular A-110, under which recipients must request prior approval before deviating from budget and program plans that were approved during the award process. Two may not be waived--cooperative agreements must include terms requiring a recipient to immediately request approval from the agreement administrator when there is reason to believe that within the next seven days a revision will be necessary for either of the following reasons:

(1) A change in scope or objective of a project or program (even if there is no associated budget revision requiring prior approval).

(2) A need for additional government funding.

(g) *Cost principles*. Whenever possible, grants officers shall apply the cost principles in 48 CFR 31 and 48 CFR 231, as provided in 32 CFR 34.2(a)(6), to agreements under 10 U.S.C. 2371 with commercial organizations. Where compliance with those cost principles would require changes to recipients' established cost accounting systems, grants officers may use an alternative

approach in "cooperative agreements under 10 U.S.C. 2371." As a minimum, any alternative approach shall, as a condition of the cooperative agreement, provide that Federal funds and funds counted as recipients' cost sharing or matching [see paragraph 37.13(b) of this section] are to be used only for costs that:

(1) A reasonable and prudent person would incur, in carrying out the advanced research project contemplated by the agreement.

(2) Are consistent with the purposes stated in the governing Congressional authorizations and appropriations.

(h) *Rights in technical data and computer software*. Given that "cooperative agreements under 10 U.S.C. 2371" entail substantial cost sharing by recipients, grants officers must exercise discretion in negotiating Government rights to technical data and computer software resulting from advanced research under the agreements. The following considerations are intended to serve as guidelines, within which grants officers necessarily have considerable latitude to negotiate provisions appropriate to any of a wide variety of circumstances that may arise:

(1) A goal of the Department of Defense is to encourage recipients to commercially develop technologies resulting from DoD-sponsored research. That will enable increased DoD reliance in the future on the commercial technology and industrial base as a source of readily available, reliable, and affordable components, subsystems, computer software, manufacturing processes, and other technological products for military systems.

(2) Grants officers should generally seek to obtain for the Department of Defense an irrevocable, world-wide license to use, modify, reproduce, release, or disclose for governmental purposes technical data or computer software generated under cooperative agreements. A governmental purpose is any activity in which the United States Government is a party, but a license for governmental purposes does not include the right to use, or have or permit others to use, modify, reproduce, release, or disclose technical data or computer software for commercial purposes.

(3) Licenses of different scope may be negotiated when necessary to accomplish program objectives or to protect the Government's interests. Consult with counsel before negotiating a license of different scope.

(4) To protect the recipient's interests in licenses, technical data, or computer software, cooperative agreements should require the recipient to mark the data or software whose disclosure they desire to protect with a legend identifying the data or software as licensed data/software subject to use, release, or disclosure restrictions. Prior to releasing or disclosing data or software marked with a restrictive legend to

third parties, grants officers should require such persons to agree in writing to use the data or software only for governmental purposes and to make no further release or disclosure of the data or software without the permission of the licenser (i.e., the recipient).

SUPPLEMENTARY

INFORMATION

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R

CHANGE 1

TO

DoD GRANT AND AGREEMENT REGULATIONS

(DoD 3210.6-R)

1994 Edition

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OFFICE OF THE DIRECTOR OF
DEFENSE RESEARCH AND ENGINEERING
3040 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-3040

25 JAN 1995

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
CHIEF OF NAVAL RESEARCH
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTOR, CONTRACTS MANAGEMENT OFFICE, ARPA
DEPUTY DIRECTOR (ACQUISITION), DLA
DEPUTY GENERAL COUNSEL, DISA
DIRECTOR, ACQUISITION MANAGEMENT, DNA
CHIEF, RESEARCH AND TECHNOLOGY, NSA
DIRECTOR, OFFICE OF ECONOMIC ADJUSTMENT, OUSD(A&T)
PRESIDENT, USUHS

SUBJECT: Defense Grant and Agreement Circular 94-1A (Amended)

This is a corrected version of the first Defense Grant and Agreement Circular (DGAC) that I sent to you yesterday (see attached memorandum), to transmit a rule concerning military recruiting on university campuses. The Circular provided new pages 23-1 and 23-2 for insertion into the interim-guidance version of the DoD Grant and Agreement Regulations (DoDGARs). Unfortunately, one line of text was omitted from the top of the new page 23-2.

Attached is a corrected set of pages 23-1 and 23-2, for transmission to offices within your Department or Agency that award or administer grants and cooperative agreements. The corrected pages may be distinguished from those sent yesterday by the DGAC number and date at the upper left of the two DoDGARs pages.

I regret any inconvenience this error may have caused.

Jasper C. Lupo
Director for Research

Attachments

cc: Director, Accession Policy, OUSD(P&R)
Director, Accounting Policy, OUSD(C)
Chief, Contract Pay Division, DFAS
Assistant Director, Policy and Plans, DCAA
Assistant Inspector General (Audit Policy and Oversight)

OFFICE OF THE DIRECTOR OF
DEFENSE RESEARCH AND ENGINEERING
3040 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-3040

24 JAN 1995

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
CHIEF OF NAVAL RESEARCH
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTOR, CONTRACTS MANAGEMENT OFFICE, ARPA
DEPUTY DIRECTOR (ACQUISITION), DLA
DEPUTY GENERAL COUNSEL, DISA
DIRECTOR, ACQUISITION MANAGEMENT, DNA
CHIEF, RESEARCH AND TECHNOLOGY, NSA
DIRECTOR, OFFICE OF ECONOMIC ADJUSTMENT, OUSD(A&T)
PRESIDENT, USUHS

SUBJECT: Defense Grant and Agreement Circular 94-1

This is the first Defense Grant and Agreement Circular under the interim-guidance version of the DoD Grant and Agreement Regulations (DoDGARs) that the Director of Defense Research and Engineering (DD&RE) issued in February, 1994. It transmits a rule concerning military recruiting on university campuses.

The DDR&E approved the attached, interim rule to implement section 558 of the National Defense Authorization Act for Fiscal Year 1995 [Public Law 103-337 (1994)], as that section applies to grants. The rule was effective immediately upon publication in the Federal Register on Tuesday, January 24, 1995.

Please transmit a notice about this requirement to offices within your Department or Agency that award or administer grants and cooperative agreements. They may remove pages 23-1 and 23-2 from the interim-guidance version of the DoDGARs (DoD 3210.6-R), and insert the attached pages 23-1 and 23-2 in lieu of those removed. Please also note that this rule is in full effect, unlike some other parts of the interim-guidance DoDGARs.

Jasper C. Lupo

Attachment

cc: Director, Accession Policy, OUSD(P&R)
Director, Accounting Policy, OUSD(C)
Chief, Contract Pay Division, DFAS
Assistant Director, Policy and Plans, DCAA
Assistant Inspector General (Audit Policy and Oversight)

NOTE: Part 23 implements a statutory requirement as it applies to grants. Consequently, compliance with these procedures is not discretionary, unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations. As an interim rule, Part 23 took effect immediately upon being published in the January 24, 1995, Federal Register, in parallel with the public being given the opportunity to comment. The rule will appear in future editions of Title 32 of the Code of Federal Regulations (CFR), at 32 CFR 23. For convenience, the full text of the interim rule published in the Federal Register [at 60 FR 4544-45] is as follows:

PART 23-GRANTS AND AGREEMENTS--MILITARY RECRUITING ON CAMPUS

§23.1 Military recruiting on campus.

(a) Clause for award documents.

(1) Grants officers shall include the following clause in grants and cooperative agreements with institutions of higher education:

> "As a condition for receipt of funds available to the Department of Defense (DoD) under this award, the recipient agrees that it is not an institution that has a policy of denying, and that it is not an institution that effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes: (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students. If the recipient is determined, using procedures established by the Secretary of Defense to implement section 558 of Public Law 103-337 (1994), to be such an institution during the period of performance of this agreement, and therefore to be in breach of this clause, the Government will cease all payments of DoD funds under this agreement and all other DoD grants and cooperative agreements, and it may suspend or terminate such grants and agreements unilaterally for material failure to comply with the terms and conditions of award."

(2) If a recipient refuses to accept the clause in paragraph (a)(1) of this section, the grants officer shall determine that the recipient is not qualified with respect to the award, and may award to an alternative recipient.

