

addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the replacement (estimated at one hour). In light of all of these factors, the FAA finds a one-year compliance time for completing the proposed actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

#### Cost Impact

The FAA estimates that 12 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed replacement, and that the average labor rate is \$60 per work hour. Required parts would cost between \$23,747 and \$29,688 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be between \$285,684 and \$356,976, or between \$23,807 and \$29,748 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

#### Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket.

A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

#### PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

##### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

#### **BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft):** Docket 2001–NM–150–AD.

**Applicability:** Model BAe 146–200A series airplanes, as listed in BAE Systems Modification Service Bulletin SB.27–109–00503C, Revision 3, dated March 19, 2001; certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

**Compliance:** Required as indicated, unless accomplished previously.

To prevent stall identification and stall warning signals from occurring at the same time, leading the flight crew to take action based on erroneous information, which could result in reduced controllability of the airplane, accomplish the following:

#### Replacement

(a) Within 1 year after the effective date of this AD, replace signal summing units (SSUs), part number C81606–3, for the stall identification system with new SSUs having part number C81606–5, according to BAE Systems Modification Service Bulletin SB.27–109–00503C, Revision 3, dated March 19, 2001.

**Note 2:** Replacement of SSUs having part number C81606–3 with new SSUs having

part number C81606–5 accomplished according to British Aerospace Service Bulletin SB.27–109–00503C, Revision 1, dated November 12, 1990; or Revision 2, dated February 4, 2000; is acceptable for compliance with paragraph (a) of this AD.

#### Spares

(b) As of the effective date of this AD, no person shall install an SSU, part number C81606–3, on any airplane.

#### Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

**Note 3:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

#### Special Flight Permits

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

**Note 4:** The subject of this AD is addressed in British airworthiness directive 009–06–90.

Issued in Renton, Washington, on October 22, 2001.

**Ali Bahrami,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 01–27072 Filed 10–26–01; 8:45 am]

**BILLING CODE 4910–13–U**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 14 CFR Parts 1260 and 1274

#### NASA Grant and Cooperative Agreement Handbook—Rewrite of Section D—Cooperative Agreements With Commercial Firms and Implementation of Section 319 of Public Law 106–391, Buy American Encouragement

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule amends NASA's Grant and Cooperative Agreement Handbook by revising Section D, Cooperative Agreements with Commercial Firms, to clarify current management policies, incorporate process improvements, conform with recent changes in legislation, and

institute risk management as part of source selection. This proposed rule also implements Section 319, Buy American Encouragement, of Public Law 106–391, NASA Authorization Act of 2000.

**DATES:** Interested parties should submit comments in writing on or before December 28, 2001 to be considered in formulation of a final rule.

**ADDRESSES:** Submit written comments to: Eugene Johnson, NASA Headquarters, Office of Procurement, Analysis Division (Code HC), Washington, DC 20546–0001. Submit electronic comments via the Internet to: [ejohnson@hq.nasa.gov](mailto:ejohnson@hq.nasa.gov).

**FOR FURTHER INFORMATION CONTACT:** Eugene Johnson, Procurement Analyst, (202) 358–4703, or e-mail: [ejohnson@hq.nasa.gov](mailto:ejohnson@hq.nasa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This proposed rule is a comprehensive revision to NASA grant and cooperative agreement policies codified at 14 CFR part 1274, Grants and Cooperative Agreements with Commercial Firms. The revision was initiated by NASA as part of the Agency's effort to re-engineer its processes for awarding and administering grants and cooperative agreements. Changes are chiefly aimed at clarifying NASA policies for publication of requirements, evaluating and selecting proposals, and implementation of a process for managing the performance risks associated with certain types of cooperative agreements with commercial firms. Scientific breakthroughs based on NASA or NASA mission related projects have greatly benefited the American society, and the world as a whole. In realizing these successes, NASA's technological pursuits involve research and experimental projects, where risks are simply unavoidable. Some recognition of the risks and liability issues associated with some of these projects is reflected in recent legislation (Section 431 of Pub. L. 105–276), which provides for NASA indemnification of the developers of experimental aerospace vehicles performing under Cooperative Agreements. This proposed rewrite of Section D of the Grant and Cooperative Agreement Handbook implements a process that requires early identification, assessment, and management by NASA and the recipient, of risk and safety issues associated with a given research project.

Additionally, this proposed rule will promulgate the requirements of Section

319, "Buy American Encouragement," of the NASA Authorization Act of 2000 (Pub. L. 106–391) for recipients of non-profit grants and cooperative agreements.

##### **B. Regulatory Flexibility Act**

NASA does not expect this proposed rule to have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the rule primarily clarifies existing requirements and refocusing attention on risk management.

##### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed changes do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

##### **List of Subjects in 14 CFR Parts 1260 and 1274**

Grant Programs—Science and Technology.

**Tom Luedtke,**  
*Associate Administrator for Procurement.*

Accordingly, 14 CFR Ch. V is proposed to be amended as follows:

##### **PART 1260—GRANTS AND COOPERATIVE AGREEMENTS**

1. The authority citation for 14 CFR Part 1260 continue to read as follows:

**Authority:** Part 1260: 42 U.S.C.2374(c)(1), Pub. L. 97–258, 96 Stat. 1003 (31 U.S.C. 6301 *et seq.*), and OMB Circular A–110.

##### **§ 1260.20 [Amended]**

2. In § 1260.20, amend paragraphs (a), (d), (e), (f), and (h) by removing "1260.38" and adding "1260.39" in its place.

3. Add § 1260.39 to read as follows:

##### **§ 1260.39 Buy American encouragement.**

###### **Buy American Encouragement (XX/XX)**

(a) As stated in Section 319 of Public Law 106–391, the NASA Authorization Act of 2000, Recipients are encouraged to purchase only American-made equipment and products.

(b) The Recipient will observe property standards and provisions set forth in §§ 1260.131 through 1260.137.

[End of Provision]

4. Revise part 1274 to read as follows:

##### **PART 1274—COOPERATIVE AGREEMENTS WITH COMMERCIAL FIRMS**

###### **Subpart 1274.1—General**

Sec.

- 1274.101 Purpose.
- 1274.102 Scope.
- 1274.103 Definitions.
- 1274.104 Effect on other issuances.
- 1274.105 Review requirements.
- 1274.106 Deviations.
- 1274.107 Publication of requirements.

###### **Subpart 1274.2—Pre-Award Requirements**

- 1274.201 Purpose.
- 1274.202 Methods of award.
- 1274.203 Solicitations/Cooperative Agreement Notices.
- 1274.204 Costs and payments.
- 1274.205 Consortia as recipients.
- 1274.206 Metric Conversion Act.
- 1274.207 Extended agreements.
- 1274.208 Intellectual property.
- 1274.209 Evaluation and selection.
- 1274.210 Unsolicited proposals.
- 1274.211 Award procedures.
- 1274.212 Document format and numbering.
- 1274.213 Distribution of cooperative agreements.
- 1274.214 Inquiries and release of information.

###### **Subpart 1274.3—Administration**

- 1274.301 Delegation of administration.
- 1274.302 Transfers, novations, and change of name agreements.

###### **Subpart 1274.4—Property**

- 1274.401 Government furnished property.
- 1274.402 Contractor acquired property.

###### **Subpart 1274.5—Procurement Standards**

- 1274.501 Purpose of procurement standards.
- 1274.502 Recipient responsibilities.
- 1274.503 Codes of conduct.
- 1274.504 Competition.
- 1274.505 Procurement procedures.
- 1274.506 Cost and price analysis.
- 1274.507 Procurement records.
- 1274.508 Contract administration.
- 1274.509 Contract provisions.
- 1274.510 Subcontracts.

###### **Subpart 1274.6—Reports and Records**

- 1274.601 Retention and access requirements for records.

###### **Subpart 1274.7—Suspension or Termination**

- 1274.701 Suspension or termination.

###### **Subpart 1274.8—Post-Award/Administrative Requirements**

- 1274.801 Adjustments to performance costs.
- 1274.802 Modifications.
- 1274.803 Closeout procedures.
- 1274.804 Subsequent adjustments and continuing responsibilities.

###### **Subpart 1274.9—Other Provisions and Special Conditions**

- 1274.901 Other provisions and special conditions.
- 1274.902 Purpose.
- 1274.903 Responsibilities.
- 1274.904 Resource sharing requirements.
- 1274.905 Rights in data.
- 1274.906 Designation of New Technology Representative and Patent Representative.

- 1274.907 Disputes.
  - 1274.908 Milestone payments.
  - 1274.909 Term of agreement.
  - 1274.910 Authority.
  - 1274.911 Patent rights.
  - 1274.912 Patent rights—retention by the recipient (large business).
  - 1274.913 Patent rights—retention by the recipient (small business).
  - 1274.914 Requests for waiver of rights—large business.
  - 1274.915 Restrictions on sale or transfer of technology to foreign firms or institutions.
  - 1274.916 Liability and risk of loss.
  - 1274.917 Additional funds.
  - 1274.918 Incremental funding.
  - 1274.919 Cost principles and accounting standards.
  - 1274.920 Responsibilities of the NASA technical officer.
  - 1274.921 Publications and reports: non-proprietary research results.
  - 1274.922 Suspension or termination.
  - 1274.923 Equipment and other property.
  - 1274.924 Civil rights.
  - 1274.925 Subcontracts.
  - 1274.926 Clean Air-Water Pollution Control Acts.
  - 1274.927 Debarment and suspension and drug-free workplace.
  - 1274.928 Foreign national employee investigative requirements.
  - 1274.929 Restrictions on lobbying.
  - 1274.930 Travel and transportation.
  - 1274.931 Electronic funds transfer payment methods.
  - 1274.932 Retention and examination of records.
  - 1274.933 Summary of recipient reporting.
  - 1274.934 Safety.
  - 1274.935 Security classification requirements.
  - 1274.936 Breach of safety or security.
  - 1274.937 Security requirements for unclassified information technology resources.
  - 1274.938 Modifications.
  - 1274.939 Application of Federal, State, and local laws and regulations.
  - 1274.940 Changes in recipient's membership.
  - 1274.941 Insurance and indemnification.
  - 1274.942 Export licenses.
- Appendix to Part 1274—Listing of Exhibits  
Exhibit A to Part 1274—Contract Provisions  
Exhibit B to Part 1274—Reports

**Authority:** 31 U.S.C. 6301 to 6308; 42 U.S.C. 2451 et seq.

## Subpart 1274.1—General

### § 1274.101 Purpose.

The following policy guidelines establish uniform requirements for NASA cooperative agreements awarded to commercial firms.

### § 1274.102 Scope.

(a) The business relationship between NASA and the recipient of a cooperation agreement differs from the relationship that exists between NASA and the recipient of a grant. Under the auspices of a grant, there is very little

involvement and interaction between NASA and the grantee (other than a few administrative, funding, and reporting requirements, or in some cases matching of funds). Under a cooperative agreement, because of its substantial involvement, NASA assumes a higher degree of responsibility for the technical performance outcomes and associated financial costs of research activities. In some cooperative agreement projects, NASA may be required to indemnify the recipient (to the extent authorized by Congress). While the principal purpose of NASA's involvement and commitment of resources is to stimulate or support research activity, a major incentive for involvement by commercial firms (particularly where costs are shared) is the profit potential from marketable products expected to result from the cooperative agreement project.

(b) Cooperative Agreements (in areas or research relevant to NASA's mission) are ordinarily entered into with commercial firms to—

- (1) Support research and development;
  - (2) Provide technology transfer from the Government to the recipient;
  - (3) Develop a capability among U.S. firms to potentially enhance U.S. competitiveness; or
  - (4) Stimulate interest from profit-oriented businesses that may have the best technical resources available, but have little interest or incentive to apply those resources to a particular area of research.
- (c) Projects that normally result in a Cooperative Agreement award to a commercial entity are those:
- (1) Not intended for the direct benefit of NASA;
  - (2) Are expected to benefit the general public;
  - (3) Require substantial cost sharing; and
  - (4) Have commercial applications and profit generating potential.

### § 1274.103 Definitions.

**Administrator.** The Administrator or Deputy Administrator of NASA.

**Agreement Officer.** A Government employee (usually a Contracting Officer or Grant Officer) who has been delegated the authority to negotiate, award, or administer the cooperative agreement. Most often Contracting Officers are delegated this authority for the more complex cooperative agreement projects.

**Associate Administrator for Procurement.** The head of the Office of Procurement, NASA Headquarters (Code H).

**Cash contributions.** The cash invested in a given program or project by the

Federal Government and/or recipient. The recipient's cash contributions may include money contributed by third parties.

**Closeout.** The process by which NASA determines that all applicable administrative actions and all required work of the award have been completed by the recipient and NASA.

**Commercial item.** The definition in FAR 2.101 is applicable.

**Cooperative agreement.** As defined by 31 U.S.C. 6305, cooperative agreements are financial assistance instruments used to stimulate or support activities for authorized purposes and in which the Government participates substantially in the performance of the effort. This Part 1274 covers only cooperative agreements with commercial firms where resource sharing is involved. Cooperative agreements with other types of organizations are covered by 14 CFR part 1260.

**Cost sharing.** Agreement whereby the Government and recipient share the funding requirements of a program or project at an agreed upon ratio or percentage (normally 50/50). Normally, the Government's payment of its share of the costs is contingent upon the accomplishment of tangible milestones (preferred method). Any payment arrangement that is based on a method other than the accomplishment of tangible milestones (e.g., a reimbursable arrangement where NASA pays a share of incurred costs, regardless of the accomplishment of tangible milestones) must be approved through the deviation process discussed in § 1274.106.

**Date of completion.** The date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which NASA sponsorship ends.

**Days.** Calendar days, unless otherwise indicated.

**General purpose equipment.**

Equipment which is usable for other than research, medical, scientific, or technical activities, whether or not special modifications are needed to make them suitable for a particular purpose. Examples of general purpose equipment include office equipment and furnishings, air conditioning equipment, reproduction and printing equipment, motor vehicles, and automatic data processing equipment.

**Government furnished equipment.** Equipment in the possession of, or acquired directly by, the Government and subsequently delivered, or otherwise made available, to a recipient and equipment procured by the

recipient with Government funds under a cooperative agreement.

**Incremental funding.** A method of funding a cooperative agreement where the funds initially allotted to the cooperative agreement are less than the award amount. Additional funding is added as described in § 1274.918.

**Non-cash or In-kind contributions.** May be in the form of personnel resources (where cost accounting methods allow accumulation of such costs), real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program. Costs incurred by NASA to provide the services of one of its support contractors to perform part of NASA's requirements under a cooperative agreement shall be included as part of NASA's cost share, and will be counted as an in-kind contribution to the cooperative agreement.

**Recipient.** An organization receiving financial assistance under a cooperative agreement to carry out a project or program. A recipient may be an individual firm, including sole proprietor, partnership, corporation, or a consortium of business entities.

**Resource contributions.** The total value of resources provided by either party to the cooperative agreement including both cash and non-cash contributions.

**Subcontracting dollar threshold.** The dollar amount of the cooperative agreement subject to the small business subcontracting policies (includes small business, veteran-owned small business, service-disabled veteran-owned small business, historically underutilized small business, small disadvantaged business, women-owned business concerns, Historically Black Colleges and Universities, and minority educational institutions). For cooperative agreements, the dollar threshold to which the small business subcontracting policies apply, is established by the total amount of NASA's cash contributions.

**Suspension.** An action by NASA or the recipient that temporarily discontinues efforts under an award, pending corrective action or pending a decision to terminate the award.

**Technical officer.** The official of the cognizant NASA office who is responsible for monitoring the technical aspects of the work under a cooperative agreement. A Contracting Officer's Technical Representative may serve as a Technical Officer.

**Termination.** The cancellation of a cooperative agreement in whole or in

part, by either party at any time prior to the date of completion.

#### **§ 1274.104 Effect on other issuances.**

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks and other non-regulatory materials which are inconsistent with the requirements of this Part shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 1274.106.

#### **§ 1274.105 Review requirements.**

(a) Once the decision is made by a Headquarters program office or Center procurement personnel, to pursue the Cooperative Agreement Notice (CAN) process, for which the total NASA resources to be expended equal or exceed \$10 million (cash plus non-cash contributions), a notification shall immediately be provided to the Associate Administrator for Procurement (HS). The notification(s) shall be forwarded by the cognizant Headquarters program office or the Center procurement office (as applicable). For any CAN where NASA's cash contributions are expected to equal or exceed \$10 million, Headquarters program office or Center procurement personnel shall also notify the Associate Administrator for Small and Disadvantaged Business Utilization (Code K). All such notifications, as described in paragraph (b) of this section, shall evidence concurrence by the cognizant Center Procurement Officer. These review requirements also apply where an unsolicited proposal is received from a commercial firm (or from a team of recipients where one of more team members is a commercial firm), and the planned award document is a cooperative agreement.

(b) The notification shall be accomplished by sending an electronic mail (e-mail) message to the following address at NASA Headquarters: [can@hq.nasa.gov](mailto:can@hq.nasa.gov). The notification must include the following information, as a minimum—

(1) Identification of the cognizant Center and program office;

(2) Description of the proposed program for which proposals are to be solicited;

(3) Rationale for decision to use a CAN rather than other types of solicitations;

(4) The amount of Government funding to be available for awards;

(5) Estimate of the number of cooperative agreements to be awarded as a result of the CAN;

(6) The percentage of cost-sharing to be required;

(7) Tentative schedule for release of CAN and award of cooperative agreements;

(8) If the term of the cooperative agreement is anticipated to exceed 3 years and/or if the Government cash contribution is expected to exceed \$20M, address anticipated changes, if any, to the provisions (see § 1274.204(m)); and

(9) If the cooperative agreement is for programs/projects that provide aerospace products or capabilities, (e.g., provision of space and aeronautics, flight and ground systems, technologies and operations), a statement that the requirements of NASA Policy Directive (NPD) 7120.4 and NASA Policy Guidance (NPG) 7120.5 have been met. This affirmative statement will include a specific reference to the signed Program Commitment Agreement.

(c) Code HS will respond by e-mail message to the sender, with a copy of the message to the Procurement Officer and the Office of Small and Disadvantaged Business Utilization, within five (5) working days of receipt of this initial notification. The response will address the following:

(1) Whether Code HS agrees or disagrees with the appropriateness for using a CAN for the effort described,

(2) Whether Code HS will require review and approval of the CAN before its issuance,

(3) Whether Code HS will require review and approval of the selected offeror's cost sharing arrangement (e.g., cost sharing percentage; type of contribution (cash, labor, etc.)).

