

requirements associated with an expenditure-based instrument. The use of a fixed-support TIA properly is a matter of negotiation between the DoD agreements officer and the recipient. The agreements officer should agree to a fixed-support TIA only if he or she is sufficiently confident in estimated project costs to be sure that the recipient's cost sharing will be at least the minimum amount desired by the Federal Government, even if the actual costs are at the low end of the original estimates. There is no obligation for the recipient to accept this type of TIA and it should not do so unless it believes that the benefits justify any risk it perceives of an increased cost share, if actual costs are at the high end of the original estimates. The proposed rule did not intend for agreements officers to pressure potential recipients to accept fixed-support TIAs against their better judgment.

Nonetheless, on the basis of the concern expressed in the comment, we added a new paragraph (c) to § 37.560 to make it clear that the agreements officer may not use a shortage of Federal Government funding for the program as a reason to try to persuade a recipient to accept a fixed-support TIA, rather than an expenditure-based instrument, or to accept responsibility for a greater share of the total project costs than it otherwise is willing to offer.

Competition (Subpart D)

Comment: One commenter noted that the proposed part 37 strongly supports the use of competitive procedures but does not completely prohibit sole source awards. The commenter recommended that the rule explain what documentation is necessary if a sole source award of a TIA is contemplated.

Response: No change. In § 37.1020, which addresses what the agreements officer must document in the award file, paragraph (b) calls for documentation describing the award process and explaining how the agreements officer and program officials solicited and evaluated proposals and selected the one supported through the TIA. This includes documentation for a sole source award.

Comment: Two commenters said that the proposed § 37.215, which discusses the requirement for recipient cost sharing, also acknowledges that lesser contributions may be deemed "practicable." Nevertheless, the commenters said, § 37.415 should call for agreements officers to include language in solicitations putting potential proposers on notice about the statutory requirement for them to

provide, to the extent practicable, 50% cost share.

Response: Agree. We added a new paragraph (a) to § 37.415.

Comment: One commenter questioned whether five years should be the limit on the period for which the Government will protect proposals and other proprietary information submitted by proposers, as provided in the proposed §§ 37.420 and 37.900. The commenter said that the five-year period should be the basic level of protection provided to all proposers under the regulations. The commenter added that such information should be protected under the Freedom of Information Act (FOIA) for as long as it retains its value as confidential business information, the release of which could cause harm to a proposer.

Response: We revised § 37.420 to explain that certain information may be protected for longer periods if it meets any of the criteria for exemptions under the FOIA. For information that does not meet any of those criteria, § 37.420 cites a five-year period because that is the period for which 10 U.S.C. 2371 provides additional authority to protect information submitted by proposers. With that change, there is no need to revise § 37.900 because it already refers to § 37.420 for the substantive coverage on this subject.

Pre-Award Business Evaluation (Subpart E)

Comment: One commenter did not totally agree with the discussion of direct and indirect costs in the proposed § 37.570 and questioned whether a Cost Accounting Standards (CAS) noncompliance would necessarily be involved. The commenter noted that a for-profit firm generally recovers Independent Research and Development (IR&D) costs as part of the General and Administrative (G&A) cost pool, but said that those costs are not all indirect costs. The commenter said that the basic unit for IR&D is the project, in accordance with CAS § 9904.420 ("Accounting for Independent Research and Development and Bid and Proposal Costs," in chapter 99 of 48 CFR) and that all direct costs of the project are charged directly to the project. The commenter added that: (1) A contract and an IR&D project are set up similarly in most accounting systems, as far as job numbers and how the work is charged; (2) indirect charges are applied to the project's direct labor and material costs, but no G&A is applied because IR&D project costs are recovered in a G&A pool; and (3) a credit is applied to the pool if the Government pays part of a cost, reducing the amount in the pool to be recovered.

Response: We revised § 37.570 to remove the references to indirect cost. We also revised the section to require agreements officers to alert the participant to the potential for a CAS violation, as well as the Administrative Contracting Officer with cognizance over the participant's Federal procurement contracts, if the participant is subject to CAS and is proposing to account differently for its own and the Federal Government's share of project costs.

Comment: One commenter said that the proposed section 37.575 addressed agreements officers' responsibilities for determining milestone payment amounts but also should require a determination that the milestone amounts are fair and reasonable estimates for the efforts to be carried out. The commenter further recommended revising the section to recognize that future milestone amounts might be adjusted for reasons other than specified cost-share percentages (e.g., if expenditures are significantly more than expected).

Response: We agree that this section needs clarification. Discussion with the commenter, a DoD Component, revealed that the use of the word "budget" in the first sentence of the section caused some confusion because it can be interpreted in different ways (e.g., to mean the budget of the DoD program or the proposed budget for the research project). Rather than defining "budget," we revised the first sentence of paragraph 37.575(a) to say that the agreements officer must assess the reasonableness of the estimated "amount," rather than "budget," for reaching each milestone. In response to this comment, we also revised paragraph 37.1010(e) to tell agreements officers that the payment provision for a TIA using the milestone payment method must tell the recipient that post-award administrators may adjust amounts of future milestone payments if a project's expenditures fall too far below the projections that were the basis for setting the amounts.

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

Comment: One commenter recommended increasing the \$300,000 threshold in the proposed § 37.645 for audits of for-profit firms to at least \$500,000 to ensure consistency with other oversight thresholds in the Department of Defense.

Response: We based the proposed threshold of \$300,000 on the government-wide threshold under the Single Audit Act (31 U.S.C. 7500 *et*