(b) Language for program solicitations.

(1) To notify prospective recipients of the requirement in the paragraph (a) of this section, grants officers shall

include the following notice in program announcements or solicitations under which grants or cooperative agreements may be awarded to institutions of higher education:

> "This is to notify potential proposers that each grant or cooperative agreement that is awarded under this announcement or solicitation to an institution of higher education must include the following clause:
>
> > "As a condition for receipt of funds available to the Department of Defense (DoD) under this award, the recipient agrees that it is not an institution that has a policy of denying, and that it is not an institution that effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes: (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students. If the recipient is determined, using procedures established by the Secretary of Defense to implement section 558 of Public Law 103-337 (1994), to be such an institution during the period of performance of this agreement, and therefore to be in breach of this clause, the Government will cease all payments of DoD funds under this agreement and all other DoD grants and cooperative agreements, and it may suspend or terminate such grants and agreements unilaterally for material failure to comply with the terms and conditions of award."
>
> "If your institution has been identified under the procedures established by the Secretary of Defense to implement section 558, then: (1) no funds available to DoD may be provided to your institution through any grant, including any existing grant; (2) as a matter of policy, this restriction also applies to any cooperative agreement; and (3) your institution is not eligible to receive a grant or cooperative agreement in response to this solicitation."

(2) Grants officers may include introductory language with the language in paragraph (b)(1) of this section, to tailor the notice to the circumstances of the particular announcement (e.g., to reflect a Broad Agency Announcement under which a DoD Component would award contracts, as well as grants and cooperative agreements). However, the language and the intent in paragraph (b)(1) may not be changed without the approval of the Director, Defense Research and Engineering [requests for such approval are to be submitted, through appropriate channels, to: Director for Research, ODDR&E(R), 3080 Defense Pentagon; Washington, D.C. 20301-3080].

SUPPLEMENTARY

INFORMATION

"CHANGE IN STATUS OF DOCUMENT" 11/09/95 7:27 AM

TO:DTIC/OMS FROM:DTIC/OCC

SUBJECT:ERRATAS BY: Deborah Campbell

DOCUMENT DESCRIPTIONS: (AD NUMBERS)

AD-A268 034 WHICH INCLUDES CHANGES #8 DTD 15 FEB 95 & CHANGE #9 DTD 22 MAR 95, WHICH INCLUDE INSTRUCTIONAL MEMOS & NEW OR REVISED PAGES.

AD-A278 040 CHANGE #1 WHICH IS A INSTRUCTIONAL MEMO DTD 1 JULY 95, PLUS NEW OR REVISED PAGES.

AD-A278 163 WHICH INCLUDES AN SEPARATE ERRATA SHEET, PLUS CHANGES #5 DTD 1 APR 95 & CHANGE #6 DTD 1 JUL 95, WHICH INCLUDE INSTRUCTIONAL MEMOS AND NEW OR REVISED PAGES.

AD-A278 357 WHICH INCLUDES CHANGE #1 DTD 1 JUL 95, CHANGE #4 DTD 1 APR 95 & CHANGE #5 DTD 1 JUL 95 WHICH A INSTRUCTIONAL MEMOS PLUS NEW OR REVISED PAGES.

AD-A278 457 WHICH IS AN INSTRUCTIONAL MEMO DTD 18 MAY 95, PLUS REVISED PAGES.

AD-A278 626 CHANGE #2 WHICH IS A INSTRUCTIONAL MEMO DTD 1 MAY 95, PLUS REVISED PAGES.

AD-A279 029 WHICH INCLUDES MMSC NUMBERED LETTERS 95-01 DTD 24 APR 95, 95-03 DTD 1 MAY 95, 95-04 DTD 18 MAY 95, 95-05 DTD 22 MAY 95, 95-06 DTD 12 95, 95-07 DTD 18 MAY 95, 95-09 DTD 14 JUL 95 WHICH ARE ALL INSTRUCTIONAL LETTERS.

AD-A279 259 FACSIMILE TRANSMITTAL SHEET DTD 24 OCT 95.

AD-A279 301 CHANGE #4 WHICH INCLUDES A INSTRUCTIONAL MEMO DTD 7 MAR 95, PLUS NEW OR REVISED PAGES.

AD-A279 353 CHANGE #3 WHICH INCLUDES A INSTRUCTIONAL MEMO DTD 22 MAY 95, PLUS NEW OR REVISED PAGES

AD-A279 355 CHANGE #8 WHICH INCLUDES A INSTRUCTIONAL MEMO DTD 18 MAY 95, PLUS CHANGE AND/OR MODIFICATIONS.

AD-A282 611 REVISION #1 WHICH INCLUDES A INSTRUCTIONAL MEMO DTD 13 OCT 95, AND FIVE REVISED PAGES.

AD-B175 057 WHICH INCLUDES AN BIENNIAL REVIEW MEMO DTD 21 AUG 95 & A DD FORM 2024.

AD-B175 919 WHICH INCLUDES AN BIENNIAL REVIEW MEMO DTD 6 SEPT 95 & A DD FORM 2024.

AD-B969 460 WHICH INCLUDES AN BIENNIAL REVIEW MEMO DTD 6 SEP 95 & A DD FORM 2024.

AD-B175 934 WHICH INCLUDES AN BIENNIAL REVIEW MEMO DTD 6 SEP 95 & A DD FORM 2024.

AD-B969 383 WHICH INCLUDES AN BIENNIAL REVIEW MEMO DTD 17 AUG 95, ADDENDUM #3 DTD 17 AUG 95 & A DD FORM 2024.

D

R

CHANGE 2

TO

DOD GRANT AND

AGREEMENT

REGULATIONS

(DOD 3210.6-R)

1994 EDITION

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F

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OFFICE OF THE DIRECTOR OF
DEFENSE RESEARCH AND ENGINEERING
3040 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-3040

1 MAY 1995

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
CHIEF OF NAVAL RESEARCH
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTOR, CONTRACTS MANAGEMENT OFFICE, ARPA
DEPUTY DIRECTOR (ACQUISITION), DLA
CHIEF, POLICY OFFICE, DISA
DIRECTOR, ACQUISITION MANAGEMENT, DNA
CHIEF, RESEARCH AND TECHNOLOGY, NSA
DIRECTOR, OFFICE OF ECONOMIC ADJUSTMENT, OUSD(A&T)
PRESIDENT, USUHS

SUBJECT: Defense Grant and Agreement Circular (DGAC) 94-2

This is the second DGAC under the interim-guidance version of the DoD Grant and Agreement Regulations (DoDGARs) that was issued in February, 1994. It transmits Part 33 of the DoDGARs, the Governmentwide rule to implement OMB Circular A-102 and set requirements for awards to State and local governments.

The interim-guidance DoDGARs included one page in lieu of the full text of Part 33. The page directed users to Title 32 of the Code of Federal Regulations (CFR), where the full text of the rule was codified.

The reason for this DGAC is that Part 33 was amended on April 19, 1995 [60 FR 19638 ff.]. The amendment sets a simplified acquisition threshold of $100,000 for State and local governments' purchases under DoD awards. The amendment affects section 33.36, but this DGAC transmits the full part--that gives DoDGARs users a single source for all of Part 33 as it now reads (pending the next issuance of the published CFR, Title 32).

Please forward this DGAC to offices in your Department or Agency that award or administer grants or agreements. They may remove pages 33-1 and 33-2 from the interim-guidance DoDGARs, and insert the attached pages 33-1 through 33-50 in lieu of those removed. Please also note that this rule is codified and in full effect, unlike some other parts of the interim-guidance DoDGARs.

Jasper C. Lupo

Attachment

cc: OAIG (Audit Policy & Oversight)

NOTE: Unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations, Part 33 *is codified in the Code of* Federal Regulations and is in full effect.

PART 33-UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Subpart A-General

§33.1 Purpose and scope of this part. This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§33.2 Scope of subpart. This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§33.3 Definitions. As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

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

(3) Other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of:

(1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and

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

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation,

transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *"programmatic"* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means:

(1) With respect to a grant, the Federal agency, and

(2) With respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for *"grant"* and *"subgrant"* in this section and except where qualified by *"Federal"*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means:

(1) For nonconstruction grants, the SF-269 "Financial Status Report" (or other equivalent report);

(2) For construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for

goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted -- not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *"grant"* in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than *"equipment"* as defined in this part.