(4) Whether Code HS will require review and approval of the resulting cooperative agreement(s).

(d) If a response from Code HS is not received within 5 working days of notification, the program office or Center may proceed with release of the CAN and award of the cooperative agreements as described.

#### **§ 1274.106 Deviations.**

(a) The Associate Administrator for Procurement may grant exceptions for classes of, or individual cooperative agreements and deviations from the requirements of this Regulation when exceptions are not prohibited by statute.

(b) A deviation is required for any of the following:

(1) When a prescribed provision set forth in this regulation for use verbatim is modified or omitted.

(2) When a provision is set forth in this regulation, but not prescribed for use verbatim, and the installation substitutes a provision which is

inconsistent with the intent, principle, and substance of the prescribed provision.

(3) When a NASA form or other form is prescribed by this regulation, and that form is altered or another form is used in its place.

(4) When limitations, imposed by this regulation upon the use of a provision, form, procedure, or any other action, are not adhered to.

(c) Requests for authority to deviate from this regulation will be forwarded to Headquarters, Program Operations Division (Code HS). Such requests, signed by the Procurement Officer, shall contain as a minimum—

(1) A full description of the deviation and identification of the regulatory requirement from which a deviation is sought;

(2) Detailed rationale for the request, including any pertinent background information;

(3) The name of the recipient and identification of the cooperative agreement affected, including the dollar value.

(4) A statement as to whether the deviation has been requested previously, and, if so, circumstances of the previous request(s); and

(5) A copy of legal counsel's concurrence or comments.

#### **§ 1274.107 Publication of requirements.**

Cooperative agreements may result from recipient proposals submitted in response to the publication of a NASA Research Announcement (NRA), a Cooperative Agreement Notice (CAN), or other Broad Agency Announcement (BAA). BAA's, NRA's and CAN's are normally promulgated through publicly accessible Government-wide announcements such as those published under the Federal Business Opportunities (FedBizOpps), and/or the NASA Acquisition Internet Service (NAIS). Prior to publicizing the CAN, see § 1274.105.

#### **Subpart 1274.2—Pre-Award Requirements**

##### **§ 1274.201 Purpose.**

This subpart provides pre-award guidance, prescribes forms and instructions, and addresses other pre-award matters.

##### **§ 1274.202 Methods of award.**

(a) Competitive Agreements. Consistent with 31 U.S.C. 6301(3), NASA uses competitive procedures to award cooperative agreements whenever possible.

(b) Awards using other than competitive procedures. Solicitations

for award of a Cooperative Agreement shall not be issued to, nor negotiations conducted with a single source unless—

(1) Use of such actions is documented in writing in accordance with NFS 1806.303; and

(2) Concurrence and approvals in accordance with the requirements stated in NFS 1806.304–70 are obtained. The dollar thresholds will be determined by the total value of the resources committed to the Cooperative Agreement (cash and quantifiable in-kind contributions).

#### **§ 1274.203 Solicitations/Cooperative Agreement Notices.**

(a) The evaluation section of the CAN shall notify potential recipients of the relative importance of factors, and any subfactors or other criteria that will be evaluated during the selection process.

(b) Publication of draft documentation may serve to prevent unnecessary expenditure of resources and unproductive time that may be spent by NASA and potential recipients. Release of draft documentation also serves to assist NASA in refining program objectives and requirements, and maximizes the quality of research proposals submitted for formal evaluation and source selection. Agreement Officers should use every effort to issue draft pre-award cooperative agreement information. Any draft documentation released for comment shall contain all factors/subfactors to be evaluated for award. Draft documents should be as close to the final product as possible. Draft CAN's or Cooperative Agreements (CA) should include terms and conditions, special requirements and expected cash and non-cash (in-kind) contributions.

(c) During the information gathering process, comments may be invited from potential recipients on all aspects of the draft documentation, including the requirements, schedules, proposal instructions and evaluation approaches. Potential recipients should be specifically requested to identify unnecessary or inefficient requirements. Comments should also be requested on any perceived safety, occupational health, security (including information technology security), environmental, export control, and/or other programmatic risk issues associated with performance of the CA.

(1) Agreement Officers should include in the award schedule of the assistance vehicle adequate time for the process to include industry review and comments, and NASA's evaluation and disposition of comments received.

(2) When providing draft documents for comment, the CAN shall advise

interested parties that any issued draft documentation shall not be considered as a solicitation for award, and that NASA is not requesting proposals in response to the draft publication.

(3) Whenever feasible, Agreement Officers should include a summary of the disposition of significant comments when issuing the final CAN and/or CA.

(4) For its research projects, NASA may publish the expected project goals and objectives in terms of "What" the commercial recipient is expected to accomplish. The commercial recipient *may* be required to submit a proposed statement of work with its proposal stating "How" the recipient will accomplish the task(s). Depending on its importance to the success of the project, for some projects the recipient's statement of work may be included as an evaluation criterion for award. In these instances, the requirement for submission of the recipient's statement of work will be clearly identified as a subfactor or criterion that will be evaluated, and its relative weight or ranking in relation to other evaluation criteria shall be stated.

(5) Where performance-based milestone payments are planned, the potential recipient should be encouraged to suggest in its statement of work (which incorporates the project goals and objectives), or elsewhere in its proposal, terms and/or performance events upon which milestone payments can be negotiated. In all cases, where the recipient submits a statement of work in response to NASA project objectives, NASA shall have final approval of the acceptability of the statement of work.

(d) To protect the integrity of the competitive process, upon release of the formal CAN the Agreement Officer shall direct that all personnel associated with the source selection refrain from communicating with prospective recipients and to refer all inquiries to the Agreement Officer or other authorized representative. The notification to potential recipients may be sent in any format (e.g., letter or electronic) appropriate to the complexity of the acquisition. It is not intended that all communication with potential recipients be terminated. Agreement officers should continue to provide information as long as it does not create an unfair competitive advantage or reveal proprietary data.

#### **§ 1274.204 Costs and payments.**

(a) *Cooperative agreements are financial assistance vehicles.* Cooperative agreements awarded to commercial firms are subject to the cost accounting standards and principles of

48 CFR chapter 99, as implemented by FAR parts 30 and 31.

(b) *Payment structure.* Cooperative agreements are solicited, awarded and administered in accordance with the method whereby fixed payments are made by NASA based on the accomplishment of predetermined tangible milestones by the recipient. Any arrangement where payments are made on a basis other than accomplished tangible milestones must be approved in accordance the requirements of § 1274.106 "Deviations".

(c) *Cost and payment matters*—(1) For cooperative agreements where commercial firms are the recipients, the accounting principles and the business relationship with the Government sponsor (e.g., allowability of costs incurred), shall be governed by the cost accounting standards of 48 CFR Chapter 99, and implemented by FAR parts 30 and 31. If the recipient is a consortium which includes non-commercial entities as members, cost allowability for those members will be determined as follows:

(i) Allowability of costs incurred by state, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A-87, "Cost Principles for State and Local Governments."

(ii) The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A-122, "Cost Principles for Non-Profit Organizations."

(iii) The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A-21, "Cost Principles for Educational Institutions."

(iv) The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals."

(2) Recipient's method for accounting for the expenditure of funds must be consistent with Generally Accepted Accounting Principles.

(d) *Cost sharing*—(1) Given the mutually beneficial nature, in particular, potential commercially marketable products, expected to result from the research activities of the cooperative agreement, resource contributions are required from the recipient. The commercial recipient is expected to contribute at least 50 percent of the total resources necessary to accomplish the cooperative agreement effort. Recipient

contributions may be cash, non-cash (in-kind) or both. Acceptable non-cash or in-kind resources include such items as equipment, facilities, labor, office space, etc. In determining the incentive to the Recipient to share costs, agreement officers must consider a variety of factors. For example, while the future profitability of intellectual property may serve as incentive for involvement of the commercial firm in the cooperative agreement, the actual or imputed value of intellectual property, that includes such items as patent rights, data rights, trade secrets, etc., are generally not considered reliable sources for computation of the recipient's contributions. In most cases these costs are not readily quantifiable. Thus, the value of intellectual property rights should be factored into the incentive for the recipient to share at least 50 percent of costs, but intellectual property rights do not serve as quantifiable amounts to determine the equitable dollar amounts of costs to be shared.

(2) As will be expected from the commercial partner, the Government's cost share should reflect certain non-cash as well as cash contributions to the most practicable extent possible. Where quantifiable, NASA will include in the calculation of the Government's cost share, non-cash or in-kind contributions, which includes the value of equipment, personnel, and facilities (this approach is also supported by the initiative to implement full cost accounting methods within the Federal Government).

(3) When other Government agencies act as partners along with NASA (e.g., Department of Defense or Federal Aviation Administration), the resources contributed by any Government agency shall be counted as part of the Governments' total cost share under the cooperative agreement.

(4) In cases where a contribution of less than 50 percent is anticipated from the commercial recipient, approval of the Associate Administrator for Procurement (Code HS) is required prior to award. The request for approval should address the evaluation factor in the solicitation and how the proposal accomplishes those objectives to such a degree that a share ratio of less than 50 percent is warranted.

(5) For every cooperative agreement, there should be evidence of the recipient's strong commitment and self-interest in the success of the research project. A very strong indicator of a recipient's self-interest is its willingness to commit to a meaningful level of cost sharing. Before considering whether it is impracticable for the recipient to share 50 percent of the performance costs,

agreement officers should also consider whether other factors exist that demonstrate the recipient's financial stake or self-interest in the success of the cooperative agreement.

(6) Acceptable cash and in-kind contributions, including IR&D costs, may not be included as contributions for any other federally assisted project or program.

(e) *Fixed Funding*—(1) Cooperative agreements are funded by NASA in a fixed amount. NASA makes disbursement of funds to the recipient as "Milestone Payments" discussed in paragraph (f) of this section. If the recipient achieves the final milestone, final payment is made, which completes NASA's financial responsibilities under the agreement.

(2) If the cooperative agreement is terminated prior to achievement of all milestones, NASA's funding is limited to milestone payments already made plus NASA's share of costs incurred to meet commitments of the recipient, which had in the judgment of NASA become firm prior to the effective date of termination. In no event, however, shall the amount of NASA's share of these additional costs exceed the amount of the next scheduled milestone payment.

(f) *Milestone obligations and payments.* A liability is created when costs are incurred, which may be earlier than the payment due date. There must always be sufficient funds obligated to cover the next milestone payment. In addition, funds must be made available (but not necessarily obligated) to cover all milestone payments expected to be made during the current fiscal year of performance.

(1) Agreement officers, technical officers, and other responsible Center personnel shall ensure that funds for milestone payments are obligated, billed and expended in accordance with the guidance set forth by the NASA Financial Management Manual (FMM 9000).

(2) Disbursement of funds to the recipient is based on the achievement of milestones or performance-related benchmarks. The milestone must represent the accomplishment of verifiable, significant event(s) and may not be based upon the mere passage of time or the performance of a particular level effort.

(3) The amount of funds to be disbursed by NASA in recognition of the achievement of milestones ("milestone payments") shall be established consistent with the ratio of resource sharing agreed upon under the cooperative agreement (see paragraph (e)(2) of this section). While the

schedule for milestone achievement must reflect the project being undertaken, the frequency should not be greater than one payment per month. For many projects, scheduling milestones to be accomplished about every 60 to 90 days appears to be most workable. Partial or interim milestone payments may not be made.

(i) The final milestone payment should be structured so that the associated payment is large enough to provide incentive to the recipient to complete its responsibilities under the cooperative agreement. Alternatively, funds may be reserved for disbursement after completion of the effort.

(ii) The Government technical officer must verify to and advise the agreement officer that each milestone has been achieved prior to authorizing the corresponding payment.

(g) *Incremental funding.* Whenever the period of performance for the cooperative agreement crosses fiscal years, the agreement shall be incrementally funded using appropriations from different fiscal years. In other circumstances, incremental funding may be appropriate. The total amount of funds obligated during the course of a fiscal year must be sufficient to cover the Government's share of the costs anticipated to be incurred by the recipient during that fiscal year. NASA may allot funds to an agreement at various times during a fiscal year in anticipation of the occurrence of costs. However, there must always be sufficient funds obligated to cover all milestone payments expected to be made during the current fiscal year.

(h) *Profit applicability.* Recipients shall not be paid a profit under cooperative agreements. Profit may be paid by the recipient to subcontractors, if the subcontractor is not part of the offering team and the subcontract is an arms-length relationship.

(i) *Independent Research and Development (IR&D) Costs.* When determining the applicable dollar amounts or reasonableness of proposed IR&D costs to be included as part of the recipient's cost share, agreement officers should seek assistance from DCAA or the cognizant audit agency.

(1) In accordance with FAR 31.205–18(e), IR&D costs may include costs contributed by contractors in performing cooperative research and development agreements or similar arrangements, entered into under sections 203(c)(5) and (6) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(c)(5) and (6)). IR&D costs incurred by a contractor pursuant to these types of cooperative

agreements should be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative arrangement.

(2) IR&D costs (or an agreed upon portion of IR&D costs) incurred by the recipient's organization and deemed by NASA as the same type of research being undertaken by the cooperative agreement between NASA and the recipient may serve as part of the recipient's contribution of shared costs under the cooperative agreement to the extent that such costs have not been reimbursed through other Federally funded contracts or financial assistance vehicles. When considering the use of IR&D costs as part of the recipient's cost share, the IR&D costs offered by the recipient shall meet the requirements of 31.205–18. Any IR&D costs incurred in a prior period, and offered as part of the recipient's cost share shall meet the criteria established by FAR 31.205–18(d), "Deferred IR&D Costs".

(j) *Contributions.* The CAN should provide a description and value for any quantifiable non-cash or in-kind Government resources (personnel, equipment, facilities, etc.), in addition to any cash funds that will be offered by the Government as part of its contributions to the cooperative agreement. As part of its proposal package, the recipient may also identify additional non-cash or in-kind resources it wishes NASA to contribute. The recipient shall verify the suitability of the requested resource to the work to be performed under the cooperative agreement. Any additional verifiable and suitable non-cash or in-kind resources requested, shall be added to NASA's shared cost of performing the cooperative agreement, and may require increased cash or in-kind contributions from the recipient to meet its percentage of the cost share.

#### **§ 1274.205 Consortia as recipients.**

(a) The use of consortia as recipients for cooperative agreements is encouraged. Such arrangements tend to bring a broader range of capabilities and resources to the cooperative agreement. In addition, consortium members can better share the projects financial costs (e.g., the 50 percent recipient's cost share or other costs of performance). A consortium is a group of organizations that enter into an agreement to collaborate for the purposes of the cooperative agreement with NASA. The agreement to collaborate can take the form of a legal entity such as a partnership or joint venture but it is not necessary that such an entity be created. A consortium may be made up of firms

that normally compete for commercial or Government business or may be made up of firms that perform complementary functions in a given industry. NASA enters into an agreement with only one entity (as identified by the consortium members). (Also see § 1274.940). The inclusion of non-profit or educational institutions, small businesses, or small disadvantaged businesses in the consortium could be particularly valuable in ensuring that the results of the consortium's activities are disseminated.

(b) Key to the success of the cooperative agreement with a consortium is the consortium's Articles of Collaboration, which is a definitive description of the roles and responsibilities of the consortium's members. The Articles of Collaboration must designate a lead firm to represent the consortium and authority to sign on the consortium's behalf. It should also address to the extent appropriate—

- (1) Commitments of financial, personnel, facilities and other resources;
- (2) A detailed milestone chart of consortium activities;
- (3) Accounting requirements;
- (4) Subcontracting procedures;
- (5) Disputes;
- (6) Term of the agreement;
- (7) Insurance and liability issues;
- (8) Internal and external reporting requirements;
- (9) Management structure of the consortium;
- (10) Obligations of organizations withdrawing from the consortia;
- (11) Allocation of data and patent rights among the consortia members
- (12) Agreements, if any, to share existing technology and data;
- (13) The firm which is responsible for the completion of the consortium's responsibilities under the cooperative agreement and has the authority to commit the consortium and receive payments from NASA, and address employee policy or other personnel issues.

(c) The consortium's charter or by-laws may be substituted for the Articles of Collaboration only if they are inclusive of all of the required information.

(d) An outline of the Articles of Collaboration should be required as part of the proposal and evaluated during the source selection process. Articles of Collaboration do not become part of the resulting cooperative agreement.

#### **§ 1274.206 Metric Conversion Act.**

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the



preferred measurement system for U.S. trade and commerce. NASA's policy with respect to the metric measurement system is stated in NPD 8010.2, Use of the Metric System of Measurement in NASA Programs.

#### **§ 1274.207 Extended agreements.**

The provisions set forth in § 1274.901 are generally considered appropriate for agreements not exceeding 3 years and/or a Government cash contribution not exceeding \$20M. For cooperative agreements expected to be longer than 3 years and/or involve Government cash contributions exceeding \$20M, consideration should be given to provisions, which place additional restrictions on the recipient in terms of validating performance and accounting for funds expended.

#### **§ 1274.208 Intellectual property.**

(a) *Intellectual Property Rights.* A cooperative agreement covers the disposition of rights to intellectual property between NASA and the recipient. If the recipient is a consortium or partnership, rights flowing between multiple organizations in a consortium must be negotiated separately and formally documented, preferably in the Articles of Collaboration.

(b) *Rights in Patents.* Patent rights clauses are required by statute and regulation. The clauses exist for recipients of the agreement whether they are—

(1) Other than small business or nonprofit organizations (generally referred to as large businesses) or

(2) Small businesses or nonprofit organizations.

(c) *Inventions.* There are five situations in which inventions may arise under a cooperative agreement—

(1) Recipient Inventions;

(2) Subcontractor Inventions;

(3) NASA Inventions;

(4) NASA Support Contractor Inventions; and

(5) Joint Inventions with Recipient.

(d) *Recipient inventions.*—(1) A recipient, if a large business, is subject to section 305 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2457) relating to property rights in inventions. The term "invention" includes any invention, discovery, improvement, or innovation. Title to an invention made under a cooperative agreement by a large business recipient initially vests with NASA. The recipient may request a waiver under the NASA Patent Waiver Regulations to obtain title to inventions made under the agreement. Such a request may be made in advance of the agreement (or 30 days

thereafter) for all inventions made under the agreement. Alternatively, requests may be made on a case-by-case basis any time an individual invention is made. Such waivers are liberally and expeditiously granted after review by NASA's Invention and Contribution Board and approval by NASA's General Counsel. When a waiver is granted, any inventions made in the performance of work under the agreement are subject to certain reporting, election and filing requirements, a royalty-free license to the Government, march-in rights, and certain other reservations.

