

DEPARTMENT OF DEFENSE**Office of the Secretary****32 CFR Parts 21, 22, 32, 34, and 37**

RIN 0790-AG87

DoD Grant and Agreement Regulations**AGENCY:** Office of the Secretary, DoD.**ACTION:** Final rule.

SUMMARY: The Department of Defense (DoD) is adding a new part to the DoD Grant and Agreement Regulations (DoDGARs) to incorporate policies and procedures for the award and administration of technology investment agreements (TIAs). TIAs are a relatively new class of assistance instruments. DoD Components use TIAs to support or stimulate defense research projects involving for-profit firms, especially commercial firms that do business primarily in the commercial marketplace. The new part therefore gives DoD agreements officers greater flexibility to negotiate award provisions in areas that can present barriers to those commercial firms (e.g., intellectual property, audits, and cost principles). The DoD also is revising several additional parts of the DoDGARs to conform them with the new part.

DATES: These final rules are effective on September 8, 2003.

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SUPPLEMENTARY INFORMATION:**A. Background and Basis for the Rulemaking**

The Congress and the DoD have a civil-military integration policy that envisions a national technology and industrial base capable of meeting national security objectives, including the performance of research and development to ensure that our armed forces have systems with superior technology. The policy calls for DoD reliance, to the maximum extent practicable, on the commercial sector of that technology and industrial base.

To help achieve civil-military integration, the Congress in 1989 enacted 10 U.S.C. 2371, "Research projects: Transactions other than contracts and grants" to authorize DoD use of cooperative agreements and other transactions. Using this authority, DoD Components through the mid-1990s developed types of cooperative agreements and other transactions to support research (called "dual-use" research) with good potential for both commercial and defense applications. The DoD in 1997 issued interim

guidance that merged various cooperative agreements and other transactions that were similar to each other into a single class of assistance instruments called technology investment agreements (TIAs).

This rulemaking's primary purpose is to establish policies and procedures for the award and administration of TIAs, based on the DoD Components' experience with them. The specific actions that the DoD is taking in order to do so are to:

- Adopt the new part 37 of the DoDGARs (32 CFR part 37) to cover TIAs. The new part is in plain language format.
- Revise the existing part 21 of the DoDGARs (32 CFR part 21) that sets out DoD Components' general responsibilities for managing assistance functions. The revision makes part 21 apply to TIAs, as well as other assistance instruments, and recasts it in a plain language format.
- Make minor amendments to the existing parts 22, 32, and 34 of the DoDGARs (32 CFR parts 22, 32, and 34), to conform those parts with the new part 37 and the revised part 21.

B. Comments and Responses

DoD published a proposed rule in the **Federal Register** on April 30, 2002 (67 FR 21486) requesting comments on a proposal to make the changes described in the previous paragraph. We received comments from an industry association representing firms doing business in the commercial marketplace, one for-profit Government contractor, an association of academic institutions, and a number of DoD Components. We considered all comments in developing the final rule.

Commenters raised specific issues but supported the creation of TIAs as a new class of assistance instruments and responded favorably to the rules' plain language format and clarity. The following paragraphs summarize the more significant specific issues raised by the comments and the responses to them. The comments are grouped by the subpart of part 37 to which they apply and therefore by subject area. In addition to the changes noted in the following paragraphs, we made other changes to update references and increase readability.

Situations for Use of TIAs (Subpart B)

Comment: One commenter said it was unsure of the basis for encouraging awards to consortia, other than the reason given in § 37.210(c)(1) [which is that consortium members are more equal partners in research performance and more directly involved in planning the effort, reviewing progress, and

overseeing financial aspects of the project than subawardees under a prime recipient usually are]. The commenter questioned the statement in the rule that there is less self-governance when a single firm is the recipient, rather than a consortium that may include multiple for-profit recipients that normally are competitors within an industry.

Response: No change. DoD agreements officers who have awarded and administered TIAs believe that interactions among a consortium's members can increase self-governance. One reason is that the members have more insight into each other's efforts than a subawardee has into the efforts of a prime awardee. Coupled with that insight, each member has an interest in ensuring that other members make their agreed-upon technical and financial contributions to the project. Importantly, the regulatory language in § 37.210 does not prohibit awards to single firms. It states that the agreements officer should consider whether an award to a single firm requires greater involvement of the Federal program official, but it gives the agreements officer the necessary authority to make the decision using his or her good business judgment.

Types of TIAs (Subpart C)

Comment: One commenter strongly recommended dropping fixed-support TIAs from the rule and said that this type of instrument appeared to be a fixed-price development contract by another name. The comment cited the proposed § 37.560, in which it is acknowledged that the contractor would be responsible for all further costs needed to complete the project, beyond the Federal Government's agreed-upon level of support.

Response: Fixed-support TIAs are not fixed-price development contracts by another name. Procurement contracts are used to acquire goods and services for the Government. TIAs are assistance instruments that DoD Components use to invest in dual-use research that is of mutual interest to recipients, due to the commercial potential of the research, and to the DoD, due to its defense potential. The recipient's interest is one reason that 50% cost sharing, to the extent practicable, is a statutory condition for any TIA under the authority of 10 U.S.C. 2371 and is a matter of policy for all other TIAs (see § 37.215 of the rule).

With substantial cost sharing, a fixed-support TIA is a viable alternative instrument that a DoD Component may offer to a prospective recipient accustomed to commercial practices, if it cannot accept all of the administrative