Suspension means depending on the context, either:

(1) Temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or

(2) An action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *"Termination"* does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

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

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§33.4 Applicability.

(a) *General*. Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of §33.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583 -- the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs*. Entitlement programs enumerated above in §33.4(a)(3) through (8) are subject to Subpart E.

§33.5 Effect on other issuances. All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §33.6.

§33.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

Subpart B -- Pre-Award Requirements

§33.10 Forms for applying for grants.

(a) *Scope*.

(1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations*.

(1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§33.11 State plans.

(a) *Scope*. The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate

and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements*. A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances*. In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments*. A State will amend a plan whenever necessary to reflect:

(1) New or revised Federal statutes or regulations or

(2) A material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§33.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

Subpart C -- Post-Award Requirements

Financial Administration

§33.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to --

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) Financial reporting. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) Accounting records. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) Internal control. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) Budget control. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) Allowable cost. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant

agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) Cash management. Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§33.21 Payment.

(a) *Scope*. This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard*. Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205.

(c) *Advances*. Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement*. Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the

grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances*. If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment*.

(1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments*.

(1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless--

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §33.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or

subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories*.

(1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances*. Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§33.22 Allowable costs.

(a) *Limitation on use of funds*. Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles*. For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a--	Use the principles in--
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institutions.	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OBM Circular A-122 as not subject to that circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§33.23 Period of availability of funds.

(a) *General*. Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations*. A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

§33.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable*. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*--

(1) Costs borne by other Federal grant agreements. Except as provided by Federal statute, a cost sharing or matching

requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) General revenue sharing. For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) Cost or contributions counted towards other Federal costs-sharing requirements. Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) Costs financed by program income. Costs financed by program income, as defined in §33.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in §33.25(g).)

(5) Services or property financed by income earned by contractors. Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) Records. Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) Special standards for third party in-kind contributions.

(i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the

payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*--

(1) Volunteer services. Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) Employees of other organizations. When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space*.

(1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land*. If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) Awards for capital expenditures. If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) Other awards. If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in §33.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition*. If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property*. In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental

value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§33.25 Program income.

(a) *General*. Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income*. Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income*. If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues*. Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties*. Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See §33.34.)

(f) *Property*. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§33.31 and 33.32.

(g) *Use of program income*. Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the

alternatives in paragraphs (g)(2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) Deduction. Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) Addition. When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) Cost sharing or matching. When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period*. There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§33.26 Non-Federal audit.

(a) *Basic rule*. Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees*. State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations" have met the audit requirement. Commercial contractors (private forprofit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use

their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection*. In arranging for audit services, §33.36 shall be followed.

Changes, Property, and Subawards

§33.30 Changes.

(a) *General*. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles*. The applicable cost principles (see §33.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*--

(1) Nonconstruction projects. Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) Construction projects. Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) Combined construction and nonconstruction projects. When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes*. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §33.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements*. The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval*.

(1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its

application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see §33.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§33.31 Real property.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use*. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition*. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) Retention of title. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sale of property. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed

to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer of title. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§33.32 Equipment.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States*. A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use*.

(1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §33.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements*. Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition*. When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment*. In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title*. The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow §33.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§33.33 Supplies.

(a) *Title*. Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition*. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§33.34 Copyrights. The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§33.35 Subawards to debarred and suspended parties. Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§33.36 Procurement.

(a) *States*. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards*.

(1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or

local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value *engineering clauses in contracts for construction projects* of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only --

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*.

(1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §33.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*--

(1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §33.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms*.

(1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) *Contract cost and price*.

(1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of

analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §33.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review*.

(1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements*. For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

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

firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions*. A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part

5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clear Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

§33.37 Subgrants.

(a) *States*. States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with §33.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees*. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions*. By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 33.10;

(2) Section 33.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in §33.21; and

(4) Section 33.50.

Reports, Records, Retention, and Enforcement

§33.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees*. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports*. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual

reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports*. For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments*. Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions*.

(1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§33.41 Financial reporting.

(a) *General*.

(1) Except as provided in paragraphs (a)(2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*--

(1) Form. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with paragraph §33.41(e)(2)(iii) of this section.

(2) Accounting basis. Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) Frequency. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) Due date. When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*--

(1) Form.

(i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) Forecasts of Federal cash requirements. Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) Cash in hands of subgrantees. When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) Frequency and due date. Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*--

(1) Advance payments. Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) Reimbursements. Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §33.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs*.--

(1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in §33.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §33.41(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by §33.41(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in §33.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §33.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) Accounting basis. The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §33.41(b)(2).

§33.42 Retention and access requirements for records.

(a) *Applicability*.

(1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see §33.36(i)(10).

(b) *Length of retention period*.

(1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained

until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*--

(1) General. When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) Real property and equipment records. The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) Records for income transactions after grant or subgrant support. In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) Indirect cost rate proposals, cost allocations plans, etc. This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) If submitted for negotiation. If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) If not submitted for negotiation. If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm*. Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*--

(1) Records of grantees and subgrantees. The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) Expiration of right of access. The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access*. The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§33.43 Enforcement.

(a) *Remedies for noncompliance*. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals*. In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination*. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension*. The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see §33.35).

§33.44 Termination for convenience. Except as provided in §33.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either §33.43 or paragraph (a) of this section.

Subpart D-After-The-Grant Requirements

§33.50 Closeout.

(a) *General*. The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports*. Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.

(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).

(3) Final request for payment (SF-270) (if applicable).

(4) Invention disclosure (if applicable).

(5) Federally-owned property report: In accordance with §33.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment*. The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments*.

(1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§33.51 Later disallowances and adjustments. The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in §33.42;

(d) Property management requirements in §§33.31 and 33.32; and

(e) Audit requirements in §33.26.

§33.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E -- Entitlement [Reserved]

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SUPPLEMENTARY

INFORMATION

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OFFICE OF THE DIRECTOR OF
DEFENSE RESEARCH AND ENGINEERING
3040 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-3040

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MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
CHIEF OF NAVAL RESEARCH
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTOR, CONTRACTS MANAGEMENT OFFICE, ARPA
DEPUTY DIRECTOR (ACQUISITION), DLA
CHIEF, POLICY OFFICE, DISA
DIRECTOR, ACQUISITION MANAGEMENT, DNA
CHIEF, RESEARCH AND TECHNOLOGY, NSA
DIRECTOR, OFFICE OF ECONOMIC ADJUSTMENT, OUSD(A&T)
PRESIDENT, USUHS

SUBJECT: Defense Grant and Agreement Circular (DGAC) 94-3

This is the third DGAC under the interim-guidance, DoD Grant and Agreement Regulations (DoDGARs) that were issued in February, 1994. It transmits DoDGARs Part 25, the Governmentwide rule on nonprocurement debarment and suspension and drug-free workplace requirements. The interim-guidance DoDGARs included one page for Part 25--it directed users to Title 32 of the Code of Federal Regulations (CFR), where the full text of the rule was codified.

The reason for this DGAC is that Part 25 was amended on June 26, 1995. Amendments to Governmentwide provisions of the rule (60 FR 33040-33043) implement Executive Order 12689 and section 2455 of the Federal Acquisition Streamlining Act of 1994, by establishing reciprocity for nonprocurement and procurement debarment and suspension actions. Additional, DoD-specific amendments (60 FR 33052-33053) clarify that: (1) debarment and suspension officials for nonprocurement are the same as those for procurement; and (2) Defense Agencies and DoD Field Activities can make drug-free determinations under §25.610 and §25.615, but cannot approve waivers under §25.625 (because they are not "agencies," as defined in the Drug-Free Workplace Act of 1988).

Please forward this DGAC to offices in your Department or Agency that award or administer grants or agreements. They may remove pages 25-1 and 25-2 from the interim-guidance DoDGARs, and insert the attached pages 25-1 through 25-38 in lieu thereof.