(2) A recipient, if a small business or nonprofit organization, may elect to retain title to its inventions. The term "nonprofit organization" is defined in 35 U.S.C. 201(i) and includes universities and other institutions of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code. The Government obtains an irrevocable, nonexclusive, royalty-free license.

(e) *Subcontractor inventions.*—(1) *Large business.* If a recipient enters into a subcontract (or similar arrangement) with a large business organization for experimental, developmental, research, design or engineering work in support of the agreement to be performed in the United States, its possessions, or Puerto Rico, section 305 of the Space Act applies. The clause applicable to large business organizations is to be used (suitably modified to identify the parties) in any subcontract. The subcontractor may request a waiver under the NASA Patent Waiver Regulations to obtain rights to inventions made under the subcontract just as a large business recipient can (see paragraph (d)(1) of this section). It is strongly recommended that a prospective large business subcontractor contact the NASA installation Patent Counsel or Intellectual Property Counsel to assure that the right procedures are followed. Just like the recipient, any inventions made in the performance of work under the agreement are subject to certain reporting, election and filing requirements, a royalty-free license to the Government, march-in rights, and certain other reservations.

(2) *Non-profit organization or small business.* In the event the recipient enters into a subcontract (or similar arrangement) with a domestic nonprofit organization or a small business firm for experimental, developmental, or research work to be performed under the agreement, the requirements of 35 U.S.C. 200 *et seq.* regarding "Patent Rights in Inventions Made With Federal Assistance," apply. The subcontractor has the first option to elect title to any

inventions made in the performance of work under the agreement, subject to specific reporting, election and filing requirements, a royalty-free license to the Government, march-in rights, and certain other reservations that are specifically set forth.

(3) Work outside the United States. If the recipient subcontracts for work to be done outside the United States, its possessions or Puerto Rico, the NASA installation Patent Counsel or Intellectual Property Counsel should be contacted for the proper patent rights clause to use and the procedures to follow.

(4) Notwithstanding paragraphs (e)(1), (2), and (3) of this section, and in recognition of the recipient's substantial contribution, the recipient is authorized, subject to rights of NASA set forth elsewhere in the agreement, to:

(i) Acquire by negotiation and mutual agreement rights to a subcontractor's subject inventions as the recipient may deem necessary; or

(ii) If unable to reach agreement pursuant to paragraph (e)(4)(i) of this section, request that NASA invoke exceptional circumstances as necessary pursuant to 37 CFR 401.3(a)(2) if the prospective subcontractor is a small business firm or nonprofit organization, or for all other organizations, request that such rights for the recipient be included as an additional reservation in a waiver granted pursuant to 14 CFR 1245.1. The exercise of this exception does not change the flow down of the applicable patent rights clause to subcontractors. Applicable laws and regulations require that title to inventions made under a subcontract must initially reside in either the subcontractor or NASA, not the recipient. This exception does not change that. The exception does authorize the recipient to negotiate and reach mutual agreement with the subcontractor for the grant-back of rights. Such grant-back could be an option for an exclusive license or an assignment, depending on the circumstances.

(f) *NASA inventions.* NASA will use reasonable efforts to report inventions made by its employees as a consequence of, or which bear a direct relation to, the performance of specified NASA activities under an agreement. Upon timely request, NASA will use its best efforts to a grant recipient first option to acquire either an exclusive or partially-exclusive, revocable, royalty-bearing license, on terms to be negotiated, for any patent applications and patents covering such inventions. This exclusive or partially-exclusive license to the recipient will be subject to the



retention of rights by or on behalf of the Government for Government purposes.

(g) *NASA support contractor inventions.* It is preferred that NASA support contractors be excluded from performing any of NASA's responsibilities under an agreement since the rights obtained by a NASA support contractor could work against the rights needed by the recipient. In the event NASA support contractors are tasked by NASA to work under the agreement and inventions are made by support contractor employees, the support contractor will normally retain title to its employee inventions in accordance with 35 U.S.C. 202, 14 CFR part 1245, and E.O. 12591. In the event the recipient decides not to pursue right to title in any such invention and NASA obtains title to such inventions, upon timely request, NASA will use its best efforts to grant the recipient first option to acquire either an exclusive or partially exclusive, revocable, royalty-bearing license, upon terms to be negotiated, for any patent applications and patents covering such inventions. This exclusive or partially-exclusive license to the recipient will be subject to the retention of rights by or on behalf of the Government for Government purposes.

(h) *Joint inventions*—(1) NASA and the recipient agree to use reasonable efforts to identify and report to each other any inventions made jointly between NASA employees (or employees of NASA support contractors) and employees of Recipient. For large businesses, the Associate General Counsel (Intellectual Property) may agree that the United States will refrain, for a specified period, from exercising its undivided interest in a manner inconsistent with the recipient's commercial interest. For small business firms and nonprofit organizations, the Associate General Counsel (Intellectual Property) may agree to assign or transfer whatever rights NASA may acquire in a subject invention from its employee to the recipient as authorized by 35 U.S.C. 202(e). The agreement officer negotiating the agreement with small business firms and nonprofit organizations can agree, up front, that NASA will assign whatever rights it may acquire in a subject invention from its employee to the small business firm or nonprofit organization. Requests under this paragraph shall be made through the Center Patent Counsel.

(2) NASA support contractors may be joint inventors. If a NASA support contractor employee is a joint inventor with a NASA employee, the same provisions apply as those for NASA

support contractor inventions (see paragraph (g) of this section). The NASA support contractor will retain or obtain nonexclusive licenses to those inventions in which NASA obtains title. If a NASA support contractor employee is a joint inventor with a recipient employee, the NASA support contractor and recipient will become joint owners of those inventions in which they have elected to retain title or requested and have been granted waiver of title. Where the NASA support contractor has not elected to retain title or has not been granted waiver of title, NASA will jointly own the invention with the Recipient.

(i) *Licenses to recipient(s)*—(1) Any exclusive or partially exclusive commercial licenses are to be royalty-bearing consistent with Government-wide policy in licensing its inventions. It also provides an opportunity for royalty-sharing with the employee-inventor, consistent with Government-wide policy under the Federal Technology Transfer Act.

(2) Upon application in compliance with 37 CFR part 404—Licensing of Government Owned Inventions, all recipients shall be granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title. Because cooperative agreements are cost sharing cooperative arrangements with a purpose of benefiting the public by improving the competitiveness of the recipient and the Government receives an irrevocable, nonexclusive, royalty-free license in each recipient subject invention, it is only equitable that the recipient receive, at a minimum, a revocable, nonexclusive, royalty-free license in NASA inventions and NASA contractor inventions where NASA has acquired title.

(3) Once a recipient has exercised its option to apply for an exclusive or partially exclusive license, a notice, identifying the invention and the recipient, is published in the **Federal Register**, providing the public opportunity for filing written objections for 60 days.

(j) *Preference for United States manufacture.* Despite any other provision, the recipient agrees that any products embodying subject inventions or produced through the use of subject inventions shall be manufactured substantially in the United States. "Manufactured substantially in the United States" means the product must have over 50 percent of its components manufactured in the United States. This requirement is met if the cost to the

recipient of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components required to make the product. In making this determination, only the product and its components shall be considered. The cost of each component includes transportation costs to the place of incorporation into the product and any applicable duty whether or not a duty-free entry certificate is issued. Components of foreign origin of the same class or kind for which determinations have been made in accordance with FAR 25.101(a) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic. The intent of this provision is to support manufacturing jobs in the United States regardless of the status of the recipient as a domestic or foreign controlled company. However, in individual cases, the requirement to manufacture substantially in the United States, may be waived by the Associate Administrator for Procurement (Code HS) upon a showing by the recipient that under the circumstances domestic manufacture is not commercially feasible.

(k) *Space Act Agreements.* Invention and patent rights in cooperative agreements must comply with statutory and regulatory provisions. Where circumstances permit, a Space Act Agreement is available as an alternative instrument which can be more flexible in the area of invention and patent rights.

(l) *Data Rights.* Data rights provisions can and should be tailored to best achieve the needs and objectives of the respective parties concerned.

(1) The data rights clause at § 1274.905 assumes a substantially equal cost sharing relationship where collaborative research, experimental, developmental, engineering, demonstration, or design activities are to be carried out, such that it is likely that "proprietary" information will be developed and/or exchanged under the agreement. If cost sharing is unequal or no extensive research, experimental, developmental, engineering, demonstration, or design activities are likely, a different set of clauses may be appropriate.

(2) The primary question that must be answered when developing data clauses is what does each party need or intend to do with the data developed under the agreement. Accordingly, the data rights clauses may be tailored to fit the circumstances. Where conflicting goals of the parties result in incompatible data provisions, agreement officers for the

Government must recognize that private companies entering into cooperative agreements bring resources to that relationship and must be allowed to reap an appropriate benefit for the expenditure of those resources. However, since serving a public purpose is a major objective of a cooperative agreement, care must be exercised to ensure the recipient is not established as a long term sole source supplier of an item or service and is not in a position to take unfair advantage of the results of the cooperative agreement. Therefore, a reasonable time period (i.e., depending on the technology, two to five years after production of the data) may be established after which the data first produced by the recipient in the performance of the agreement will be made public.

(3) Data can be generated from different sources and can have various restrictions placed on its dissemination. Recipient data furnished to NASA can exist prior to, or be produced outside of, the agreement or be produced under the agreement. NASA can also produce data in carrying out its responsibilities under the agreement. Each of these areas must be covered.

(4) For data, including software, first produced by the recipient under the agreement, the recipient may assert copyright. Data exchanged with a notice showing that the data is protected by copyright must include appropriate licenses in order for NASA to use the data as needed.

(5) Recognizing that the dissemination of the results of NASA's activities is a primary objective of a cooperative agreement, the parties should specifically delineate what results will be published and under what conditions. This should be set forth in the clause of the cooperative agreement entitled "Publication and Reports: Non-Proprietary Research Results." Any such agreement on the publication of results should be stated to take precedence over any other clause in the cooperative agreement.

(6) Section 1274.905(b)(3) requires the recipient to provide NASA a government purpose license for data first produced by the Recipient that constitutes trade secrets or confidential business or financial information. NASA and the recipient shall determine the scope of this license at the time of award of the cooperative agreement. In addition to the purposes given as examples in § 1274.905(b)(3), the license should provide NASA the right to use this data under a separate cooperative agreement or contract issued to a party other than the Recipient for the purpose of continuing the project in the event

the cooperative agreement is terminated by either party.

(7) In accordance with section 303(b) of the Space Act, any data first produced by NASA under the agreement which embodies trade secrets or financial information that would be privileged or confidential if it had been obtained from a private participant, will be marked with an appropriate legend and maintained in confidence for an agreed to period of up to five years (the maximum allowed by law). This does not apply to data other than that for which there has been agreement regarding publication or distribution. The period of time during which data first produced by NASA is maintained in confidence should be consistent with the period of time determined in accordance with paragraph (h)(2) of this section, before which data first produced by the recipient will be made public. Also, NASA itself may use the marked data (under suitable protective conditions) for agreed-to purposes.

#### § 1274.209 Evaluation and selection.

(a) *Factor development.* The agreement officer, along with the NASA evaluation team has discretion to determine the relevant evaluation criteria based upon the project requirements, and the goals and objectives of the cooperative agreement.

(b) *Communications during non-competitive awards.* For cooperative agreements awarded non-competitively (see § 1274.202(b)), there are no restrictions on communications between NASA and the recipient. In addition, there is no requirement for the development and publication of formal evaluation or source selection criteria.

(c) *Communication during competitive awards.* As discussed in § 1274.203(c), when a competitive source selection process will be followed to select the recipient, an appropriate level of care shall be taken by NASA personnel in order to protect the integrity of the source selection process. Therefore, upon release of the formal CAN, the agreement officer shall direct all procurement personnel associated with the source selection to refrain from communicating with perspective recipients and that all inquiries be referred to the agreement officer, or other authorized representative.

(d) *Selection factors and subfactors.*—(1) At a minimum, the selection process for the competitive award of cooperative agreements to commercial entities shall include evaluation of potential recipients' proposals for merit and relevance to NASA's mission requirements through their responses to

the publication of NASA evaluation factors. The evaluation factors may include technical and management capabilities (mission suitability), past performance, and proposed costs (including proposed cost share).

(2) For programs that may involve potentially hazardous operations related to flight, and/or mission critical ground systems), NASA's selection factors and subfactors shall include evaluation of the recipient's proposed approach to managing risk (e.g., technology being applied or developed, technical complexity, performance specifications and tolerances, delivery schedule, etc.).

(3) As part of the evaluation process, the factors, subfactors, or other criteria should be tailored to properly address the requirements of the cooperative agreement.

(e) *Other factors and subfactors.* Other factors and subfactors may include:

(1) The composition or appropriateness of the business relationship of proposed team members or consortium, articles of collaboration, participation of an appropriate mix of small business, veteran-owned small business, service-disabled veteran-owned small business, historically underutilized small business, small disadvantaged business, and women-owned business concerns, as well as non-profits and educational institutions, including historically black colleges and universities and minority institutions).

(2) Other considerations may include enhancing U.S. competitiveness, developing a capability among U.S. firms, identification of potential markets, appropriateness of business risks.

(f) *Evaluation.*—(1) The proposals shall be evaluated in accordance with the criteria published in the CAN. Proposals selected for award will be supported by documentation as described in § 1274.211(b). When evaluation results in a proposal not being selected, the proposer will be notified in accordance with the CAN.

(2) The technical evaluation of proposals may include peer reviews. Because the business sense of a cooperative agreement proposal is critical to its success, NASA may reserve the right to utilize appropriate outside evaluators to assist in the evaluation of such proposal elements as the business base projections, the market for proposed products, and/or the impact of anticipated product price reductions.

(g) *Cost evaluation.*—(1) Prior to award of a cooperative agreement, agreement officers shall ensure that proposed costs are accurate and reasonable. In order to do so, cost and pricing data may be

required. The level of cost and pricing data to be requested shall be commensurate with the analysis necessary to reach agreement on overall proposed project costs. The evaluation of costs shall lead to the determination and verification of total project costs to be shared by NASA and the recipient, as well as establishment of NASA's milestone payment schedule based on its 50 percent cost share. The guidance at FAR 15.4 and NFS 1815.4 can assist in determining whether cost and pricing data are necessary and the level of analysis required. While competition may be present (i.e., more than one proposal is received), in most cases companies are proposing competing technologies and varying approaches that reflect very different methods (and accompanying costs) to satisfy NASA's project objectives. Consequently, this type of competitive environment is very different from an environment where competitive proposals are submitted in response to a request for proposals leading to award of a contract for relatively well-defined program or project requirements.

(2) During evaluation of the cost proposal, the agreement officer, along with other NASA evaluation team members and/or pricing support personnel, shall determine the reasonableness of the overall proposed project costs, including verifying the value of the recipient's proposed non-cash and in-kind contributions. Commitments should be obtained and verified to the extent practicable from the recipient or any associated team members, from which proposed contributions will be made.

(3) If the recipient's proposed contributions include application of IR&D costs, see § 1274.204(i).

(h) *Award to Foreign firms.* An award may not be made to a foreign government. However, if selected as the best available source, an award may be made to a foreign firm. If a proposal is selected from a foreign firm sponsored by their respective government agency, or from entities considered quasi-governmental, approval must be obtained from Headquarters, Program Operations Division (Code HS). Such requests must include detailed rationale for the selection, to include the funding source of the foreign participant. The approval of the Associate Administrator for Procurement is required to exclude foreign firms from submitting proposals. Award to a foreign firm shall be on a no-exchange-of-funds basis (see NPD 1360.2).

(i) The Office of External Affairs (Code I), shall be notified prior to any announcement of intent to award to a

foreign firm. Additionally, pursuant to section 126 of Pub.L. 106-391, as part of the evaluation of costs and benefits of entering into an obligation to conduct a space mission in which a foreign entity will participate as a supplier of the spacecraft, spacecraft system, or launch system, NASA shall solicit comment on the potential impact of such participation, through notice published in the FedBizOpps or NAIS.

(j) *Safe-guarding proposals.* Competitive proposal information shall be protected in accordance with FAR 15.207, Handling proposals and information. Unsolicited proposals shall be protected in accordance with FAR 15.608, Prohibitions, and FAR 15.609, Limited use of data.

(1) Evaluation team members, the source selection authority, and Agreement Officers are responsible for protecting sensitive information on the award of a grant or cooperative agreement and for determining who is authorized to receive such information. Sensitive information includes: information contained in proposals; information prepared for NASA's evaluation of proposals; the rankings of proposals for an award; reports and evaluations of source selection panels, boards, or advisory councils; and other information deemed sensitive by the source selection authority or by the Agreement Officer.

(2) No sensitive information shall be disclosed to persons not on the evaluation team or evaluation panel, unless the Selecting Official or the Agreement Officer has approved disclosure based upon an unequivocal "need-to-know" and the individual receiving the information has signed a Non-Disclosure Certificate. All attendees at formal source selection presentations and briefings shall be required to sign an Attendance Roster and a Disclosure Certificate. The attendance rosters and certificates shall be maintained in official files for a minimum of six months after award.

(3) The improper disclosure of sensitive information could result in criminal prosecution or an adverse action.

(k) *Controls on the use of outside evaluators.* The use of outside evaluators shall be approved in accordance with NFS 1815.207-70(b). A cover sheet with the following legend shall be affixed to data provided to outside evaluators:

#### **Government Notice for Handling Proposals**

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any

authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with.

(l) *Consortium awards.* If the cooperative agreement is to be awarded to a consortium, a completed, formally executed Articles of Collaboration is required prior to award.

(m) *Printing, binding, and duplicating.* Proposals for efforts that involve printing, binding, and duplicating in excess of 25,000 pages are subject to the regulations of the Congressional Joint Committee on Printing. The technical office will refer such proposals to the Installation Central Printing Management Officer (ICPMO) to ensure compliance with NPD 1490.1. The Agreement Officer will be advised in writing of the results of the ICPMO review.