Jasper C. Lupo
Director for Research

Attachment

cc: OAIG (Audit Policy & Oversight)

NOTE: Unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations, Part 25 is codified in the Code of Federal Regulations and is in full effect.

PART 25-GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Subpart A-General

§25.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible [see definition of "ineligible" in §25.105], and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103-355, sec. 2455, 108 Stat. 3327) by--

(1) Providing for the inclusion in the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

§25.105 Definitions. The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, Military Department or Defense Agency or other agency of the executive branch, excluding the independent regulatory agencies.

(1) The meaning of *agency* in Subpart F of this part, Drug-Free Workplace Requirements, is given at §25.605(b)(6) and is different than the meaning given in this section for Subparts A through E of this part. *Agency* in Subpart F of this part means the Department of Defense or a Military Department only, and does not include any Defense Agency.

(2) [Reserved]

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict,

decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A p rson so excluded is "debarred."

Debarring official. An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) DoD Components' debarring officials for nonprocurement transactions are the same officials identified in 48 CFR part 209, subpart 209.4, as debarring officials for procurement contracts.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9,

subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) DoD Components' suspending officials for nonprocurement transactions are the same officials identified in 48 CFR part 209, subpart 209.4, as suspending officials for procurement contracts.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

§25.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations, such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement

transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods and services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(1) *Principal investigators.*

(2) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," §25.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in §25.110(a). Sections 25.325, "Scope of debarment," and 25.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* In accordance with E.O. 12689 and section 2455 of Public Law 103-355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension, or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

§25.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B-Effect of Action

§25.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to §25.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions [see §25.110(a)(1)(ii)] for the period of their exclusion.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for--

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

§25.205 Ineligible persons. Persons who are ineligible, as defined in §25.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§25.210 Voluntary exclusion. Persons who accept voluntary exclusions under §25.315 are excluded in accordance with the terms of their settlements. Military Departments and Defense Agencies shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§25.215 Exception provision. Military Departments and Defense Agencies may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and §25.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with §25.505(a).

§25.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded, except as provided in §25.215.

§22.225 Failure to adhere to restrictions.

(a) Except as permitted under §25.215 or §25.220, a participant shall not knowingly do business under a covered transaction with a person who is--

(1) Debarred or suspended;

(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (see Appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

Subpart C-Debarment

§25.300 General. The debarring official may debar a person for any of the causes in §25.305, using procedures established in §§25.310 through 25.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§25.305 Causes for debarment. Debarment may be imposed in accordance with the provisions of §§25.300 through 25.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in §25.215 or §25.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under §25.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in §25.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

§25.310 Procedures. Military Departments and Defense Agencies shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§25.311 through 25.314.

§25.311 Investigation and referral. Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§25.312 Notice of proposed debarment. A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under §25.305 for proposing debarment;

(d) Of the provisions of §§25.311 through 25.314, and any other Military Department and Defense Agency procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

§25.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.*

(1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§25.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.*

(1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and

argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.*

(1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in §25.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§25.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, Military Departments and Defense Agencies may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (see subpart E).

§25.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of Subpart F of this part [*see* §25.305(c)(5)], the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§25.311 through 25.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

§25.325 Scope of debarment.

(a) *Scope in general.*

(1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (*see* §§25.311 through 25.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the

knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D-Suspension

§25.400 General.

(a) The suspending official may suspend a person for any of the causes in §25.405 using procedures established in §§25.410 through 25.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in §25.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§25.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§25.400 through 25.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in §25.305(a); or

(2) That a cause for debarment under §25.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§25.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* Military Departments and Defense Agencies shall process suspension actions as informally

as practicable, consistent with principles of fundamental fairness, using the procedures in §§25.411 through 25.413.

§25.411 Notice of suspension. When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under §25.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§25.411 through 25.413, and any other Military Department and Defense Agency procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§25.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.*

(1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§25.413 Suspending official's decision. The suspending official may modify or terminate the suspension [for example, see §25.320(c) for reasons for reducing the period or scope of debarment] or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.*

(1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§25.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§25.420 Scope of suspension. The scope of a suspension is the same as the scope of a debarment (see §25.325), except that the procedures of §§25.410 through 25.413 shall be used in imposing a suspension.

Subpart E-Responsibilities of GSA, Agency and Participants

§25.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§25.505 Military Departments' and Defense Agencies' responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which Military Departments and Defense Agencies have granted exceptions under §25.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in §25.500(b) and of the exceptions granted under §25.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs

before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded.

(e) Agency officials shall check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§25.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this Part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs for its principals. Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.*

(1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this Part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs for its principals and for participants.

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to Military Departments and Defense Agencies if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F-Drug-Free Workplace Requirements (Grants)

§25.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that--

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR supbarts 9.4, 23.5, and 52.2.

§25.605 Definitions.

(a) Except as amended in this section, the definitions of §25.105 apply to this subpart.

(b) For purposes of this subpart--

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

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

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

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All "direct charge" employees;

(ii) All "indirect charge" employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

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

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

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management governmentwide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government

if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§25.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(1) Heads of Defense Agencies, Heads of DoD Field Activities, and their designees are authorized to make such determinations on behalf of the Secretary of Defense.

(2) [Reserved]

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§25.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment. A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that--

(a) The grantee has made a false certification under §25.630;

(b) With respect to a grantee other than an individual--

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A.)(a)-(g) and/or (B.) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual--

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§25.616 Determinations of grantee violations. Heads of Defense Agencies, Heads of DoD Field Activities, and their designees are authorized to make determinations of grantee violations under §25.615.

§25.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in §25.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years [*see* §25.320(a)(2) of this part].

§25.625 Exception provision. The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§25.630 Certification requirements and procedures.

(a) (1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d) (1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e) (1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program

in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§25.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

Appendix A to Part 25-Certification Regarding Debarment, Suspension, and Other Responsibility Matters--Primary Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded,* as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered

transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters--Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix B to Part 25-Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded,* as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in

good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix C to Part 25-Certification Regarding Drug-Free Workplace Requirements

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

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

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

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

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All "direct charge" employees; (ii) all "indirect charge" employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) temporary personnel and consultants who are

directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces);

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition:

(b) Establishing an ongoing drug-free awareness program to inform employees about--

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

(2) The grantee's policy of maintaining a drug-free workplace;

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

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will--

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted--

(1) Taking appropriate personnel action against such employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for

such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

_____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

ERRATA

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CHANGE 4

TO

DOD GRANT AND

AGREEMENT

REGULATIONS

(DOD 3210.6-R)

1994 EDITION

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OFFICE OF THE DIRECTOR OF
DEFENSE RESEARCH AND ENGINEERING
WASHINGTON, DC 20301-3040

15 MAR 1996

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
CHIEF OF NAVAL RESEARCH
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTOR, CONTRACTS MANAGEMENT OFFICE, ARPA
CHIEF, POLICY OFFICE, DISA
DEPUTY DIRECTOR (ACQUISITION), DLA
DEPUTY DIRECTOR (ACQUISITION AND LOGISTICS), DMA
DIRECTOR, ACQUISITION MANAGEMENT, DNA
CHIEF, RESEARCH AND TECHNOLOGY, NSA
DIRECTOR, OFFICE OF ECONOMIC ADJUSTMENT, OUSD(A&T)
DIRECTOR, RESEARCH ADMINISTRATION, USUHS
ASSISTANT INSPECTOR GENERAL (POLICY AND OVERSIGHT)

SUBJECT: Defense Grant and Agreement Circular (DGAC) 94-4

This is the fourth DGAC under the interim-guidance, DoD Grant and Agreement Regulations (DoDGARs) that were issued in February, 1994. It transmits the DoDGARs Part 23, the final rule concerning military recruiting on university campuses.

The rule implements section 558 of the National Defense Authorization Act for Fiscal Year 1995 [Public Law 103-337 (1994)], as that section applies to grants. The final rule was effective immediately upon publication in the Federal Register on Friday, March 8, 1996.

Please forward this DGAC to offices in your Department or Agency that award or administer grants or cooperative agreements. They may remove pages 23-1 through 23-2 from the interim-guidance DoDGARs, and insert the attached pages 23-1 through 23-4 in lieu thereof.

Jasper C. Lupo
Director for Research

Attachment

NOTE: Unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations, Part 23 is codified in the Code of Federal Regulations and is in full effect.

PART 23-GRANTS AND AGREEMENTS--MILITARY RECRUITING ON CAMPUS

§23.1 Military recruiting on campus.

(a) *Purpose*. The purpose of this section is to implement section 558 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337), as it specifically affects grants and cooperative agreements (note that section 558 appears as a note to 10 U.S.C. 503). This section thereby supplements DoD's primary implementation of section 558, in 32 CFR part 216, "Military Recruiting at Institutions of Higher Education."

(b) *Definitions specific to this section*. In this section:

(1) "Directory information" has the following meaning, given in section 558(c) of Public Law 103-337. It means, with respect to a student, the student's name, address, telephone listing, date and place of birth, level of education, degrees received, and the most recent previous educational institution enrolled in by the student.

(2) "Institution of higher education" has the following meaning, given at 32 CFR 216.3(b). The term:

(i) Means a domestic college, university, or subelement of a university providing postsecondary school courses of study, including foreign campuses of such institutions. A subelement of a university is a discrete (although not necessarily autonomous) organizational entity that establishes policy or practices affecting military recruiting and related actions covered by 32 CFR part 216. For example, a subelement may be an undergraduate school, a law school, medical school, or graduate school of arts and sciences.

(ii) Includes junior colleges, community colleges, and institutions providing courses leading to undergraduate and post-graduate degrees.

(iii) Does not include entities that operate exclusively outside the United States, its territories, and possessions.

(c) *Statutory requirement*. No funds available to the Department of Defense may be provided by grant to any institution of higher education that either has a policy of denying or that effectively prevents the Secretary of Defense from obtaining, for military recruiting purposes, entry to campuses or access to students on campuses or access to directory information pertaining to students.

(d) *Policy*.

(1) Applicability to subordinate elements of institutions of higher education. 32 CFR part 216, DoD's primary implementation of section 558, establishes procedures by which the Department of Defense identifies institutions of higher education that have a policy or practice described in paragraph (c) of this section. In cases where those procedures lead to a determination that specific subordinate elements of an institution of higher education have such a policy or practice, rather than the institution as a whole, 32 CFR part 216 provides that the prohibition on use of DoD funds applies only to those subordinate elements.

(2) Applicability to cooperative agreements. As a matter of DoD policy, the restrictions of section 558, as implemented by 32 CFR part 216, apply to cooperative agreements, as well as grants.

(3) Deviations. Grants officers may not deviate from any provision of this section without obtaining the prior approval of the Director of Defense Research and Engineering. Requests for deviations shall be submitted, through appropriate channels, to: Director for Research, ODDR&E(R), 3080 Defense Pentagon, Washington, D.C. 20301-3080.

(e) *Grants officers' responsibilities*. A grants officer shall:

(1) Not award any grant or cooperative agreement to an institution of higher education that has been identified pursuant to the procedures of 32 CFR part 216. Such institutions are identified on the Governmentwide "List of Parties Excluded from Federal Procurement and Nonprocurement Programs," as being ineligible to receive awards of DoD funds [note that 32 CFR 25.505(d) requires the grants officer to check the list prior to determining that a recipient is qualified to receive an award].

(2) Not consent to any subaward of DoD funds to such an organization, under a grant or cooperative agreement to any

recipient, if such subaward requires the grants officer's consent.

(3) Include the clause in paragraph (f) of this section in each grant or cooperative agreement with an institution of higher education. Note that this requirement does not flow down (i.e., recipients are not required to include the clause in subawards).

(4) If an institution of higher education refuses to accept the clause in paragraph (f):

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

(ii) Transmit the name of the institution, through appropriate channels, to the Director for Accession Policy, Office of the Assistant Secretary of Defense for Force Management Policy, OASD(FMP), 4000 Defense Pentagon, Washington, D.C. 20301-4000. This will allow OASD(FMP) to decide whether to initiate an evaluation of the institution under 32 CFR part 216, to determine whether it is an institution that has a policy or practice described in paragraph (c) of this section.

(f) *Clause for award documents*. The following clause is to be included in grants and cooperative agreements with institutions of higher education:

> "As a condition for receipt of funds available to the Department of Defense (DoD) under this award, the recipient agrees that it is not an institution of higher education (as defined in 32 CFR part 216) that has a policy of denying, and that it is not an institution of higher education that effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes: (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students. If the recipient is determined, using the procedures in 32 CFR part 216, to be such an institution of higher education during the period of performance of this agreement, and therefore to be in breach of this clause, the Government will cease all payments of DoD funds under this agreement and all other DoD grants and cooperative agreements to the recipient, and it may suspend or terminate such grants and agreements unilaterally for material failure to comply with the terms and conditions of award."

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SUPPLEMENTARY

INFORMATION

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CHANGE 3

TO

DOD GRANT AND

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REGULATIONS

(DOD 3210.6-R)

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OFFICE OF THE DIRECTOR OF
DEFENSE RESEARCH AND ENGINEERING
3040 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-3040

5 JUL 1995

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
CHIEF OF NAVAL RESEARCH
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTOR, CONTRACTS MANAGEMENT OFFICE, ARPA
DEPUTY DIRECTOR (ACQUISITION), DLA
CHIEF, POLICY OFFICE, DISA
DIRECTOR, ACQUISITION MANAGEMENT, DNA
CHIEF, RESEARCH AND TECHNOLOGY, NSA
DIRECTOR, OFFICE OF ECONOMIC ADJUSTMENT, OUSD(A&T)
PRESIDENT, USUHS

SUBJECT: Defense Grant and Agreement Circular (DGAC) 94-3

This is the third DGAC under the interim-guidance, DoD Grant and Agreement Regulations (DoDGARs) that were issued in February, 1994. It transmits DoDGARs Part 25, the Governmentwide rule on nonprocurement debarment and suspension and drug-free workplace requirements. The interim-guidance DoDGARs included one page for Part 25--it directed users to Title 32 of the Code of Federal Regulations (CFR), where the full text of the rule was codified.

The reason for this DGAC is that Part 25 was amended on June 26, 1995. Amendments to Governmentwide provisions of the rule (60 FR 33040-33043) implement Executive Order 12689 and section 2455 of the Federal Acquisition Streamlining Act of 1994, by establishing reciprocity for nonprocurement and procurement debarment and suspension actions. Additional, DoD-specific amendments (60 FR 33052-33053) clarify that: (1) debarment and suspension officials for nonprocurement are the same as those for procurement; and (2) Defense Agencies and DoD Field Activities can make drug-free determinations under §25.610 and §25.615, but cannot approve waivers under §25.625 (because they are not "agencies," as defined in the Drug-Free Workplace Act of 1988).

Please forward this DGAC to offices in your Department or Agency that award or administer grants or agreements. They may remove pages 25-1 and 25-2 from the interim-guidance DoDGARs, and insert the attached pages 25-1 through 25-38 in lieu thereof.

Jasper C. Lupo
Director for Research

Attachment

cc: OAIG (Audit Policy & Oversight)

NOTE: Unlike some other parts in this interim-guidance draft of the DoD Grant and Agreement Regulations, Part 25 is codified in the Code of Federal Regulations and is in full effect.

PART 25-GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Subpart A-General

§25.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible [see definition of "ineligible" in §25.105], and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103-355, sec. 2455, 108 Stat. 3327) by--

(1) Providing for the inclusion in the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

§25.105 Definitions. The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, Military Department or Defense Agency or other agency of the executive branch, excluding the independent regulatory agencies.

(1) The meaning of *agency* in Subpart F of this part, Drug-Free Workplace Requirements, is given at §25.605(b)(6) and is different than the meaning given in this section for Subparts A through E of this part. *Agency* in Subpart F of this part means the Department of Defense or a Military Department only, and does not include any Defense Agency.

(2) [Reserved]

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict,

decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

Debarring official. An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) DoD Components' debarring officials for nonprocurement transactions are the same officials identified in 48 CFR part 209, subpart 209.4, as debarring officials for procurement contracts.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9,

subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) DoD Components' suspending officials for nonprocurement transactions are the same officials identified in 48 CFR part 209, subpart 209.4, as suspending officials for procurement contracts.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

§25.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations, such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement

transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods and services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(1) Principal investigators.