#### **§ 1274.210 Unsolicited proposals.**

(a) For a proposal to be considered a valid unsolicited proposal, the submission must:

- (1) Be innovative and unique;
- (2) Be independently originated and developed by the recipient;
- (3) Be prepared without Government supervision, endorsement, direction or direct Government involvement;
- (4) Include sufficient technical and cost detail to permit a determination that Government support could be worthwhile and the proposed work could benefit the agency's research and development or other mission responsibilities; and

(5) Not be an advance proposal for a known agency requirement that can be acquired by competitive methods.

(b) For each unsolicited proposal selected for award, the cognizant technical office will prepare and furnish to the Agreement Officer, a justification for acceptance of an unsolicited proposal (JAUP). The JAUP shall be submitted for the approval of the Agreement Officer after review and concurrence at a level above the technical officer. The evaluator shall consider the following factors, in addition to any others appropriate for the particular proposal:

- (1) Unique and innovative methods, approaches or concepts demonstrated by the proposal.
- (2) Overall scientific or technical merits of the proposal.
- (3) The offeror's capabilities, related experience, facilities, techniques, or unique combinations of these which are integral factors for achieving the proposal objectives.
- (4) The qualifications, capabilities, and experience of the proposed key personnel who are critical in achieving the proposal objectives.

(5) Current, open solicitations under which the unsolicited proposal could be evaluated.

(c) Unsolicited proposals shall be handled in accordance with NFS 1815.606, "Agency Procedures".

(d) Unsolicited proposals from foreign sources are subject to NPD 1360.2, "Development of International Cooperation in Space and Aeronautics Programs".

(e) There is no requirement for a public announcement of the award of a cooperative agreement. However, in those instances where a public announcement is planned, per NFS 1805.303-71(a)(3), the NASA Administrator shall be notified at least five (5) workdays prior to a planned public announcement for award of a cooperative agreement (regardless of dollar value), if it is thought the Agreement may be of significant interest to Headquarters.

(f) Additional information regarding unsolicited proposals is available in the handbook entitled, "Guidance for the Preparation and Submission of Unsolicited Proposals", which is available on the NASA Acquisition Internet Service Website at: <http://ec.msfc.nasa.gov/hq/library/unSol-Prop.html>.

#### **§ 1274.211 Award procedures.**

(a) In accordance with NFS 1805.303-71(a)(3), the NASA Administrator shall be notified at least five (5) workdays prior to a planned public announcement for award of a cooperative agreement (regardless of dollar value), if it is thought the agreement may be of significant interest to Headquarters.

(b) For awards that are the result of a competitive source selection, the technical officer will prepare and furnish to the agreement officer a signed selection statement based on the selection criteria stated in the solicitation.

(1) *General.* Multiple year cooperative agreements are encouraged, but normally they should extend no more than three years.

(2) *Bilateral award.* All cooperative agreements shall be awarded on a bilateral basis.

(3) *Central Contractor Registration (CCR).* Prior to implementation of the Integrated Financial Management (IFM) System at each center, all grant and cooperative agreement recipients are required to register in the Department of Defense (DOD) Central Contractor Registration (CCR) database. Registration is required in order to obtain a Commercial and Government Entity (CAGE) code, which will be used as a grant and cooperative agreement

identification number for the new system. The agreement officer shall verify that the prospective awardee is registered in the CCR database using the DUNS number or, if applicable, the DUNS+4 number, via the Internet at <http://www.ccr2000.com> or by calling toll free: 888-227-2423, commercial: 616-961-5757.

(4) *Certifications, Disclosures, and Assurances.*—(i) Agreement officers are required to ensure that all necessary certifications, disclosures, and assurances have been obtained prior to awarding a cooperative agreement.

(ii) Each new proposal shall include a certification for debarment and suspension under the requirements of 14 CFR 1265.510 and 1260.117.

(iii) Each new proposal for an award exceeding \$100,000 shall include a certification, and a disclosure form (SF LLL) if required, on Lobbying under the requirements of 14 CFR 1271.110 and 1260.117.

(iv) Unless a copy is on file at the NASA center, recipients must furnish an assurance on NASA Form (NF) 1206 on compliance with Civil Rights statutes specified in 14 CFR parts 1250 through 1253.

#### **§ 1274.212 Document format and numbering.**

(a) *Formats.* Agreement Officers are authorized to use the format set forth in Exhibit B (available via the Internet at: <http://ec.msfc.nasa.gov/hq/qrcover.htm>) to subpart A of part 1260 of this chapter, with minimum modification, as the standard cooperative agreement cover page for the award of all cooperative agreements (until such time that a revised replacement form is approved, and/or designation is made of a bilateral award letter format to supplement the format set forth in Exhibit B to subpart A of part 1260 of this chapter).

(b) *Cooperative agreement numbering system.* Cooperative agreement numbering may be changed once the Integrated Financial Management (IFM) is implemented. Until IFM is implemented, cooperative agreement numbering shall conform to NFS 1804.7102, except that a NCC prefix will be used in lieu of the NAS prefix. Along with the prefix NCC, a one or two digit Center Identification Number, and a sequence number of up to five digits will be used. Inclusive of the prefix and fiscal year, the total number of characters, digits, and spaces cannot exceed 11.

#### **§ 1274.213 Distribution of cooperative agreements.**

Copies of cooperative agreements and modifications will be provided to:

payment office, technical officer, administrative agreement officer when delegation has been made (particularly when administrative functions are delegated to DOD or another agency), NASA Center for Aerospace Information (CASI), Attn: Document Processing Section, 7121 Standard Drive, Hanover, MD 21076, and any other appropriate recipient. Copies of the statement of work, contained in the Recipient's proposal and accepted by NASA, will be provided to the administrative agreement officer and CASI. The cooperative agreement file will contain a record of the addresses for distributing agreements and supplements.

#### **§ 1274.214 Inquiries and release of information.**

NASA personnel shall follow the procedures established in NFS 1805.402 prior to releasing information to the news media or the general public. The procedures established by NFS 1805.403 shall be followed when responding to inquiries from members of Congress.

### **Subpart 1274.3—Administration**

#### **§ 1274.301 Delegation of administration.**

Normally, cooperative agreements will be administered by the awarding activity. NASA Form 1678, NASA Technical Officer Delegation for Cooperative Agreements with Commercial Firms, will be used to delegate responsibilities to the NASA Technical Officer.

#### **§ 1274.302 Transfers, novations, and change of name agreements.**

(a) Transfer of cooperative agreements. Novation is the only means by which a cooperative agreement may be transferred from one recipient to another.

(b) Novation and change of name. NASA legal counsel, shall review for legal sufficiency, all novation agreements or change of name agreements of the recipient, prior to formal execution by the agreement officer.

### **Subpart 1274.4—Property**

#### **§ 1274.401 Government Furnished Property.**

Property or equipment owned by the Government that will be used in the performance of a cooperative agreement shall be included as part of the Government's percentage (usually 50 percent) of shared costs. In most cases the property or equipment will be categorized as non-cash contributions. Agreement officers may use the procedures promulgated by FAR subpart

45.2, as guidelines to calculate the value of the property or equipment.

#### **§ 1274.402 Contractor acquired property.**

As provided in § 1274.923(c), title to property acquired with government funds vests in the government. Under a cost shared cooperative agreement, joint ownership of property equal to the cost-sharing ratio will result if the parties make no specific arrangements regarding such property. The disposition of acquired property should be addressed in the cooperative agreement at the time of award. The cooperative agreement may provide that all such property be contributed by the recipient as a non-cash contribution. A reasonable dollar value must be specified and adequately supported. In this case, title will vest in the recipient. Alternatively, NASA and the recipient may include in the cooperative agreement any other appropriate arrangement for the disposition of acquired property upon completion of the effort.

### **Subpart 1274.5—Procurement Standards**

#### **§ 1274.501 Purpose of procurement standards.**

(a) The procurement standards stated in §§ 1274.502 through 1274.510, may not apply to or may supplement the procedures of a commercial recipient that has a purchasing system approved in accordance with the requirements of FAR Subpart 44.3 and NFS 1844.3.

(b) Sections 1274.502 through 1274.510 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders.

#### **§ 1274.502 Recipient responsibilities.**

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to NASA, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to

such Federal, State or local authority as may have proper jurisdiction.

#### **§ 1274.503 Codes of conduct.**

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

#### **§ 1274.504 Competition.**

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall normally be excluded from competing for such procurements, unless conflicts or apparent conflicts of interest issues have been resolved. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

#### **§ 1274.505 Procurement procedures.**

(a) All recipients shall establish written procurement procedures. These procedures shall provide at a minimum, that the conditions in paragraphs (a)(1), (2) and (3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features that unduly restrict competition.

(ii) Requirements that the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small business, veteran-owned small business, service-disabled veteran-owned small business, historically underutilized small business, small disadvantaged business, women-owned business concerns, Historically Black Colleges and Universities, and minority educational institutions as subcontractors to the maximum extent practicable. Recipients of NASA awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by 14 CFR part 1265, the implementation of Executive Orders 12549 and 12689, "Debarment and Suspension."

(e) Recipients shall, on request, make available for NASA, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in NASA's implementation of this subpart.

(2) The procurement is expected to exceed the small purchase threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be

awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

#### **§ 1274.506 Cost and price analysis.**

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicies, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

#### **§ 1274.507 Procurement records.**

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

(a) Basis for contractor selection.

(b) Justification for lack of competition when competitive bids or offers are not obtained.

(c) Basis for award cost or price.

#### **§ 1274.508 Contract administration.**

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

#### **§ 1274.509 Contract provisions.**

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts:

(a) Contracts in excess of the simplified acquisition threshold (currently \$100,000) shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the simplified acquisition threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall

describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, NASA, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(d) For Construction and facility improvements, except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, NASA may accept the bonding policy and requirements of the recipient, provided NASA has made a determination that the Federal Government'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 shall, 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 statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described in this section, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR

Part 223, "Surety companies doing business with the United States."

#### **§ 1274.510 Subcontracts.**

Recipients (individual firms or consortia) are not authorized to issue grants or cooperative agreements to subrecipients. All entities that are involved in performing the research and development effort that is the purpose of the cooperative agreement shall be part of the recipient's consortium and not subcontractors. All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of Exhibit A to this part, as applicable and may be subject to approval requirements cited in § 1274.925.

### **Subpart 1274.6—Reports and Records**

#### **§ 1274.601 Retention and access requirements for records.**

(a) This subpart sets forth requirements for record retention and access to records for awards to recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final invoice. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by NASA, the 3-year retention requirement is not applicable to the Recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in paragraph (g) of this section.

(c) Copies of original records may be substituted for the original records if authorized by NASA.

(d) NASA shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate record keeping, NASA may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) NASA, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely

and unrestricted access to any books, documents, papers, or other records of Recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, NASA shall not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when NASA can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to NASA.

(g) Indirect cost rate proposals, cost allocations plans, etc., 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).

(1) *If submitted for negotiation.* If the recipient submits to NASA or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) *If not submitted for negotiation.* If the Recipient is not required to submit to NASA or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

### **Subpart 1274.7—Suspension or Termination**

#### **§ 1274.701 Suspension or termination.**

(a) *Suspension.* NASA or the recipient may suspend the cooperative agreement for a mutually agreeable period of time, if an assessment is required to determine whether the agreement should be terminated.

(b) *Termination.*—(1) A cooperative agreement provides both NASA and the recipient the ability to terminate the

Agreement if it is in their best interests to do so, by giving the other party prior written notice. Upon receipt of a notice of termination, the receiving party shall take immediate steps to stop the accrual of any additional obligations, which might require payment.

(2) NASA may, for example, terminate the Agreement if the recipient is not making anticipated technical progress, if the recipient materially changes the objectives of the agreement, or if appropriated funds are not available to support the program.

(3) Similarly, the recipient may terminate the agreement if, for example, technical progress is not being made, if the commercial recipient shifts its technical emphasis, or if other technological advances have made the effort obsolete.

(4) If the cooperative agreement is terminated by either NASA or the recipient and NASA elects to continue the project with a party other than the recipient, the right of the government to use data first produced by either NASA or the recipient in the performance of this agreement is covered by § 1274.905(b). See § 1274.208(l)(6) to assure that appropriate language is contained in § 1274.905(b).

### **Subpart 1274.8—Post-Award/ Administrative Requirements**

#### **1274.801 Adjustments to performance costs.**

In order to accomplish program objectives, there may be occasions where additional contributions (cash and/or in-kind contributions) by NASA and the recipient beyond the initial agreement may be needed. There may also be occasions where actual costs of NASA and the recipient may be less than initially agreed. In cases where program costs are adjusted, prior to execution of a modification to the agreement, mutual agreement between NASA and the Recipient shall also be reached on the corresponding changes in program requirements such as schedule, work statements and milestone payments. Funding for any work required beyond the initial funding level of the cooperative agreement, shall require submission by the Recipient of a detailed proposal to the Agreement Officer. Prior to execution of a modification increasing NASA's cost share or funding levels, detailed cost analysis techniques may be applied, which may include requests for audits services and/or application of other pricing support techniques.



**1274.802 Modifications.**

Modifications to the cooperative agreement, in particular, modifications that affect funding, milestone payments, program schedule and statement of work requirements shall be executed on a bilateral basis.

**1274.803 Closeout procedures.**

(a) Recipients shall submit, within 90 calendar days after the date of completion of the cooperative agreement, all financial, performance, and other reports as required by the terms and conditions of the award. Extensions may be approved when requested by the recipient.

(b) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with § 1274.923.

**1274.804 Subsequent adjustments and continuing responsibilities.**

The closeout of an award does not affect any of the following:

(a) Audit requirements in § 1274.932.

(b) Government Furnished and Contractor Acquired Property requirements in §§ 1274.401 and 1274.402.

(c) Records retention as required in § 1274.601.

**Subpart 1274.9—Other provisions and Special Conditions****1274.901 Other provisions and special conditions.**

Where applicable, the provisions set forth in this subpart are to be incorporated in and made a part of all cooperative agreements with commercial firms. When included, the provisions at § 1274.902 through § 1274.909 and the provisions at § 1274.933 through § 1274.942 are to be incorporated in full text substantially as stated in this regulation. When required, the provisions at § 1274.910 through § 1274.932, may be incorporated by reference in an enclosure to each cooperative agreement. For inclusion of provisions in subcontracts, see Exhibit A of this part, and § 1274.925.

**§ 1274.902 Purpose.****Purpose (XX/XX)**

The purpose of this cooperative agreement is to conduct a shared resource project that will lead to \_\_\_\_\_. This cooperative agreement will advance the technology developments and research which have been performed on \_\_\_\_\_. The specific objective is to \_\_\_\_\_. This work will culminate in \_\_\_\_\_.  
(End of provision)

**§ 1274.903 Responsibilities.****Responsibilities (XX/XX)**

(a) This Cooperative Agreement will include substantial NASA participation during performance of the effort. NASA and the Recipient agree to the following Responsibilities, a statement of cooperative interactions to occur during the performance of this effort. NASA and the Recipient shall exert all reasonable efforts to fulfill the responsibilities stated below.

(b) NASA Responsibilities. The following NASA responsibilities are hereby set forth effective upon the start date, which unless stated otherwise, shall be the execution date of this bilateral Cooperative Agreement. The end date stated below, may be changed by a written bilateral modification:

Responsibilities  
Start Date/End Date

(c) Recipient Responsibilities. The Recipient shall be responsible for particular aspects of project performance as set forth in the technical proposal dated \_\_\_\_\_, attached hereto (or Statement of Work dated \_\_\_\_\_, attached hereto). The following responsibilities are hereby set forth effective upon the start date, which unless stated otherwise, shall be the execution date of this bilateral Cooperative Agreement. The end date stated below, may be changed by a written bilateral modification:

Responsibilities  
Start Date/End Date

(d) Since NASA contractors may obtain certain intellectual property rights arising from work for NASA in support of this agreement, NASA will inform Recipient whenever NASA intends to use NASA contractors to perform technical engineering services in support of this agreement.

(e) Unless the Cooperative Agreement is terminated by the parties, end date can only be changed by execution of a bilateral modification  
(End of provision)

**§ 1274.904 Resource sharing requirements.****Resource Sharing Requirements (XX/XX)**

Where NASA and other Government agencies are involved in the cooperative agreement, "NASA" shall also mean "Federal Government".

(a) NASA and the Recipient will share in providing the resources necessary to perform the agreement. NASA funding and non-cash contributions (personnel, equipment, facilities, etc.) and the dollar value of the Recipient's cash and/or non-cash contribution will be on a \_\_\_\_\_ (NASA)-\_\_\_\_\_ (Recipient) basis. Criteria and procedures for the allowability and allocability of cash and non-cash contributions shall be governed by FAR Parts 30 and 31, and NFS Parts 1830 and 1831.

(b) The Recipient's share shall not be charged to the Government under this Agreement or under any other contract, grant, or cooperative agreement, except to the extent that the Recipient's contribution may be allowable IR&D costs pursuant to FAR 31.205–18(e).

(End of provision)

**§ 1274.905 Rights in data.**

As noted in 1274.208(l)(1), the following provision assumes a substantially equal cost sharing relationship where collaborative research, experimental, developmental, engineering, demonstration, or design activities are to be carried out, such that it is likely that "proprietary" information will be developed and/or exchanged under the agreement. If cost sharing is unequal or no extensive research, experimental, developmental, engineering, demonstration, or design activities are likely, a different set of provisions may be appropriate. The Agreement Officer is expected to complete and/or select the appropriate bracketed language under the provision for those paragraphs dealing with data first produced under the cooperative agreement. In addition, the Agreement Officer may, in consultation with the Center's Patent or Intellectual Property Counsel, tailor the provision to fit the particular circumstances of the program and/or the recipient's need to protect specific proprietary information.

**Rights in Data (XX/XX)****(a) Definitions**

*Data*, means recorded information, regardless of form, the media on which it may be recorded, or the method of recording. The term includes, but is not limited to, data of a scientific or technical nature, computer software and documentation thereof, and data comprising commercial and financial information.

**(b) Data Categories**

(1) *General*: Data exchanged between NASA and Recipient under this cooperative agreement will be exchanged without restriction as to its disclosure, use or duplication except as otherwise provided below in this provision.

(2) *Background Data*: In the event it is necessary for Recipient to furnish NASA with Data which existed prior to, or produced outside of, this cooperative agreement, and such Data embodies trade secrets or comprises commercial or financial information which is privileged or confidential, and such Data is so identified with a suitable notice or legend, the Data will be maintained in confidence and disclosed and used by NASA and its contractors (under suitable protective conditions) only for the purpose of carrying out NASA's responsibilities under this cooperative agreement. Upon completion of activities under this agreement, such Data will be disposed of as requested by Recipient.

(3) *Data first produced by Recipient*: In the event Data first produced by Recipient in carrying out Recipient's responsibilities under this cooperative agreement is furnished to NASA, and Recipient considers such Data to embody trade secrets or to

comprise commercial or financial information which is privileged or confidential, and such Data is so identified with a suitable notice or legend, the Data will be maintained in confidence for a period of [insert "two" to "five"] years after development of the data and be disclosed and used by ["NASA" or "the Government," as appropriate] and its contractors (under suitable protective conditions) only for [insert appropriate purpose; for example: experimental; evaluation; research; development, etc.] by or on behalf of ["NASA" or "the Government" as appropriate] during that period. In order that ["NASA" or "the Government", as appropriate] and its contractors may exercise the right to use such Data for the purposes designated above, NASA, upon request to the Recipient, shall have the right to review and request delivery of Data first produced by Recipient. Delivery shall be made within a time period specified by NASA.

(4) *Data first produced by NASA:* As to Data first produced by NASA in carrying out NASA's responsibilities under this cooperative agreement and which Data would embody trade secrets or would comprise commercial or financial information that is privileged or confidential if it had been obtained from the Recipient, will be marked with an appropriate legend and maintained in confidence for an agreed to period of up to ( ) years [INSERT A PERIOD UP TO 5 YEARS] after development of the information, with the express understanding that during the aforesaid period such Data may be disclosed and used (under suitable protective conditions) by or on behalf of the Government for Government purposes only, and thereafter for any purpose whatsoever without restriction on disclosure and use. Recipient agrees not to disclose such Data to any third party without NASA's written approval until the aforementioned restricted period expires. Use of this data under a separate cooperative agreement or contract issued to a party other than the Recipient for the purpose of continuing the project in the event this cooperative agreement is terminated by either party shall constitute a government purpose.

(5) Copyright—(i) In the event Data is exchanged with a notice indicating the Data is protected under copyright as a published copyrighted work, or are deposited for registration as a published work in the U.S. Copyright Office, the following paid-up licenses shall apply:

(A) If it is indicated on the Data that the Data existed prior to, or was produced outside of, this agreement, the receiving party and others acting on its behalf, may reproduce, distribute, and prepare derivative works for the purpose of carrying out the receiving party's responsibilities under this cooperative agreement; and

(B) If the furnished Data does not contain the indication of paragraph (b)(5)(i)(A) of this section, it will be assumed that the Data was first produced under this agreement, and the receiving party and others acting on its behalf, shall be granted a paid up, nonexclusive, irrevocable, world-wide license for all such Data to reproduce, distribute copies to the public, prepare

derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the receiving party. For Data that is computer software, the right to distribute shall be limited to potential users in the United States.

(ii) When claim is made to copyright, the Recipient shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship to the data when and if the data are delivered to the Government.

(6) *Oral and visual information.* If information which the Recipient considers to embody trade secrets or to comprise commercial or financial information which is privileged or confidential is disclosed orally or visually to NASA, such information must be reduced to tangible, recorded form (i.e., converted into Data as defined herein), identified and marked with a suitable notice or legend, and furnished to NASA within 10 days after such oral or visual disclosure, or NASA shall have no duty to limit or restrict, and shall not incur any liability for, any disclosure and use of such information.

(7) *Disclaimer of Liability.* Notwithstanding the above, NASA shall not be restricted in, nor incur any liability for, the disclosure and use of:

(i) Data not identified with a suitable notice or legend as set in paragraph (b)(2) of this section; nor

(ii) Information contained in any Data for which disclosure and use is restricted under paragraphs (b)(2) or (3) of this section, if such information is or becomes generally known without breach of the above, is known to or is generated by NASA independently of carrying out responsibilities under this agreement, is rightfully received from a third party without restriction, or is included in data which Participant has, or is required to furnish to the U.S. Government without restriction on disclosure and use.

(c) *Marking of Data.* Any Data delivered under this cooperative agreement, by NASA or the Recipient, shall be marked with a suitable notice or legend indicating the data was generated under this cooperative agreement.

(d) *Lower Tier Agreements.* The Recipient shall include this provision, suitably modified to identify the parties, in all subcontracts or lower tier agreements, regardless of tier, for experimental, developmental, or research work.

(End of provision)

#### **1274.906 Designation of New Technology Representative and Patent Representative.**

##### **Designation of New Technology Representative and Patent Representative (XX/XX)**

(a) For purposes of administration of the clause of this cooperative agreement entitled "PATENT RIGHTS—RETENTION BY THE CONTRACTOR (LARGE BUSINESS)" or "PATENT RIGHTS—RETENTION BY THE CONTRACTOR (SMALL BUSINESS)" the following named representatives are hereby designated by the Agreement Officer to administer such clause:

*Title/Office Code/Address*  
New Technology

Representative  
Patent  
Representative

(b) Reports of reportable items, and disclosure of subject inventions, interim reports, final reports, utilization reports, and other reports required by the clause, as well as any correspondence with respect to such matters, should be directed to the New Technology Representative unless transmitted in response to correspondence or request from the Patent Representative. Inquiries or requests regarding disposition of rights, election of rights, or related matters should be directed to the Patent Representative. This clause shall be included in any subcontract hereunder requiring "PATENT RIGHTS—RETENTION BY THE CONTRACTOR (LARGE BUSINESS)" clause or "PATENT RIGHTS -RETENTION BY THE CONTRACTOR (SMALL BUSINESS)" clause, unless otherwise authorized or directed by the Agreement Officer. The respective responsibilities and authorities of the above-named representatives are set forth in NFS 1827.305-370.

(End of provision)

#### **§ 1274.907 Disputes.**

##### **Disputes (XX/XX)**

(a) In the event that a disagreement arises, representatives of the parties shall enter into discussions in good faith and in a timely and cooperative manner to seek resolution. If these discussions do not result in a satisfactory solution, the aggrieved party may seek a decision from the Dispute Resolution Official under paragraph (b) of this provision. This request must be presented no more than (3) three months after the events giving rise to the disagreement have occurred.

(b) The aggrieved party may submit a written request for a decision to the Center Ombudsman, who is designated as the Dispute Resolution Official. The written request shall include a statement of the relevant facts, a discussion of the unresolved issues, and a specification of the clarification, relief, or remedy sought. A copy of this written request and all accompanying materials must be provided to the other party at the same time. The other party shall submit a written position on the matters in dispute within thirty (30) calendar days after receiving this notification that a decision has been requested. The Dispute Resolution Official shall conduct a review of the matters in dispute and render a decision in writing within thirty (30) calendar days of receipt of such written position.

(End of provision)

#### **§ 1274.908 Milestone payments.**

##### **Milestone Payments (XX/XX)**

(a) By submission of the first invoice, the Recipient is certifying that it has an established accounting system which complies with generally accepted accounting principles, with the requirements of this agreement, and that appropriate arrangements have been made for receiving, distributing, and accounting for Federal funds received under this agreement.

(b) Payments will be made upon the following milestones: [The schedule for

payments may be based upon the Recipient's completion of specific tasks, submission of specified reports, or whatever is appropriate.]

*Date/Payment Milestone/Amount*

(c) Upon submission by the recipient of invoices in accordance with the provisions of the agreement and upon certification by NASA of completion of the payable milestone, the Agreement Officer shall authorize payment. Payment shall be made within 30 calendar days after receipt of proper invoice. Payment shall be considered as being made on the date of electronic funds transfer. A proper invoice must include the following:

- (i) Name and address of the Recipient.
- (ii) Invoice date (The Recipient is encouraged to date invoices as close as possible to the date of the mailing or transmission).
- (iii) Cooperative agreement number.
- (iv) Description, milestone, and extended price of efforts/tasks performed.
- (v) Payment terms.
- (vi) Name and address of Recipient official to whom payment is to be sent. (Must be the same as that in the cooperative agreement or in a proper notice of assignment).
- (vii) Name (where practicable), title, phone number, and mailing address of the person to be notified in the event of a defective invoice.
- (viii) Any other information or documentation required by the cooperative agreement.
- (ix) Taxpayer identification number (TIN).
- (x) While not required, the recipient is strongly encouraged to assign an identification number to each invoice.
- (d) A payment milestone may be successfully completed in advance of the date appearing in paragraph (b) of this section. However, payment shall not be made prior to that date without the written consent of the Agreement Officer.
- (e) The recipient is not entitled to partial payment for partial completion of a payment milestone.
- (f) Unless approved by the Agreement Officer, all preceding payment milestones must be completed before payment can be made for the next payment milestone.
- (g)(i) If the Recipient is authorized to submit invoices directly to the NASA paying office, the original invoice should be submitted to:  
[Insert the mailing address for submission of cost vouchers]
- (ii) If the Recipient is not authorized to submit invoices directly to the NASA paying office, the original invoice should be submitted to the Agreement Officer for certification.
- (iii) Copies of the recipient's invoice should be submitted to the following offices:  
(A) Copy 1—NASA Agreement Officer.  
(B) Copy 2—Auditor.  
(C) Copy 3—Contract administration office.  
(D) Copy 4—Project management office.  
(E) Copy 5—Other recipients as designated by the Agreement Officer.  
(End of provision)

## **§ 1274.909 Term of agreement.**

### **Term of Agreement (XX/XX)**

(a) The agreement commences on the effective date indicated on the attached cover sheet and continues until the expiration date indicated on the attached cover sheet unless terminated by either party. If all resources are expended prior to the expiration date of the agreement, the parties have no obligation to continue performance and may elect to cease at that point. The parties may extend the expiration date if additional time is required to complete the milestones at no increase in Government resources. Requests for approval for no-cost extensions must be forwarded to the NASA Agreement Officer no later than ten days prior to the expiration of the award to be considered.

(b) Provisions of this Agreement, which, by their express terms or by necessary implication, apply for periods of time other than that specified as the agreement term, shall be given effect, notwithstanding expiration of the term of the agreement.  
(End of provision)

## **§ 1274.910 Authority.**

### **Authority (XX/XX)**

This is a cooperative agreement as defined in 31 U.S.C. 6305 (the Chiles Act) and is entered into pursuant to the authority of 42 U.S.C. 2451, et seq. (the Space Act).  
(End of provision)

## **§ 1274.911 Patent rights.**

### **Patent Rights (XX/XX)**

- (a) Definitions.
  - (1) "Administrator" means the Administrator or Deputy Administrator of NASA.
  - (2) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.
  - (3) "Made" when used in relation to any invention means the conception or first actual reduction to practice such invention.
  - (4) "Nonprofit organization" means a domestic university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any domestic nonprofit scientific or educational organization qualified under a State nonprofit organization statute.
  - (5) "Practical application" means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.
  - (6) "Recipient" means:
    - (i) The signatory Recipient party or parties or;
    - (ii) The Consortium, where a Consortium has been formed for carrying out Recipient responsibilities under this agreement.

(7) "Small Business Firm" means a domestic small business concern as defined at 15 U.S.C. 632 and implementing regulations of the Administrator of the Small Business Administration. (For the purpose of this definition, the size standard contained in 13 CFR 121.901 through 121.911 will be used.)

(8) "Subject Invention" means any invention of a Recipient and/or Government employee conceived or first actually reduced to practice in the performance of work under this Agreement.

(9) "Manufactured substantially in the United States" means the product must have over 50 percent of its components manufactured in the United States. This requirement is met if the cost to the Recipient of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components required to make the product. (In making this determination only the product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with FAR 25.102(a)(3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

(b) Allocation of Principal Rights.

(1) Recipient Inventions. For other than Small Business Firm or Nonprofit organization Recipients, the "PATENT RIGHTS—RETENTION BY RECIPIENT (LARGE BUSINESS)" provision applies. For Small Business Firm and Nonprofit organization Recipients, the "PATENT RIGHTS—RETENTION BY RECIPIENT (SMALL BUSINESS)" provision applies.

(2) NASA Inventions. NASA will use reasonable efforts to report inventions made by NASA employees as a consequence of, or which bear a direct relation to, the performance of specified NASA activities under this cooperative agreement and, upon timely request, NASA will use its best efforts to grant the Recipient or designated Consortium Member (if applicable) the first option to acquire either an exclusive or partially exclusive, revocable, royalty-bearing license, on terms to be subsequently negotiated, for any patent applications and patents covering such inventions, and subject to the license reserved in paragraph (b)(5)(i) of this section. Upon application in compliance with 37 CFR part 404—Licensing of Government Owned Inventions, the Recipient or each Consortium Member (if applicable), shall be granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title. Each nonexclusive license may extend to subsidiaries and affiliates, if any, within the corporate structure of the licensee and includes the right to grant sublicenses of the same scope to the extent the licensee was legally obligated to do so at the time the cooperative agreement was signed.

(3) NASA Contractor Inventions. In the event NASA contractors are tasked to perform work in support of specified NASA activities under this cooperative agreement and inventions are made by contractor employees, the recipient will normally retain title to its employee inventions in accordance with 35 U.S.C. 202, 14 CFR part 1245, and E.O. 12591. In the event the recipient decides not to pursue right to title in any such invention and NASA obtains title to such inventions, NASA will use reasonable efforts to report such inventions and, upon timely request, NASA will use its best efforts to grant the Recipient or designated Consortium Member (if applicable) the first option to acquire either an exclusive or partially exclusive, revocable, royalty-bearing license, upon terms to be subsequently negotiated, for any patent applications and patents covering such inventions, and subject to the license reserved in paragraph (b)(5)(ii) of this section. Upon application in compliance with 37 CFR part 404—Licensing of Government Owned Inventions, the Recipient or each Consortium Member (if applicable), shall be granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title. Each nonexclusive license may extend to subsidiaries and affiliates, if any, within the corporate structure of the licensee and includes the right to grant sublicenses of the same scope to the extent the licensee was legally obligated to do so at the time the cooperative agreement was signed.

(4) Joint NASA and Recipient Inventions. NASA and Recipient agree to use reasonable efforts to identify and report to each other any inventions made jointly between NASA employees (or employees of NASA contractors) and employees of Recipient.

(i) For other than small business firms and nonprofit organizations the Administrator may agree that the United States will refrain from exercising its undivided interest in a manner inconsistent with Recipient's commercial interest and to cooperate with Recipient in obtaining patent protection on its undivided interest on any waived inventions subject, however, to the condition that Recipient makes its best efforts to bring the invention to the point of practical application at the earliest practicable time. In the event that the Administrator determines that such efforts are not undertaken, the Administrator may void NASA's agreement to refrain from exercising its undivided interest and grant licenses for the practice of the invention so as to further its development. In the event that the Administrator decides to void NASA's agreement to refrain from exercising its undivided interest and grant licenses for this reason, notice shall be given to the Inventions and Contributions Board as to why such action should not be taken. Either alternative will be subject to the applicable license or licenses reserved in paragraph (b)(5) of this section.

(ii) For small business firms and nonprofit organization, NASA may assign or transfer whatever rights it may acquire in a subject invention from its employee to the Recipient as authorized by 35 U.S.C. 202(e).

(5) Minimum rights reserved by the Government. Any license or assignment granted Recipient pursuant to paragraphs (b)(2), (b)(3), or (b)(4) of this section will be subject to the reservation of the following licenses:

(i) As to inventions made solely or jointly by NASA employees, the irrevocable, royalty-free right of the Government of the United States to practice and have practiced the invention by or on behalf of the United States; and

(ii) As to inventions made solely by, or jointly with, employees of NASA contractors, the rights in the Government of the United States as set forth in paragraph (b)(5)(i) of this section, as well as the revocable, nonexclusive, royalty-free license in the contractor as set forth in 14 CFR 1245.108.

(6) Preference for United States manufacture. The Recipient agrees that any products embodying subject inventions or produced through the use of subject inventions shall be manufactured substantially in the United States. However, in individual cases, the requirement to manufacture substantially in the United States may be waived by the Associate Administrator for Procurement (Code HS) with the concurrence of the Associate General Counsel for Intellectual Property upon a showing by the Recipient that under the circumstances domestic manufacture is not commercially feasible.

(7) Work performed by the Recipient under this cooperative agreement is considered undertaken to carry out a public purpose of support and/or stimulation rather than for acquiring property or services for the direct benefit or use of the Government. Accordingly, such work by the Recipient is not considered "by or for the United States" and the Government assumes no liability for infringement by the Recipient under 28 U.S.C. 1498.

(End of provision)

#### **§ 1274.912 Patent Rights—Retention by the recipient (large business).**

##### **Patent Rights—Retention by the Recipient (Large Business) (XX/XX)**

(a) Definitions.

(1) "Administrator," as used in this clause, means the Administrator of the National Aeronautics and Space Administration (NASA) or duly authorized representative.

(2) "Invention," as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the U.S.C.

(3) "Made," as used in relation to any invention, means the conception or first actual reduction to practice such invention.

(4) "Nonprofit organization," as used in this clause, means a domestic university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any domestic nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

(5) "Practical application," as used in this clause, means to manufacture, in the case of

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

(6) "Reportable item," as used in this clause, means any invention, discovery, improvement, or innovation of the Recipient, whether or not the same is or may be patentable or otherwise protectable under Title 35 of the United States Code, conceived or first actually reduced to practice in the performance of any work under this contract or in the performance of any work that is reimbursable under any clause in this contract providing for reimbursement of costs incurred prior to the effective date of this contract.

(7) "Small business firm," as used in this clause, means a domestic small business concern as defined at 15 U.S.C. 632 and implementing regulations of the Administrator of the Small Business Administration. (For the purpose of this definition, the size standard contained in 13 CFR 121.901 through 121.911 will be used.)

(8) "Subject invention," as used in this clause, means any reportable item which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

(9) "Manufactured substantially in the United States" means the product must have over 50 percent of its components manufactured in the United States. This requirement is met if the cost to the Recipient of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components required to make the product. (In making this determination only the product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with Federal Acquisition Regulation 25.102(a)(3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

(b) Allocation of principal rights—(1) Presumption of title. (i) Any reportable item that the Administrator considers to be a subject invention shall be presumed to have been made in the manner specified in paragraph (1) or (2) of section 305(a) of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2457(a)) (hereinafter called "the Act"), and the above presumption shall be conclusive unless at the time of reporting the reportable item the Recipient submits to the Agreement Officer a written statement, containing supporting details, demonstrating that the reportable item was not made in the manner specified in paragraph (1) or (2) of section 305(a) of the Act.