(2) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," §25.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in §25.110(a). Sections 25.325, "Scope of debarment," and 25.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* In accordance with E.O. 12689 and section 2455 of Public Law 103-355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension, or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

§25.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B-Effect of Action

§25.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to §25.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions [see §25.110(a)(1)(ii)] for the period of their exclusion.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for--

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

§25.205 Ineligible persons. Persons who are ineligible, as defined in §25.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§25.210 Voluntary exclusion. Persons who accept voluntary exclusions under §25.315 are excluded in accordance with the terms of their settlements. Military Departments and Defense Agencies shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§25.215 Exception provision. Military Departments and Defense Agencies may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and §25.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with §25.505(a).

§25.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded, except as provided in §25.215.

§22.225 Failure to adhere to restrictions.

(a) Except as permitted under §25.215 or §25.220, a participant shall not knowingly do business under a covered transaction with a person who is--

(1) Debarred or suspended;

(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (see Appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

Subpart C-Debarment

§25.300 **General.** The debarring official may debar a person for any of the causes in §25.305, using procedures established in §§25.310 through 25.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§25.305 **Causes for debarment.** Debarment may be imposed in accordance with the provisions of §§25.300 through 25.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in §25.215 or §25.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under §25.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in §25.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

§25.310 Procedures. Military Departments and Defense Agencies shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§25.311 through 25.314.

§25.311 Investigation and referral. Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§25.312 Notice of proposed debarment. A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under §25.305 for proposing debarment;

(d) Of the provisions of §§25.311 through 25.314, and any other Military Department and Defense Agency procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

§25.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.*

(1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§25.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.*

(1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and

argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.*

(1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in §25.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§25.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, Military Departments and Defense Agencies may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (see subpart E).

§25.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of Subpart F of this part [see §25.305(c)(5)], the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§25.311 through 25.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

§25.325 Scope of debarment.

(a) *Scope in general.*

(1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (*see* §§25.311 through 25.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the

knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D-Suspension

§25.400 General.

(a) The suspending official may suspend a person for any of the causes in §25.405 using procedures established in §§25.410 through 25.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in §25.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§25.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§25.400 through 25.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in §25.305(a); or

(2) That a cause for debarment under §25.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§25.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* Military Departments and Defense Agencies shall process suspension actions as informally

as practicable, consistent with principles of fundamental fairness, using the procedures in §§25.411 through 25.413.

§25.411 Notice of suspension. When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under §25.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§25.411 through 25.413, and any other Military Department and Defense Agency procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§25.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.*

(1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§25.413 Suspending official's decision. The suspending official may modify or terminate the suspension [for example, see §25.320(c) for reasons for reducing the period or scope of debarment] or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.*

(1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§25.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§25.420 Scope of suspension. The scope of a suspension is the same as the scope of a debarment (see §25.325), except that the procedures of §§25.410 through 25.413 shall be used in imposing a suspension.

Subpart E-Responsibilities of GSA, Agency and Participants

§25.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§25.505 Military Departments' and Defense Agencies' responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which Military Departments and Defense Agencies have granted exceptions under §25.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in §25.500(b) and of the exceptions granted under §25.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs

before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded.

(e) Agency officials shall check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§25.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this Part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs for its principals. Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.*

(1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this Part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs for its principals and for participants.

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to Military Departments and Defense Agencies if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F-Drug-Free Workplace Requirements (Grants)

§25.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that--

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR supbarts 9.4, 23.5, and 52.2.

§25.605 Definitions.

(a) Except as amended in this section, the definitions of §25.105 apply to this subpart.

(b) For purposes of this subpart--

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

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

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

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All "direct charge" employees;

(ii) All "indirect charge" employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

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

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

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management governmentwide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government

if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§25.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(1) Heads of Defense Agencies, Heads of DoD Field Activities, and their designees are authorized to make such determinations on behalf of the Secretary of Defense.

(2) [Reserved]

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§25.615 **Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.** A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that--

(a) The grantee has made a false certification under §25.630;

(b) With respect to a grantee other than an individual--

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A.)(a)-(g) and/or (B.) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual--

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§25.616 Determinations of grantee violations. Heads of Defense Agencies, Heads of DoD Field Activities, and their designees are authorized to make determinations of grantee violations under §25.615.

§25.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in §25.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years [*see* §25.320(a)(2) of this part].

§25.625 Exception provision. The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§25.630 Certification requirements and procedures.

(a) (1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d) (1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e) (1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program

in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§25.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

Appendix A to Part 25-Certification Regarding Debarment, Suspension, and Other Responsibility Matters--Primary Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded,* as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered

transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters--Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix B to Part 25-Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded,* as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in

good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix C to Part 25-Certification Regarding Drug-Free Workplace Requirements

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

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

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

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

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All "direct charge" employees; (ii) all "indirect charge" employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) temporary personnel and consultants who are

directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces);

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition:

(b) Establishing an ongoing drug-free awareness program to inform employees about--

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

(2) The grantee's policy of maintaining a drug-free workplace;

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

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will--

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted--

(1) Taking appropriate personnel action against such employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for

such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

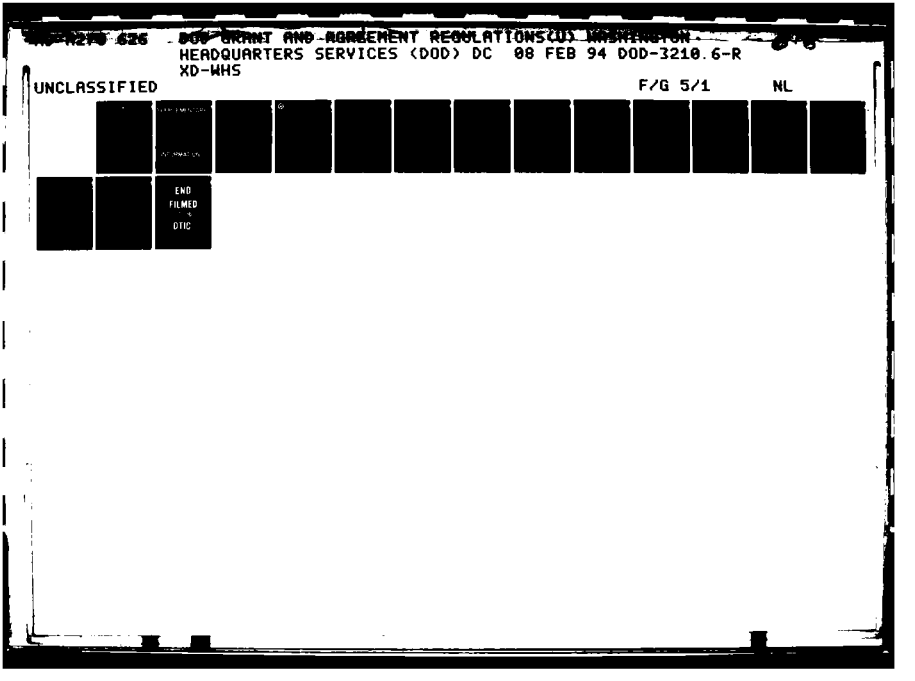
_____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.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OFFICE OF THE DIRECTOR OF
DEFENSE RESEARCH AND ENGINEERING
WASHINGTON, DC 20301-3040

9 AUG 1996

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
CHIEF OF NAVAL RESEARCH
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTOR, CONTRACTS MANAGEMENT OFFICE, DARPA
CHIEF, POLICY OFFICE, DISA
DEPUTY DIRECTOR (ACQUISITION), DLA
DEPUTY DIRECTOR (ACQUISITION AND LOGISTICS), DMA
DIRECTOR, ACQUISITION MANAGEMENT, DNA
CHIEF, RESEARCH AND TECHNOLOGY, NSA
DIRECTOR, OFFICE OF ECONOMIC ADJUSTMENT, OUSD(A&T)
DIRECTOR, RESEARCH ADMINISTRATION, USUHS
ASSISTANT INSPECTOR GENERAL (POLICY AND OVERSIGHT)

SUBJECT: Defense Grant and Agreement Circular (DGAC) 94-5

This is the fifth DGAC under the interim-guidance, DoD Grant and Agreement Regulations (DoDGARs) that were issued in February, 1994. It clarifies that DoD policy is to use the 1993 version of OMB Circular A-110 for awards to institutions of higher education and other nonprofit organizations, and to stop using the 1976 version of the Circular for those classes of recipients.