(ii) Regardless of whether title to a given subject invention would otherwise be subject

to an advance waiver or is the subject of a petition for waiver, the Recipient may nevertheless file the statement described in paragraph (b)(1)(i) of this section. The Administrator will review the information furnished by the Recipient in any such statement and any other available information relating to the circumstances surrounding the making of the subject invention and will notify the Recipient whether the Administrator has determined that the subject invention was made in the manner specified in paragraph (1) or (2) of section 305(a) of the Act.

(2) Property rights in subject inventions. Each subject invention for which the presumption of paragraph (b)(1)(i) of this section is conclusive or for which there has been a determination that it was made in the manner specified in paragraph (1) or (2) of section 305(a) of the Act shall be the exclusive property of the United States as represented by NASA unless the Administrator waives all or any part of the rights of the United States, as provided in paragraph (b)(3) of this section.

(3) Waiver of rights.—(i) Section 305(f) of the Act provides for the promulgation of regulations by which the Administrator may waive the rights of the United States with respect to any invention or class of inventions made or that may be made under conditions specified in paragraph (1) or (2) of section 305(a) of the Act. The promulgated NASA Patent Waiver Regulations, 14 CFR part 1245, subpart 1, have adopted the Presidential memorandum on Government Patent Policy of February 18, 1983, as a guide in acting on petitions (requests) for such waiver of rights.

(ii) As provided in 14 CFR part 1245, subpart 1, Recipients may petition, either prior to execution of the Agreement or within 30 days after execution of the Agreement, for advance waiver of rights to any or all of the inventions that may be made under an Agreement. If such a petition is not submitted, or if after submission it is denied, the Recipient (or an employee inventor of the Recipient may petition for waiver of rights to an identified subject invention within eight months of first disclosure of invention in accordance with paragraph (e)(2) of this section or within such longer period as may be authorized in accordance with 14 CFR 1245.105. Further procedures are provided in the REQUESTS FOR WAIVER OF RIGHTS—LARGE BUSINESS provision.

(c) Minimum rights reserved by the Government—(1) With respect to each Recipient subject invention for which a waiver of rights is applicable in accordance with 14 CFR part 1245, subpart 1, the Government reserves—

(i) An irrevocable, royalty-free license for the practice of such invention throughout the world by or on behalf of the United States or any foreign government in accordance with any treaty or agreement with the United States; and

(ii) Such other rights as stated in 14 CFR 1245.107.

(2) Nothing contained in this paragraph shall be considered to grant to the Government any rights with respect to any invention other than a subject invention.

(d) Minimum rights to the Recipient—(1) The Recipient is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a Recipient subject invention and any resulting patent in which the Government acquires title, unless the Recipient fails to disclose the subject invention within the times specified in paragraph (e)(2) of this section. The Recipient's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Recipient is a party and includes the right to grant sublicenses of the same scope to the extent the Recipient was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the Administrator except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Recipient's domestic license may be revoked or modified by the Administrator to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with 14 CFR part 1245, subpart 3, Licensing of NASA Inventions. This license will not be revoked in that field of use or the geographical areas in which the Recipient has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the Administrator to the extent the Recipient, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the Recipient will be provided a written notice of the Administrator's intention to revoke or modify the license, and the Recipient will be allowed 30 days (or such other time as may be authorized by the Administrator for good cause shown by the Recipient) after the notice to show cause why the license should not be revoked or modified. The Recipient has the right to appeal, in accordance with 14 CFR 1245.112, any decision concerning the revocation or modification of its license.

(e) Invention identification, disclosures, and reports—(1) The Recipient shall establish and maintain active and effective procedures to assure that reportable items are promptly identified and disclosed to Recipient personnel responsible for the administration of this clause within six months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this contract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of the reportable items, and records that show that the procedures for identifying and disclosing reportable items are followed. Upon request, the Recipient shall furnish the Agreement Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Recipient will disclose each reportable item to the Agreement Officer

within two months after the inventor discloses it in writing to Recipient personnel responsible for the administration of this clause or, if earlier, within six months after the Recipient becomes aware that a reportable item has been made, but in any event for subject inventions before any on sale, public use, or publication of such invention known to the Recipient. The disclosure to the agency shall be in the form of a written report and shall identify the Agreement under which the reportable item was made and the inventor(s) or innovator(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the reportable item. The disclosure shall also identify any publication, on sale, or public use of any subject invention and whether a manuscript describing such invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the Recipient will promptly notify the agency of the acceptance of any manuscript describing a subject invention for publication or of any on sale or public use planned by the Recipient for such invention.

(3) The Recipient shall furnish the Agreement Officer the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Agreement Officer) from the date of the Agreement, listing reportable items during that period, and certifying that all reportable items have been disclosed (or that there are no such inventions) and that the procedures required by paragraph (e)(1) of this section have been followed.

(ii) A final report, within three months after completion of the work, listing all reportable items or certifying that there were no such reportable items, and listing all subcontracts at any tier containing a patent rights clause or certifying that there were no such subcontracts.

(4) The Recipient agrees, upon written request of the Agreement Officer, to furnish additional technical and other information available to the Recipient as is necessary for the preparation of a patent application on a subject invention and for the prosecution of the patent application, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions.

(5) The Recipient agrees, subject to 48 CFR (FAR) 27.302(j), that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) Examination of records relating to inventions—(1) The Agreement Officer or any authorized representative shall, pursuant to the Retention and Examination of Records provision of this cooperative agreement, have the right to examine any books (including laboratory notebooks), records, and documents of the Recipient relating to the conception or first actual reduction to

practice of inventions in the same field of technology as the work under this contract to determine whether—

(i) Any such inventions are subject inventions;

(ii) The Recipient has established and maintained the procedures required by paragraph (e)(1) of this section; and

(iii) The Recipient and its inventors have complied with the procedures.

(2) If the Agreement Officer learns of an unreported Recipient invention that the Agreement Officer believes may be a subject invention, the Recipient may be required to disclose the invention to the agency for a determination of ownership rights.

(3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) Subcontracts—(1) Unless otherwise authorized or directed by the Agreement Officer, the Recipient shall—

(i) Include this Clause Patent Rights—Retention by the Recipient—(Large Business) (suitably modified to identify the parties) in any subcontract hereunder (regardless of tier) with other than a small business firm or nonprofit organization for the performance of experimental, developmental, or research work; and

(ii) Include the clause Patent Right—Retention by the Recipient—(Small Business) (suitably modified to identify the parties) in any subcontract hereunder (regardless of tier) with a small business firm or nonprofit organization for the performance of experimental, developmental, or research work.

(2) In the event of a refusal by a prospective subcontractor to accept such a clause the Recipient—

(i) Shall promptly submit a written notice to the Agreement Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Agreement Officer.

(3) The Recipient shall promptly notify the Agreement Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Agreement Officer, the Recipient shall furnish a copy of such subcontract, and, no more frequently than annually, a listing of the subcontracts that have been awarded.

(4) The subcontractor will retain all rights provided for the Recipient in the clause of paragraph (g)(1)(i) or (1)(ii) of this section, whichever is included in the subcontract, and the Recipient will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(5) Notwithstanding paragraph (g)(4) of this section, and in recognition of the contractor's substantial contribution of funds, facilities and/or equipment to the work performed under this cooperative agreement, the Recipient is authorized, subject to the rights

of NASA set forth elsewhere in this clause, to:

(i) Acquire by negotiation and mutual agreement rights to a subcontractor's subject inventions as the Recipient may deem necessary to obtaining and maintaining of such private support; and

(ii) Request, in the event of inability to reach agreement pursuant to paragraph (g)(5)(i) of this section, that NASA invoke exceptional circumstances as necessary pursuant to 37 CFR 401.3(a)(2) if the prospective subcontractor is a small business firm or organization, or for all other organizations, request that such rights for the Recipient be included as an additional reservation in a waiver granted pursuant to 14 CFR part 1245, subpart 1. Any such requests to NASA should be prepared in consideration of the following guidance and submitted to the contract officer.

(A) *Exceptional circumstances*: A request that NASA make an "exceptional circumstances" determination pursuant to 37 CFR 401.3(a)(2) must state the scope of rights sought by the Recipient pursuant to such determination; identify the proposed subcontractor and the work to be performed under the subcontract; and state the need for the determination.

(B) *Waiver petition*: The subcontractor should be advised that unless it requests a waiver of title pursuant to the NASA Patent Waiver Regulations (14 CFR part 1245, subpart 1), NASA will acquire title to the subject invention (42 U.S.C. 2457, as amended, sec. 305). If a waiver is not requested or granted, the Recipient may request a license from NASA (see licensing of NASA inventions, 14 CFR Part 1245, subpart 3). A subcontractor requesting a waiver must follow the procedures set forth in the attached clause REQUESTS FOR WAIVER OF RIGHTS—LARGE BUSINESS.

(h) *Preference for United States manufacture*. The Recipient agrees that any products embodying subject inventions or produced through the use of subject inventions shall be manufactured substantially in the United States. However, in individual cases, the requirement to manufacture substantially in the United States may be waived by the Associate Administrator for Procurement (Code HS) with the concurrence of the Associate General Counsel for Intellectual Property upon a showing by the Recipient that under the circumstances domestic manufacture is not commercially feasible.

(i) *March-in rights*. The Recipient agrees that, with respect to any subject invention in which it has acquired title, NASA has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency to require the Recipient, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Subcontractor, assignee, or exclusive licensee refuses such a request NASA has the right to grant such a license itself if the Federal agency determines that—

(1) Such action is necessary because the Recipient or assignee has not taken, or is not

expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Recipient, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Recipient, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(End of provision)

#### **§ 1274.913 Patent rights—retention by the recipient (small business).**

##### **Patent Rights—Retention by the Recipient (Small Business) (XX/XX)**

(a) Definitions—

(1) "Invention," as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the U.S.C.

(2) "Made," as used in this clause, when used in relation to any invention means the conception or first actual reduction to practice such invention.

(3) "Nonprofit organization," as used in this clause, means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

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

(5) "Small business firm," as used in this clause, means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.901 through 121.911 will be used.

(6) "Subject invention," as used in this clause, means any invention of the Subcontractor conceived or first actually reduced to practice in the performance of work under this Agreement.

(7) "Manufactured substantially in the United States" means the product must have over 50 percent of its components manufactured in the United States. This requirement is met if the cost to the Recipient

of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components required to make the product. (In making this determination only the product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with FAR 25.102(a)(3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

(b) Allocation of principal rights. The Recipient may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Recipient retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) Invention disclosure, election of title, and filing of patent application by Recipient—(1) The Recipient will disclose each subject invention to NASA within two months after the inventor discloses it in writing to Recipient personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the Recipient will promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any sale or public use planned by the Recipient.

(2) The Recipient will elect in writing whether or not to retain title to any such invention by notifying NASA within two years of disclosure to the Federal agency. However, in any case where publication, on sale or public use has initiated the one-year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Recipient will file its initial patent application on a subject invention to which it elects to retain title within one year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Recipient will file patent

applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application of six months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure election, and filing under paragraphs (c)(1), (2), and (3) of this section may, at the discretion of the agency, be granted.

(d) Conditions when the Government may obtain title. The Recipient will convey to NASA, upon written request, title to any subject invention—(1) If the Recipient fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this section, or elects not to retain title; provided, that the agency may only request title within 60 days after learning of the failure of the Recipient to disclose or elect within the specified times.

(2) In those countries in which the Recipient fails to file patent applications within the times specified in paragraph (c) of this section; provided, however, that if the Recipient has filed a patent application in a country after the times specified in paragraph (c) of this section, but prior to its receipt of the written request of the Federal agency, the Recipient shall continue to retain title in that country.

(3) In any country in which the Recipient decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum rights to Recipient and protection of the Recipient right to file—(1) The Recipient will retain a nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Recipient fails to disclose the invention within the times specified in paragraph (c) of this section. The Recipient's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the Recipient is a party and includes the right to grant sublicenses of the same scope to the extent the Recipient was legally obligated to do so at the time the agreement was awarded. The license is transferable only with the approval of NASA, except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by NASA to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and agency licensing regulations (if any). This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical application and continues to make the benefits of the invention reasonable accessible to the public. The license in any foreign country may be revoked or modified at the discretion of NASA to the extent the Subcontractor, its licensees, or the domestic

subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, NASA will furnish the Recipient a written notice of its intention to revoke or modify the license, and the Recipient will be allowed 30 days (or such other time as may be authorized by NASA for good cause shown by the Recipient) after the notice to show cause why the license should not be revoked or modified. The Recipient has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and part 1245, subpart 1, concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

(f) Recipient action to protect the Government's interest—(1) The Recipient agrees to execute or to have executed and promptly deliver to NASA all instruments necessary to:

(i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Subcontractor elects to retain title, and,

(ii) convey title to the Federal agency when requested under paragraph (d) of this section and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The Recipient agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient each subject invention made under contract in order that the Recipient can comply with the disclosure provisions of paragraph (c) of this section, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this section. The Recipient shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Recipient will notify NASA of any decisions not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Recipient agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention the following statement, "This invention was made with Government support under (identify the agreement) awarded by NASA. The Government has certain rights in the invention."

(5) The Recipient shall provide the Agreement Officer the following:

(i) A listing every 12 months (or such longer period as the Agreement Officer may



specify) from the date of the Agreement, of all subject inventions required to be disclosed during the period.

(ii) A final report prior to closeout of the Agreement listing all subject inventions or certifying that there were none.

(iii) Upon request, the filing date, serial number, and title, a copy of the patent application, and patent number and issue date for any subject invention in any country in which the Recipient has applied for patents.

(iv) An irrevocable power to inspect and make copies of the patent application file, by the Government, when a Federal Government employee is a co-inventor.

(g) Subcontracts—(1) Unless otherwise authorized or directed by the Agreement Officer, the Recipient shall—

(i) Include this clause (Patent Rights—Retention by the Recipient (Small Business)), suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization; and

(ii) Include in all other subcontracts, regardless of tier, for experimental, developmental, or research work the patent rights clause (Patent Rights—Retention by the Recipient (Large Business)).

(2) In the event of a refusal by a prospective subcontractor to accept such a clause the Recipient—

(i) Shall promptly submit a written notice to the Agreement Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Agreement Officer.

(3) The Recipient shall promptly notify the Agreement Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Agreement Officer, the Recipient shall furnish a copy of such subcontract, and, no more frequently than annually, a listing of the subcontracts that have been awarded.

(4) The subcontractor will retain all rights provided for the Recipient in the clause under paragraph (g)(1)(i) or (g)(1)(ii) of this section, whichever is included in the subcontract, and the Recipient will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(5) Notwithstanding paragraph (g)(4) of this section, and in recognition of the contractor's substantial contribution of funds, facilities and/or equipment to the work performed under this cooperative agreement, the Recipient is authorized, subject to the rights of NASA set forth elsewhere in this clause, to—

(i) Acquire by negotiation and mutual agreement rights to a subcontractor's subject inventions as the Recipient may deem necessary to obtaining and maintaining of such private support; and

(ii) Request, in the event of inability to reach agreement pursuant to paragraph

(g)(5)(i) of this section that NASA invoke exceptional circumstances as necessary pursuant to 37 CFR 401.3(a)(2) if the prospective subcontractor is a small business firm or organization, or for all other organizations, request that such rights for the Recipient be included as an additional reservation in a waiver granted pursuant to 14 CFR part 1245, subpart 1. Any such requests to NASA should be prepared in consideration of the following guidance and submitted to the contract office:

(A) *Exceptional circumstances:* A request that NASA make an "exceptional circumstances" determination pursuant to 37 CFR 401.3(a)(2) must state the scope of rights sought by the Recipient pursuant to such determination; identify the proposed subcontractor and the work to be performed under the subcontract; and state the need for the determination.

(B) *Waiver petition:* The subcontractor should be advised that unless it requests a waiver of title pursuant to the NASA Patent Waiver Regulations (14 CFR part 1245, subpart 1), NASA will acquire title to the subject invention (42 U.S.C. 2457, as amended, sec. 305). If a waiver is not requested or granted, the Recipient may request a license from NASA (see licensing of NASA inventions, 14 CFR Part 1245, Subpart 3). A subcontractor requesting a waiver must follow the procedures set forth in the REQUESTS FOR WAIVER OF RIGHTS—LARGE BUSINESS provision.

(h) Reporting on utilization of subject inventions. The Recipient agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Recipient or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Recipient, and such other data and information as the agency may reasonably specify. The Recipient also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceeding under-taken by the agency in accordance with paragraph (i) of this section. As required by 35 U.S.C. 202(c)(5), the agency agrees it will not disclose such information to persons outside the Government without permission of the Recipient.

(i) Preference for United States manufacture. The Recipient agrees that any products embodying subject inventions or produced through the use of subject inventions shall be manufactured substantially in the United States. However, in individual cases, the requirement to manufacture substantially in the United States may be waived by the Associate Administrator for Procurement (Code HS) with the concurrence of the Associate General Counsel for Intellectual Property upon a showing by the Recipient that under the circumstances domestic manufacture is not commercially feasible.

(j) March-in rights. The Recipient agrees that, with respect to any subject invention in which it has acquired title, NASA has the right in accordance with the procedures in 37

CFR 401.6 and any supplemental regulations of the agency to require the Recipient, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Subcontractor, assignee, or exclusive licensee refuses such a request NASA has the right to grant such a license itself if the Federal agency determines that—

(1) Such action is necessary because the Recipient or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Recipient, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Recipient, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this section has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) Special provisions for Agreements with nonprofit organizations. If the Recipient is a nonprofit organization, it agrees that:

(1) Rights to a subject invention in the United States may not be assigned without the approval of NASA, except where such assignment is made to an organization which has one of its primary functions the management of inventions; *provided*, that such assignee will be subject to the same provisions as the Recipient;

(2) The Recipient will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when NASA deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) The balance of any royalties or income earned by the Recipient with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and

(4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Recipient determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; *provided* that the Recipient is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Recipient. However, the Recipient agrees that the Secretary of

Commerce may review the Contractor's licensing program and decisions regarding small business applicants, and the Recipient will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Recipient could take reasonable steps to more effectively implement the requirements of this paragraph.

(1) Documentation submissions. A copy of all submissions or requests required by this clause, plus a copy of any reports, manuscripts, publications, or similar material bearing on patent matters, shall be sent to the installation Patent Counsel in addition to any other submission requirements in the cooperative agreement. If any reports contain information describing a "subject invention" for which the Recipient has elected or may elect title, NASA will use reasonable efforts to delay public release by NASA or publication by NASA in a NASA technical series, in order for a patent application to be filed, provided that the Recipient identify the information and the "subject invention" to which it relates at the time of submittal. If required by the Agreement Officer, the Recipient shall provide the filing date, serial number and title, a copy of the patent application, and a patent number and issue date for any "subject invention" in any country in which the Recipient has applied for patents.

(End of provision)

#### **§ 1274.914 Requests for waiver of rights—large business.**

##### **Requests For Waiver of Rights—Large Business (XX/XX)**

(a) In accordance with the NASA Patent Waiver Regulations, 14 CFR part 1245, subpart 1, waiver of rights to any or all inventions made or that may be made under a NASA agreement, contract or subcontract with other than a small business firm or a domestic nonprofit organization may be requested at different time periods. Advance waiver of rights to any or all inventions that may be made under a contract or subcontract may be requested prior to the execution of the agreement, contract or subcontract, or within 30 days after execution by the selected Recipient. In addition, waiver of rights to an identified invention made and reported under a agreement, contract or subcontract may be requested, even though a request for an advance waiver was not made or, if made, was not granted.

(b) Each request for waiver of rights shall be by petition to the Administrator and shall include an identification of the petitioner; place of business and address; if petitioner is represented by counsel, the name, address, and telephone number of the counsel; the signature of the petitioner or authorized representative; and the date of signature. No specific forms need be used, but the request should contain a positive statement that waiver of rights is being requested under the NASA Patent Waiver Regulations; a clear indication of whether the request is for an advance waiver or for a waiver of rights for an individual identified invention; whether foreign rights are also requested and, if so,

the countries, and a citation of the specific Section or Sections of the regulations under which such rights are requested; and the name, address, and telephone number of the party with whom to communicate when the request is acted upon. Requests for advance waiver of rights should, preferably, be included with the proposal, but in any event in advance of negotiations.

(c) Petitions for advance waiver, prior to agreement execution, must be submitted to the Agreement Officer. All other petitions will be submitted to the Patent Representative designated in the contract.

(d) Petitions submitted with proposals selected for negotiation of a agreement will be forwarded by the Contracting or Officer to the installation Patent Counsel for processing and then to the Inventions and Contributions Board. The Board will consider these petitions and where the Board makes the findings to support the waiver, the Board will recommend to the Administrator that waiver be granted, and will notify the petitioner and the Agreement Officer of the Administrator's determination. The Agreement Officer will be informed by the Board whenever there is insufficient time or information or other reasons to permit a decision to be made without unduly delaying the execution of the agreement. In the latter event, the petitioner will be so notified by the Agreement Officer. All other petitions will be processed by installation Patent Counsel and forwarded to the Board. The Board shall notify the petitioner of its action and if waiver is granted, the conditions, reservations, and obligations thereof will be included in the Instrument of Waiver. Whenever the Board notifies a petitioner of a recommendation adverse to, or different from, the waiver requested, the petitioner may request reconsideration under procedures set forth in the regulations.

(End of provision)

#### **§ 1274.915 Restrictions on sale or transfer of technology to foreign firms or institutions.**

##### **Restrictions on Sale or Transfer of Technology to Foreign Firms or Institutions (XX/XX)**

(a) The parties agree that access to technology developments under this Agreement by foreign firms or institutions must be carefully controlled. For purposes of this clause, a transfer includes a sale of the company, or sales or licensing of the technology. Transfers include:

- (1) Sales of products or components,
- (2) Licenses of software or documentation related to sales of products or components, or
- (3) Transfers to foreign subsidiaries of the Recipient for purposes related to this Agreement.

(b) The Recipient shall provide timely notice to the Agreement Officer in writing of any proposed transfer of technology developed under this Agreement. If NASA determines that the transfer may have adverse consequences

to the national security interests of the United States, or to the establishment of a robust United States industry, NASA and the Recipient shall jointly endeavor to find alternatives to the proposed transfer which obviate or mitigate potential adverse consequences of the transfer.

(End of provision)

#### **§ 1274.916 Liability and risk of loss.**

The following provision is applicable to all cooperative agreements with commercial firms, except programs or projects that are subject to section 431 of Public Law 105-276, which addresses insurance for, or indemnification of, developers of experimental aerospace vehicles.

##### **Liability and Risk of Loss (XX/XX)**

(a) With regard to activities undertaken pursuant to this agreement, neither party shall make any claim against the other, employees of the other, the other's related entities (e.g., contractors, subcontractors, etc.), or employees of the other's related entities for any injury to or death of its own employees or employees of its related entities, or for damage to or loss of its own property or that of its related entities, whether such injury, death, damage or loss arises through negligence or otherwise, except in the case of willful misconduct.

(b) To the extent that a risk of damage or loss is not dealt with expressly in this agreement, each party's liability to the other party arising out of this Agreement, whether or not arising as a result of an alleged breach of this Agreement, shall be limited to direct damages only, and shall not include any loss of revenue or profits or other indirect or consequential damages.

(End of provision)

#### **§ 1274.917 Additional funds.**

##### **Additional Funds (XX/XX)**

Pursuant to this Agreement, NASA is providing a fixed amount of funding for activities to be undertaken under the terms of this cooperative agreement. NASA is under no obligation to provide additional funds. Under no circumstances shall the Recipient undertake any action which could be construed to imply an increased commitment on the part of NASA under this cooperative agreement.

(End of provision)

#### **§ 1274.918 Incremental funding.**

##### **Incremental Funding (XX/XX)**

(a) Of the award amount indicated on the cover page of this Agreement, only the obligated amount indicated on the cover page of this agreement is available for payment. NASA may supplement the Agreement, as required, until it is fully funded. Any work beyond the funding limit will be at the recipient's risk.

(b) These funds will be obligated as appropriated funds become available without any action required of the Recipient. NASA is not obligated to make payments in excess of the total funds obligated.  
(End of provision)

#### **§ 1274.919 Cost principles and accounting standards.**

##### **Cost Principles and Accounting Standards (XX/XX)**

The expenditure of Government funds by the Recipient and the allowability of costs recognized as a resource contribution by the Recipient (See clause entitled "Resource Sharing Requirements") shall be governed by the FAR cost principles implemented by FAR Parts 30 and 31. (If the Recipient is a consortium which includes non-commercial firm members, cost allowability for those members will be determined as follows: Allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A-87, "Cost Principles for State and Local Governments." The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A-122, "Cost Principles for Non-Profit Organizations." The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A-21, "Cost Principles for Educational Institutions." The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.") Recipient's method for accounting for the expenditure of funds must be consistent with Generally Accepted Accounting Principles.  
(End of provision)

#### **§ 1274.920 Responsibilities of the NASA technical officer.**

##### **Responsibilities of the NASA Technical Officer (XX/XX)**

(a) The NASA Grant Administrator and Technical Officer for this cooperative agreement are identified on the cooperative agreement cover sheet.

(b) The Grant Specialist shall serve as NASA's authorized representative for the administrative elements of all work to be performed under the agreement.

(c) The Technical Officer shall have the authority to issue written Technical Advice which suggests redirecting the project work (e.g., by changing the emphasis among different tasks), or pursuing specific lines of inquiry likely to assist in accomplishing the effort. The Technical Officer shall have the authority to approve or disapprove those technical reports, plans, and other technical information the Recipient is required to submit to NASA for approval. The Technical Officer is not authorized to issue and the Recipient shall not follow any Technical Advice which constitutes work which is not

contemplated under this agreement; which in any manner causes an increase or decrease in the resource sharing or in the time required for performance of the project; which has the effect of changing any of the terms or conditions of the cooperative agreement; or which interferes with the Recipient's right to perform the project in accordance with the terms and conditions of this cooperative agreement. In the event of perceived interference, dispute resolution procedures apply as set forth in § 1274.907.  
(End of provision)

#### **§ 1274.921 Publications and Reports: non-proprietary research results.**

The requirements set forth under this provision may be modified by the Agreement Officer based on specific report needs for the particular grant or cooperative agreement.

##### **Publications and Reports: Non-Proprietary Research Results (XX/XX)**

(a) NASA encourages the widest practicable dissemination of research results at all times during the course of the investigation consistent with the other terms of this agreement.

(b) All information disseminated as a result of the cooperative agreement shall contain a statement which acknowledges NASA's support and identifies the cooperative agreement by number.

(c) Prior approval by the NASA Technical Officer is required only where the Recipient requests that the results of the research be published in a NASA scientific or technical publication. Two copies of each draft publication shall accompany the approval request.

(d) Reports shall contain full bibliographic references, abstracts of publications and lists of all other media in which the research was discussed. The Recipient shall submit the following technical reports:

(1) A progress report for every year of the cooperative agreement (except the final year). Each report is due 60 days before the anniversary date of the cooperative agreement and shall describe research accomplished during the report period.

(2) A summary of research is due by 90 days after the expiration date of the cooperative agreement, regardless of whether or not support is continued under another cooperative agreement. This report is intended to summarize the entire research accomplished during the duration of the cooperative agreement.

(e) Progress reports and summaries of research shall display the following on the first page:

- (1) Title of the cooperative agreement.
- (2) Type of report.
- (3) Period covered by the report.

(4) Name and address of the Recipient's organization.

(5) Cooperative agreement number.

(f) An original and two copies, one of which shall be of suitable quality to permit micro-reproduction, shall be sent as follows:

(1) Original—Agreement Officer.

(2) Copy—Technical Officer

(3) Micro-reproducible copy—NASA Center for Aerospace Information (CASI), Parkway Center, Attn: Document Processing Section, 7121 Standard Drive, Hanover, MD 21076.  
(End of provision)

#### **§ 1274.922 Suspension or termination.**

##### **Suspension or Termination (XX/XX)**

(a) This cooperative agreement may be suspended or terminated in whole or in part by the Recipient or by NASA after consultation with the other party. With prior written notice, NASA may terminate the agreement, for example, if the Recipient is not making anticipated technical progress, if the Recipient materially fails to comply with the terms of the agreement, if the Recipient materially changes the objective of the agreement, or if appropriated funds are not available to support the program.

(b) Upon fifteen (15) days written notice to the other party, either party may temporarily suspend the cooperative agreement, pending corrective action or a decision to terminate the cooperative agreement. The notice should express the reasons why the agreement is being suspended.

(c) In the event of termination by either party, the Recipient shall not be entitled to additional funds or payments except as may be required by the Recipient to meet NASA's share of commitments which had in the judgment of NASA become firm prior to the effective date of termination and are otherwise appropriate. In no event, shall these additional funds or payments exceed the amount of the next payable milestone billing amount.  
(End of provision)

#### **§ 1274.923 Equipment and other property.**

##### **Equipment and Other Property (XX/XX)**

(a) Under no circumstances shall cooperative agreement funds be used to acquire land or any interest therein, to acquire or construct facilities (as defined in 48 CFR (FAR) 45.301), or to procure passenger carrying vehicles.

(b) Contractor acquired equipment or property used in performance of the Cooperative Agreement shall be controlled in accordance with 48 CFR (FAR) 45.6.

(c) The government shall have title to equipment and other personal property acquired with government funds. Such property shall be disposed of pursuant to 48 CFR (FAR) 45.603. The Recipient shall have title to equipment and other personal property acquired with Recipient funds. Such property shall remain with the Recipient at the conclusion of the

cooperative agreement. Under a shared cost arrangement, the Government and the Recipient have joint ownership of acquired property in accordance with the cost share ratio. Jointly owned property shall be disposed of as agreed to by the parties.

(d) Title to Government furnished equipment (including equipment, title to which has been transferred to the Government prior to completion of the work) will remain with the Government.

(e) The Recipient shall establish and maintain property management standards for Government property and otherwise manage such property as set forth in 48 CFR (FAR) 45.5 and 48 CFR (NFS) 1845.5.

(f) Recipients shall submit annually a NASA Form 1018, NASA Property in the Custody of Contractors, in accordance with the instructions on the form, the provisions of 48 CFR (NFS) 1845.71 and any supplemental instructions that may be issued by NASA for the current reporting period. The original NF 1018 shall be submitted to the center Deputy Chief Financial Officer, Finance, with three copies sent concurrently to the center Industrial Property Officer. The annual reporting period shall be from October 1 of each year through September 30 of the following year. The report shall be submitted in time to be received by October 31. Negative reports (i.e. no reportable property) are required. The information contained in the reports is entered into the NASA accounting system to reflect current asset values for agency financial statement purposes. Therefore, it is essential that required reports be received no later than October 31. A final report is required within 30 days after expiration of the agreement.

(g) As of the date of this rewrite, process changes have been made to facilitate electronic submission of NF 1018. Recipients may use the procedures established by NASA Procurement Notice (PN) 97-64, issued on August 9, 2001.

(End of provision)

#### **§ 1274.924 Civil rights.**

##### **Civil Rights (XX/XX)**

Work on NASA cooperative agreements is subject to the provisions of Title VI of the Civil Rights Act of 1964 (Pub. L. 88-352; 42 U.S.C. 2000d-l), Title IX of the Education Amendments of 1972 (20 U.S.C. 1680 *et seq.*), section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), and the NASA implementing regulations (14 CFR Parts 1250, 1251, 1252 and 1253).

(End of provision)

#### **§ 1274.925 Subcontracts.**

##### **Subcontracts (XX/XX)**

(a) Recipients are not authorized to issue grants or cooperative agreements.

(b) NASA Agreement Officer consent is required for subcontracts over (dollar threshold inserted by Agreement Officer) and/or subcontracts for (critical systems, subsystems, components, or services inserted

by Agreement Officer and Cognizant NASA Project Office) \_\_\_\_\_.

(c) If not submitted by the Recipient and accepted by NASA in the original proposal. The Recipient shall provide the following information to the Agreement Officer:

(1) A copy of the proposed subcontract.

(2) Basis for subcontractor selection.

(3) Justification for lack of competition when competitive bids or offers are not obtained.

(4) Basis for award cost or award price.

(d) The Recipient shall utilize small business, veteran-owned small business, service-disabled veteran-owned small business, historically underutilized small business, small disadvantaged business, women-owned business concerns, Historically Black Colleges and Universities, and minority educational institutions as subcontractors to the maximum extent practicable.

(e) All entities that are involved in performing the research and development effort that is the purpose of the cooperative agreement shall be part of the Recipient's consortium and not subcontractors. (End of provision)

#### **§ 1274.926 Clean Air-Water Pollution Control Acts.**

##### **Clean Air-Water Pollution Control Acts (XX/XX)**

If this cooperative agreement or supplement thereto is in excess of \$100,000, the Recipient agrees to notify the Agreement Officer promptly of the receipt, whether prior or subsequent to the Recipient's acceptance of this cooperative agreement, of any communication from the Director, Office of Federal Activities, Environmental Protection Agency (EPA), indicating that a facility to be utilized under or in the performance of this cooperative agreement or any subcontract thereunder is under consideration to be listed on the EPA "List of Violating Facilities" published pursuant to 40 CFR 15.20. By acceptance of a cooperative agreement in excess of \$100,000, the Recipient—

(a) Stipulates that any facility to be utilized thereunder is not listed on the EPA "List of Violating Facilities" as of the date of acceptance;

(b) Agrees to comply with all requirements of section 114 of the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.* as amended by Pub. L. 91-604) and section 308 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 *et seq.* as amended by Pub. L. 92-500) relating to inspection, monitoring, entry, reports and information, and all other requirements specified in the aforementioned sections, as well as all regulations and guidelines issued thereunder after award of and applicable to the cooperative agreement; and

(c) Agrees to include the criteria and requirements of this clause in every subcontract hereunder in excess of \$100,000, and to take such action as the Contracting or Grant Officer may direct to enforce such criteria and requirements.

(End of provision)

#### **§ 1274.927 Debarment and Suspension and Drug-Free Workplace.**

##### **Debarment and Suspension and Drug-Free Workplace (XX/XX)**

NASA cooperative agreements are subject to the provisions of 14 CFR part 1265, Government-wide Debarment and Suspension (Nonprocurement) and 14 CFR Part 1267, Government-wide requirements for Drug-Free Workplace, unless excepted by 14 CFR 1265.110 or 1265.610.

(End of provision)

#### **§ 1274.928 Foreign national employee investigative requirements.**

##### **Foreign National Employee Investigative Requirements (XX/XX)**

(a) The Recipient shall submit a properly executed Name Check Request (NASA Form 531) and a completed applicant fingerprint card (Federal Bureau of Investigation Card FD-258) for each foreign national employee requiring access to a NASA Installation. These documents shall be submitted to the Installation's Security Office at least 75 days prior to the estimated duty date. The NASA Installation Security Office will request a National Agency Check (NAC) for foreign national employees requiring access to NASA facilities. The NASA Form 531 and fingerprint card may be obtained from the NASA Installation Security Office.

(b) The Installation Security Office will request from NASA Headquarters, Code I, approval for each foreign national's access to the Installation prior to providing access to the Installation. If the access approval is obtained from NASA Headquarters prior to completion of the NAC and performance of the cooperative agreement requires a foreign national to be given access immediately, the Technical Officer may submit an escort request to the Installation's Chief of Security. (End of provision)

#### **§ 1274.929 Restrictions on lobbying.**

##### **Restrictions on Lobbying (XX/XX)**

This award is subject to the provisions of 14 CFR part 1271 "New Restrictions on Lobbying."

(End of provision)

#### **§ 1274.930 Travel and transportation.**

##### **Travel and Transportation (XX/XX)**

(a) For travel funded by the government under this agreement, section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118)(Fly America Act) requires the Recipient to use U.S.-flag air carriers for international air transportation of personnel and property to the extent that service by those carriers is available.

(b) Department of Transportation regulations, 49 CFR part 173, govern Recipient shipment of hazardous materials and other items.