To do so, this DGAC revises paragraph §31.10(a)(1)(i) of the interim-guidance DoDGARs. That paragraph previously cited the 1976 version of A-110 as the standard for administering awards to universities and other nonprofit entities, pending DoD's formal implementation of the 1993 version of the Circular. It allowed grants officers, if recipients consented, to incorporate terms and conditions providing for administration of awards in accordance with the updated A-110. As revised by this DGAC, the paragraph states that grants officers shall provide for administration of awards to universities and other nonprofit entities in accordance with the 1993 version of A-110.

This DGAC also makes conforming changes to paragraph §34.2(a), paragraph §37.12(a)(1), and introductory language of section 37.13 in Parts 34 and 37 of the interim-guidance DoDGARs. The changed paragraphs clarify that the coverage in those parts for awards to commercial organizations will continue to be based on the 1976 version of OMB Circular A-110, as an interim measure,

pending codification of those parts of the DoDGARs in the Code of Federal Regulations.

Please forward this DGAC to offices in your Department or Agency that award or administer grants or agreements. They may remove pages 31-1 through 31-4, 34-1 and 34-2, and 37-5 through 37-8 from the interim-guidance DoDGARs, and insert the attached pages in lieu thereof.

Jasper C. Lupo
Director for Research

Attachment

PART 31-ADMINISTRATION OF DoD GRANTS AND AGREEMENTS

Subpart A-General Matters and Field Administration Services

§31.1 Scope. This part prescribes policies and procedures for administering grants and cooperative agreements.

§31.2 Policy.

(a) DoD policy is to minimize unnecessary duplication of field administration services, and relieve the concomitant increased burdens on recipients, when recipients of grants and agreements also perform Federal contracts. Therefore, DoD offices assigned cognizance over the performance of contract administration services for selected organizations or classes of organizations shall also perform administration services for grants and cooperative agreements with such organizations. These offices, referred to in this part as "grants administration offices," are (see the "DoD Directory of Contract Administration Services Components," DLAH 4105.4,[1] for specific addresses of regional offices):

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

(i) Institutions of higher education and laboratories affiliated with such institutions, to the extent they are treated in accordance with the university cost principles in OMB Circular A-21.[2]

(ii) Nonprofit organizations that are subject to the nonprofit cost principles in OMB Circular A-122,[3] if their principal business with the Department of Defense is research and development.

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

(i) Commercial organizations.

(ii) Nonprofit organizations identified in Attachment C of OMB Circular A-122 that are subject to commercial cost principles in 48 CFR 31.

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[1] Copies may be obtained from Defense Logistics Agency, Publications Distribution Division (DASC-WP), Cameron Station, Alexandria, VA 22304-6100.

[2] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

[3] See footnote 2 to section 31.2(a)(1)(i).

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

(iv) State and local governments.

(b) Contracting activities shall use cross-servicing arrangements whenever practicable and, to the maximum extent possible, delegate responsibility to the cognizant grants administration offices for field administration of grants and cooperative agreements. This will minimize the extent to which recipients of grants and agreements are unnecessarily subjected to duplicative reviews by multiple contracting activities.

§31.3 Grants administration office functions. Responsibilities of cognizant grants administration offices shall be:

(a) Performing pre-award surveys, when requested by grants officers.

(b) Performing property administration services.

(c) Reviewing recipients' financial management, property management and purchasing systems.

(d) Determining that recipients have drug-free workplace programs, as required under 32 CFR 25.

(e) Ensuring timely submission of required reports.

(f) Executing administrative closeout procedures.

(g) Performing other administration functions as delegated by applicable cross-servicing agreements or letters of delegation.

Subpart B-Administrative Requirements

§31.10 Requirements in other parts. In addition to the procedures in this part, administrative requirements for grants and cooperative agreements are specified in the following portions of the DoD Grant and Agreement Regulations:

(a) *Domestic recipients.*

(1) Standard administrative requirements for grants and cooperative agreements with domestic recipients are specified by:

(i) The current version of OMB Circular A-110 (58 FR 62992, November 29, 1993), for grants and agreements performed by domestic institutions of higher education and nonprofit organizations. Grants officers shall incorporate terms and conditions that provide for recipients' administration of awards in accordance with that version of the OMB Circular, until the

Department of Defense's implementation of the Circular is formally codified (at which time terms and conditions shall specify administration in accordance with the codified implementation of the Circular).

(ii) 32 CFR 33, the Department of Defense implementation of OMB Circular A-102,[4] for grants and cooperative agreements performed by State or local governments.

(iii) 32 CFR 34 for commercial organizations, for those DoD Components' programs where awards to commercial organizations are permitted. Note that 32 CFR 34 in this interim-guidance version of the DoD Grant and Agreement Regulations will continue at this time to be based upon the previous version of OMB Circular A-110 (issued July 30, 1976), notwithstanding the use of the current version of that Circular for grants and agreements with domestic institutions of higher education and nonprofit organizations [see paragraph (a)(1)(i) of this section].

(2) Special requirements are specified in Subpart B of 32 CFR 37 for use on an exception basis to administer cooperative agreements under 10 U.S.C. 2371. Note that the requirements for commercial organizations in the interim-guidance version of 32 CFR 37 will continue at this time to be based upon the previous version of OMB Circular A-110, as will those in 32 CFR 34 [see paragraph (a)(1)(iii) of this section].

(b) *Foreign recipients*. DoD Components shall use the administrative requirements specified in paragraph (a)(1) of this section, to the maximum extent practicable, for grants and cooperative agreements with foreign recipients.

§31.11 Metric system of measurement. [Reserved].

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[4] See footnote 2 to section 31.2(a)(1)(i).

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PART 34-ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH COMMERCIAL ORGANIZATIONS

§34.1 Purpose. This part prescribes standard administrative requirements for grants and cooperative agreements with commercial organizations, for DoD programs where awards to commercial organizations are permitted.

§34.2 Policy.

(a) General. The interim-guidance version of this part bases administrative requirements for grants and agreements with commercial organizations upon the previous version of OMB Circular A-110[1] (issued July 30, 1976), notwithstanding the use of the current version of that Circular for grants and agreements with institutions of higher education and nonprofit organizations [see 32 CFR 31.10(a)(1)(i)]. Grants officers shall use the 1976 version of Circular A-110 for grants and cooperative agreements with commercial organizations, with the following clarifications, additions, and exceptions:

(1) Cash depositories, bonding and insurance, records retention, and program income. Grants officers shall apply the provisions of Attachments A, B, C, and D of OMB Circular A-110.

(2) Cost sharing and matching. Grants officers shall apply the requirements of Attachment E of OMB Circular A-110, except that:

(i) Recipients may use their independent research and development (IR&D) funds as cost sharing or matching for a grant or cooperative agreement. In such cases, the IR&D contributions must meet all criteria other than paragraph 3.b.(5) in Attachment E to OMB Circular A-110. Use of IR&D as cost sharing is permitted, whether or not the Government decides at a later date to reimburse any of the IR&D as allowable indirect costs under the commercial cost principles in 48 CFR 31.

(ii) Real property or nonexpendable personal property purchased with recipients' funds may be included as recipients' cost sharing or matching, if recipients notify grants officers in advance that such property is being included. To be included, the property must meet the general requirement for recipients' contributions--they may count as cost sharing or matching to the extent that they are used for authorized purposes of the agreement, consistent with applicable cost principles.

(3) Standards for financial management systems. The standards in Attachment F of OMB Circular A-110 shall apply. To the extent that they comply with these minimum standards, recipients shall be allowed and encouraged to use financial

[1] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

management systems already established for doing business in the commercial marketplace.

(4) Financial reporting, program monitoring, and program reporting. Grants officers may apply the provisions of Attachments G and H of OMB Circular A-110, or may include equivalent technical and financial reporting requirements that ensure reasonable oversight of the expenditure of appropriated funds. As a minimum, equivalent requirements must include:

(i) Periodic reports (at least annually, and no more frequently than quarterly) addressing both program status and business status.

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

(B) The business portions of the reports shall provide summarized details on the status of resources (federal funds and non-federal cost sharing or matching), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original grant or agreement; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations.

(C) When grants officers previously authorized advance payments [pursuant to paragraph (a)(5) of this section], they should consult with the program manager and consider whether program progress reported in the periodic report, in relation to reported expenditures, is sufficient to justify continued authorization of advance payments.

(ii) A final report that addresses all major accomplishments under the agreement.

(5) Payment requirements. Attachment I of OMB Circular A-110 shall apply, except that reimbursements, not advance payments, are the preferred method of payment for commercial organizations (notwithstanding paragraphs 3, 4 and 5 of Attachment I). Advance payments may be used in exceptional circumstances, subject to the following conditions:

(i) The grants officer, in consultation with the program manager, judges that advance payments are necessary or will materially contribute to the probability of success of the project contemplated under the agreement (e.g., as startup funds for a project being performed by a newly formed company). The rationale for the judgment shall be documented in the award file.

(ii) Recipients and the DoD Component maintain procedures to ensure that minimum time elapses between the

(i) A general description of the cooperative agreement or other transaction, including the technologies for which advanced research is provided for under such agreement.

(ii) The potential military and, if any, commercial utility of such technologies.

(iii) The reasons for using a cooperative agreement or other transaction, rather than a contract or grant, to provide support for such advanced research.

(iv) With respect to payments, if any, under the authority of 10 U.S.C. 2371(a):

(A) The amounts that were received by the Federal Government in connection with such cooperative agreement or other transaction during the fiscal year covered by the report.

(B) The amounts that were credited to each account established under 10 U.S.C. 2371(d).

(2) In the format specified by DTIC.

(3) In accordance with the schedule specified by DTIC.

(c) Report control symbol. The information required by 10 U.S.C. 2371(e) and the "Interim Guidance for Military Departments and Advanced Research Projects Agency on Grants, Cooperative Agreements and Other Transactions" is reported to the the Work Unit Information Summary Database at DTIC, which is assigned report control symbol DD-A&T(A)1936.

Subpart B-Administration of Agreements Under 10 U.S.C. 2371

§37.10 Purpose of this subpart. This subpart prescribes administrative requirements for "cooperative agreements under 10 U.S.C. 2371."

§37.11 Consortia. A cooperative agreement with a consortium of legal entities (which may be any combination of commercial organizations, academic institutions, other nonprofit organizations, and/or governmental entities), shall be administered as follows:

(a) If the consortium is incorporated or otherwise a legally responsible entity and the agreement is with the consortium, the agreement shall be administered in accordance with the requirements in section 37.12 or 37.13 of this subpart applicable for the particular type of entity (e.g., a nonprofit organization).

(b) If the consortium is not a legally responsible entity and the agreement is signed by each consortium member [see section 37.5(b) of this part], each consortium member shall administer its portion of the agreement in accordance with the applicable requirements in section 37.12 or 37.13 of this subpart.

§37.12 Universities, other nonprofit organizations, and State and local governments.

(a) "Cooperative agreements under 10 U.S.C. 2371" shall be administered in accordance with 32 CFR 31.10(a), which specifies that:

(1) Agreements with universities and other nonprofit organizations shall be administered in accordance with the current version of OMB Circular A-110 (58 FR 62992, November 29, 1993). Grants officers shall incorporate terms and conditions that provide for recipients' administration of awards in accordance with that version of the OMB Circular, until the Department of Defense's implementation of the Circular is formally codified (at which time terms and conditions shall specify administration in accordance with the codified implementation of the Circular).

(2) Agreements with State and local governmental organizations shall be administered in accordance with 32 CFR 33, the Department of Defense implementation of OMB Circular A-102.[2]

§37.13 Commercial organizations. To the maximum extent practicable, "cooperative agreements under 10 U.S.C. 2371" shall be

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[2] Contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

administered in accordance with 32 CFR 34. In keeping with the intent of 10 U.S.C. 2371 to help remove barriers to integrating the defense and civilian sectors of the nation's technology and industrial bases, grants officers may, in some cases, use alternative provisions described in this section when those specified in 32 CFR 34 would force changes in a commercial organizations's normal business practices, without adding commensurate value in terms of improved stewardship for appropriated funds. The provisions in 32 CFR 34 may be tailored by use of the following (note that references to OMB Circular A-110 are to the previous version, issued in 1976, notwithstanding the use of the current version of that Circular for awards to institutions of higher education and nonprofit organizations). Also note that, for those subjects not specifically addressed below, administration shall be in accordance with 32 CFR 34):

(a) *Program Income*. Provisions of Attachment D to OMB Circular A-110 apply, as provided in 32 CFR 34.1(a)(1). Grants officers must use care in selecting one of the three methodologies for use of program income that are described in Attachment D (deduction, addition, or augmentation of recipients' cost sharing), to ensure that recipients continue to comply throughout the project with cost sharing or matching requirements established in accordance with section 37.3(b)(2) of this part.

(b) *Cost sharing and matching*. Provisions of 32 CFR 34.2(a)(2) apply. Recipients' contributions may count as cost sharing or matching only to the extent that they are used for authorized purposes of the agreement, consistent with applicable cost principles [see paragraph 37.13(g) of this section].

(c) *Standards for financial management systems*. Whenever possible, grants officers shall apply the standards for financial management systems in 32 CFR 34.2(a)(3) (i.e., Attachment F of OMB Circular A-110) to agreements under 10 U.S.C. 2371 with commercial organizations. Where application of those financial management standards would require changes to recipients' established accounting systems, grants officers may use alternative approaches in "cooperative agreements under 10 U.S.C. 2371." As a minimum, such alternative approaches shall, as conditions of the cooperative agreement, provide that:

(1) Recipients have and maintain established accounting systems that:

(i) Comply with Generally Accepted Accounting Principles.

(ii) Control and properly document all cash receipts and disbursements.

(2) Recipients maintain adequate records to account for Federal funds received and recipients' cost sharing or matching that is required under the agreement.

(d) *Financial reporting, program monitoring, and program reporting*. Grants officers may use the alternative provided in 32 CFR 34.2(a)(4) to the standard approach in Attachments G and H of OMB Circular A-110. In addition, when a "cooperative agreement under 10 U.S.C. 2371" has been structured around payable milestones, the agreement may also require submission of reports that describe the successful completion of payable events [see paragraph 37.13(e)(3) of this section], to serve as the basis for aproval of payments by the agreement administrator.

(e) *Payment methods*. The agreement may provide for:

(1) Cost reimbursement.

(2) Advance payments, under the conditions specified in of 32 CFR 34.2(a)(5)(i), (ii), and (iii).

(3) Payments based on payable milestones. These are payments according to a schedule that is based on predetermined measures of technical progress or other payable milestones. This approach relies upon the fact that, as research progresses throughout the term of the agreement, observable activity will be taking place. At the completion of each predetermined activity, the recipient will submit a report or other evidence of accomplishment to the program manager. The agreement administrator may approve payment to the recipient, after receiving validation from the program manager that the milestone was successfully reached.

(f) *Revision of financial plans*. For agreements under 10 U.S.C. 2371, grants officers may waive all but two of the requirements in Attachment J of OMB Circular A-110, under which recipients must request prior approval before deviating from budget and program plans that were approved during the award process. Two may not be waived--cooperative agreements must include terms requiring a recipient to immediately request approval from the agreement administrator when there is reason to believe that within the next seven days a revision will be necessary for either of the following reasons:

(1) A change in scope or objective of a project or program (even if there is no associated budget revision requiring prior approval).

(2) A need for additional government funding.

(g) *Cost principles*. Whenever possible, grants officers shall apply the cost principles in 48 CFR 31 and 48 CFR 231, as provided in 32 CFR 34.2(a)(6), to agreements under 10 U.S.C. 2371 with commercial organizations. Where compliance with those cost principles would require changes to recipients' established cost accounting systems, grants officers may use an alternative