(End of provision)

**§ 1274.931 Electronic funds transfer payment methods.****Electronic Funds Transfer Payment Methods (XX/XX)**

Payments under this cooperative agreement will be made by the Government by electronic funds transfer through the Treasury Fedline Payment System (FEDLINE) or the Automated Clearing House (ACH), at the option of the Government. After award, but no later than 14 days before an invoice is submitted, the Recipient shall designate a financial institution for receipt of electronic funds transfer payments, and shall submit this designation to the Agreement Officer or other Government official, as directed.

(a) For payment through FEDLINE, the Recipient shall provide the following information:

(1) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(2) The American Bankers Association 9-digit identifying number for wire transfers of the financing institution receiving payment if the institution has access to the Federal Reserve Communication System.

(3) Payee's account number at the financial institution where funds are to be transferred.

(4) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains wire transfer activity. Provide the telegraphic abbreviation and American Bankers Association identifying number for the correspondent institution.

(b) For payment through ACH, the Recipient shall provide the following information:

(1) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for FEDLINE).

(2) Number of account to which funds are to be deposited.

(3) Type of depositor account ("C" for checking, "S" for savings).

(4) If the Recipient is a new enrollee to the ACH system, a "Payment Information Form," SF 3881, must be completed before payment can be processed.

(c) In the event the Recipient, during the performance of this cooperative agreement, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(d) The documents furnishing the information required in this clause must be dated and contain the signature, title, and telephone number of the Recipient official authorized to provide it, as well as the Recipient's name and contract number.

(e) Failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

(End of provision)

**§ 1274.932 Retention and examination of records.****Retention and Examination of Records (XX/XX)**

Financial records, supporting documents, statistical records, and all other records (or

microfilm copies) pertinent to this cooperative agreement shall be retained for a period of 3 years, except that records for nonexpendable property acquired with cooperative agreement funds shall be retained for 3 years after its final disposition and, if any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been resolved. The retention period starts from the date of the submission of the final invoice. The Administrator of NASA and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any pertinent books, documents, papers, and records of the Recipient and of subcontractors to make audits, examinations, excerpts, and transcripts. All provisions of this clause shall apply to any subcontractor performing substantive work under this cooperative agreement.

(End of provision)

**§ 1274.933 Summary of Recipient Reporting Responsibilities.****Summary of Recipient Reporting Responsibilities (XX/XX)**

This cooperative agreement requires the recipient to submit a number of reports. These reporting requirements are summarized below. In the event of a conflict between this provision and other provisions of the cooperative agreement requiring reporting, the other provisions take precedence.

[The Agreement Officer may add/delete reporting requirements as appropriate.]

Report	Frequency	Reference
Report of Joint NASA/Recipient Inventions.	As required .....	1274.911 Patent Rights (Paragraph (b)(4)).
Interim Report of Reportable Items.	Every 12 months .....	1274.912 Patent Rights—Retention by the Recipient (Large Business) (Paragraph (e)(3)(i)).
Final Report of Reportable Items.	3 months after completion ..	1274.912 Patent Rights—Retention by the Recipient (Large Business) (Paragraph (e)(3)(ii)).
Disclosure of Subject Inventions.	Within 2 months after inventor discloses it to the Recipient.	1274.912 Patent Rights Retention by (Large Recipient Business) (Paragraph (e)(2)) or 1274.913 Patent Rights—Retention by the Recipient (Small Business) (Paragraph (c)(1)).
Election of Title to a Subject Invention.	1 year after disclosure of the subject invention if a statutory bar exists, otherwise within 2 years.	1274.913 Patent Rights—Retention by the Recipient (Small Business) (Paragraph (c)(2)).
Listing of Subject Inventions	Every 12 months from the date of the agreement.	1274.913 Patent Rights—Retention by the Recipient (Small Business) (Paragraph (f)(5)(i)).
Subject Inventions Final Report.	Prior to close-out of the agreement.	1274.913 Retention by the Recipient (Small Business) (Paragraph (f)(5)(ii)).
Notification of Decision to Forego Patent Protection.	30 days before expiration of the response period.	1274.913 Patent Rights—Retention by the Recipient (Small Business) (Paragraph (f)(3)).
Notification of a Subcontract Award.	Promptly upon award of a subcontract.	1274.912 Patent Rights—Retention by the Recipient (Large Business) (Paragraph (g)(3)) or 1274.913 Patent Rights—Retention by the Recipient (Small Business) (Paragraph (g)(3)).
Utilization of Subject Invention.	Annually .....	1274.913 Patent Rights—Retention by the Recipient (Small Business) (Paragraph (h)).
Notice of Proposed Transfer of Technology.	Prior to transferring technology to foreign firm or institution.	1274.915 Restrictions on Sale or Transfer of Technology to Foreign Firms or institutions (Paragraph (b)).

Report	Frequency	Reference
Progress Report .....	60 days prior to the anniversary date of the agreement (except final year).	1274.921 Publications and reports: Non-Proprietary Research results (Paragraph (d)(1)).
Summary of Research .....	90 days after completion of agreement.	1274.921 Publications and Reports: Non-Proprietary Research Results (Paragraph (d)(2)).
NASA Form 1018 Property in the Custody of Contractors.	Annually by October 31 .....	1274.923 Equipment and Other Property (Paragraph (f)).
NASA Form 1018 Property in the Custody of Contractors.	60 days after expiration date of agreement.	1274.923 Equipment and Other Property (Paragraph (f)).

**§ 1274.934 Safety.****Safety (XX/XX)**

NASA's safety priority is to protect: (1) The public, (2) astronauts and pilots, (3) the NASA workforce (including contractor employees working on NASA contracts), and (4) high-value equipment and property.

(a) The Recipient shall act responsibly in matters of safety and shall take all reasonable safety measures in performing under this cooperative agreement. The recipient shall comply with all applicable federal, state, and local laws relating to safety. The Recipient shall maintain a record of, and will notify the NASA Agreement Officer immediately (within one workday) of any accident involving death, disabling injury or substantial loss of property. The Recipient will immediately (within one workday) advise NASA of hazards that come to its attention as a result of the work performed.

(b) Where the work under this cooperative agreement involves flight hardware, the hazardous aspects, if any, of such hardware will be identified, in writing, by the Recipient. Compliance with this provision by subcontractors shall be the responsibility of the Recipient.

(End of provision)

**§ 1274.935 Security classification requirements.****Security Classification Requirements (XX/XX)**

Performance under this Cooperative Agreement will involve access to and/or generation of classified information, work in a secure area, or both, up to the level of [insert the applicable security clearance level]. Federal Acquisition Regulation clause 52.204-2 shall apply to this Agreement and DD Form 254, Contract Security Classification Specification Attachment [Insert the attachment number of the DD Form 254].

(End of provision)

**§ 1274.936 Breach of safety or security.****Breach of Safety or Security (XX/XX)**

Safety is the freedom from those conditions that can cause death, injury, occupational illness, damage to or loss of equipment or property, or damage to the environment. Safety is essential to NASA and is a material part of this contract. NASA's safety priority is to protect: (1) The public; (2) astronauts and pilots; (3) the NASA workforce

(including contractor employees working on NASA contracts); and (4) high-value equipment and property. A major breach of safety by the Recipient entitles the Government to remedies (pending corrective measures by the Recipient) which includes, suspension or termination of the Cooperative Agreement, require removal or change of Recipient's personnel from performing under the Agreement. A major breach of safety must be related directly to the work on the Agreement. A major breach of safety is an act or omission of the Recipient that consists of an accident, incident, or exposure resulting in a fatality or mission failure; or in damage to equipment or property equal to or greater than \$1 million; or in any "willful" or "repeat" violation cited by the Occupational Health and Safety Administration (OSHA) or by a state agency operating under an OSHA approved plan.

(a) Security is the condition of safeguarding against espionage, sabotage, crime (including computer crime), or attack. A major breach of security by the Recipient entitles the Government to remedies (pending corrective measures by the Recipient) which includes, suspension or termination of the Cooperative Agreement, require removal or change of Recipient's personnel from performing under the Cooperative Agreement. A major breach of security may occur on or off Government installations, but must be related directly to the work on the Cooperative Agreement. A major breach of security may arise from any of the following: compromise of classified information; illegal technology transfer; workplace violence resulting in criminal conviction; sabotage; compromise or denial of information technology services; damage or loss greater than \$250,000 to the Government; or theft.

(b) In the event of a major breach of safety or security, the Recipient shall report the breach to the Agreement Officer. If directed by the Agreement Officer, the Recipient shall conduct its own investigation and report the results to the Government. The Recipient shall cooperate with the Government investigation, if conducted.

(End of provision)

**§ 1274.937 Security requirements for unclassified information technology resources.****Security Requirements for Unclassified Information Technology Resources (XX/XX)**

(a) The Recipient shall be responsible for Information Technology security for all systems connected to a NASA network or operated by the Recipient for NASA, regardless of location. This provision is applicable to all or any part of the cooperative agreement that includes information technology resources or services in which the Recipient must have physical or electronic access to NASA's sensitive information contained in unclassified systems that directly support the mission of the Agency. This includes information technology, hardware, software, and the management, operation, maintenance, programming, and system administration of computer systems, networks, and telecommunications systems. Examples of tasks that require security provisions include:

(1) Computer control of spacecraft, satellites, or aircraft or their payloads;

(2) Acquisition, transmission or analysis of data owned by NASA with significant replacement cost should the Recipient's copy be corrupted; and

(3) Access to NASA networks or computers at a level beyond that granted the general public, e.g. bypassing a firewall.

(b) The Recipient shall provide, implement, and maintain an IT Security Plan. This plan shall describe the processes and procedures that will be followed to ensure appropriate security of IT resources that are developed, processed, or used under this cooperative agreement. The plan shall describe those parts of the cooperative agreement to which this provision applies. The Recipient's IT Security Plan shall be compliant with Federal laws that include, but are not limited to, the Computer Security Act of 1987 (40 U.S.C. 1441 et seq.) and the Government Information Security Reform Act of 2000. The plan shall meet IT security requirements in accordance with Federal and NASA policies and procedures that include, but are not limited to:

(1) OMB Circular A-130, Management of Federal Information Resources, Appendix III, Security of Federal Automated Information Resources;

(2) NASA Procedures and Guidelines (NPG) 2810.1, Security of Information Technology; and

(3) Chapter 3 of NPG 1620.1, NASA Security Procedures and Guidelines.

(c) Within \_\_\_\_\_ days after cooperative agreement award, the Recipient shall submit for NASA approval an IT Security Plan. This plan must be consistent with and further detail the approach contained in the Recipient's proposal that resulted in the award of this cooperative agreement and in compliance with the requirements stated in this provision. The plan, as approved by the Agreement Officer, shall be incorporated into the cooperative agreement as a compliance document.

(d)(1) Recipient personnel requiring privileged access or limited privileged access to systems operated by the Recipient for NASA or interconnected to a NASA network shall be screened at an appropriate level in accordance with NPG 2810.1, Section 4.5; NPG 1620.1, Chapter 3; and paragraph (d)(2) of this provision. Those Recipient personnel with non-privileged access do not require personnel screening. NASA shall provide screening using standard personnel screening National Agency Check (NAC) forms listed in paragraph (d)(3) of this provision, unless Recipient screening in accordance with paragraph (d)(4) is approved. The Recipient shall submit the required forms to the NASA Center Chief of Security (CCS) within fourteen (14) days after cooperative agreement award or assignment of an individual to a position requiring screening. The forms may be obtained from the CCS. At the option of the government, interim access may be granted pending completion of the NAC.

(2) Guidance for selecting the appropriate level of screening is based on the risk of adverse impact to NASA missions. NASA defines three levels of risk for which screening is required (IT-1 has the highest level of risk):

(i) IT-1—Individuals having privileged access or limited privileged access to systems whose misuse can cause very serious adverse impact to NASA missions. These systems include, for example, those that can transmit commands directly modifying the behavior of spacecraft, satellites or aircraft.

(ii) IT-2—Individuals having privileged access or limited privileged access to systems whose misuse can cause serious adverse impact to NASA missions. These systems include, for example, those that can transmit commands directly modifying the behavior of payloads on spacecraft, satellites or aircraft; and those that contain the primary copy of "level 1" data whose cost to replace exceeds one million dollars.

(iii) IT-3—Individuals having privileged access or limited privileged access to systems whose misuse can cause significant adverse impact to NASA missions. These systems include, for example, those that interconnect with a NASA network in a way that exceeds access by the general public, such as bypassing firewalls; and systems operated by the Recipient for NASA whose function or data has substantial cost to replace, even if these systems are not interconnected with a NASA network.

(3) Screening for individuals shall employ forms appropriate for the level of risk as follows:

(i) IT-1: Fingerprint Card (FC) 258 and Standard Form (SF) 85P, Questionnaire for Public Trust Positions (Information regarding financial record, question 22, and the Authorization for Release of Medical Information are not applicable);

(ii) IT-2: FC 258 and SF 85, Questionnaire for Non-Sensitive Positions; and

(iii) IT-3: NASA Form 531, Name Check, and FC 258.

(4) The Agreement Officer may allow the Recipient to conduct its own screening of individuals requiring privileged access or limited privileged access provided the Recipient can demonstrate that the procedures used by the Recipient are equivalent to NASA's personnel screening procedures. As used here, equivalent includes a check for criminal history, as would be conducted by NASA, and completion of a questionnaire covering the same information as would be required by NASA.

(5) Screening of Recipient personnel may be waived by the Agreement Officer for those individuals who have proof of—

(i) Current or recent national security clearances (within last three years);

(ii) Screening conducted by NASA within last three years; or

(iii) Screening conducted by the Recipient, within last three years, that is equivalent to the NASA personnel screening procedures as approved by the Agreement Officer under paragraph (d)(4) of this provision.

(e) The Recipient shall ensure that its employees, in performance of the cooperative agreement, receive annual IT security training in NASA IT Security policies, procedures, computer ethics, and best practices in accordance with NPG 2810.1, Section 4.3 requirements. The Recipient may use web-based training available from NASA to meet this requirement.

(f) The Recipient shall afford NASA, including the Office of Inspector General, access to the Recipient's, subcontractors' or subawardees' facilities, installations, operations, documentation, databases and personnel used in performance of the cooperative agreement. Access shall be provided to the extent required to carry out a program of IT inspection, investigation and audit to safeguard against threats and hazards to the integrity, availability and confidentiality of NASA data or to the function of computer systems operated on behalf of NASA, and to preserve evidence of computer crime.

(g) The Recipient shall incorporate the substance of this clause in all subcontracts or subagreements that meet the conditions in paragraph (a) of this provision.

(End of provision)

#### **§ 1274.938 Modifications.**

##### **Modifications (XX/XX)**

During the term of this agreement and in the interest of achieving program objectives, the parties may agree to changes that affect the responsibility statements, milestones, or other provisions of this agreement. Any changes to this agreement will be accomplished by a written bilateral modification.

(End of provision)

#### **§ 1274.939 Application of Federal, State, and local laws and regulations.**

##### **Application of Federal, State, and Local Laws and Regulations (XX/XX)**

(a) Federal Laws and Regulations. This Cooperative Agreement shall be governed by the Federal Laws, regulations, policies, and related administrative practices applicable to this Cooperative Agreement on the date the Agreement is executed. The Recipient understands that such Federal laws, regulations, policies, and related administrative practices may be modified from time to time. The Recipient agrees to consider modifying this Agreement to be governed by those later modified Federal laws, regulations, policies, and related administrative practices that directly affect performance of the Project.

(b) State or Territorial Law and Local Law.

Except to the extent that a Federal statute or regulation preempts State or territorial law, nothing in the Cooperative Agreement shall require the Recipient to observe or enforce compliance with any provision thereof, perform any other act, or do any other thing in contravention of any applicable State or territorial law; however, if any of the provisions of the Cooperative Agreement violate any applicable State or territorial law, or if compliance with the provisions of the Agreement would require the Recipient to violate any applicable State or territorial law, the Recipient agrees to notify the Government (NASA) immediately in writing in order that the Government and the Recipient may make appropriate arrangements to proceed with the Project as soon as possible.

(c) Changed Conditions of Performance (Including Litigation). The Recipient agrees to notify the Government (NASA) immediately of any change in State or local law, conditions, or any other event that may significantly affect its ability to perform the Project in accordance with the terms of this Cooperative Agreement. In addition, the Recipient agrees to notify the Government (NASA) immediately of any decision pertaining to the Recipient's conduct of litigation that may affect the Government's interests in the Project or the Government's administration or enforcement of applicable Federal laws or regulations. Before the Recipient may name the Government as a party to litigation for any reason, the Recipient agrees to inform the Government; this proviso applies to any type of litigation whatsoever, in any forum.

(d) No Government Obligations to Third Parties. Absent the Government's express written consent, and notwithstanding any concurrence by the Government in or approval of the award of any Agreement of the Recipient (third party contract) or subcontract of the Recipient (third party subcontract) or the solicitation thereof, the Government shall not be subject to any obligations or liabilities to third party contractors or third party subcontractors or any other person(s).

(End of provision)



**§ 1274.940 Changes in recipient's membership.****Changes in Recipient's Membership (XX/XX)**

The Recipient shall notify the cognizant Agreement Officer within seven (7) days of any change in the corporate membership (ownership) structure of the Recipient, including the addition or withdrawal of any of the Recipient's affiliated members (e.g., Consortium Member). If NASA reasonably determines that any change in the corporate membership (ownership) of Recipient will conflict with NASA's objectives for the

Project or any statutory or regulatory restriction applicable to the agency, NASA may terminate this Agreement after giving the Agreement Recipient at least ninety (90) days prior written notice of such perceived conflict and a reasonable opportunity to cure such conflict.  
(End of provision)

**§ 1274.941 Insurance and Indemnification.**

The following provision is applicable to all cooperative agreements with commercial firms that involve programs or projects that are subject to Section 431 of Public Law 105–276, which addresses insurance for, or indemnification of, developers of experimental aerospace vehicles.

**Insurance and Indemnification (XX/XX)**

(a) *General.* The Recipient has applied, under the provisions of section 431 of Public Law 105–276 (Section 431), for indemnification by the Government against certain third party damage claims that might arise under the Agreement. Under section 431, a necessary prerequisite to, and consideration for, the Government's granting such indemnification is the Recipient's obtaining insurance against an initial increment of such damages arising from certain third party claims. This provision sets forth the requirements for this insurance prerequisite to a Government grant of indemnification.

(b) *Definitions.* The definitions at 14 CFR part 1266, Cross-Waivers and Indemnification, apply to this provision.

(c) *Insurance.* The Recipient shall obtain, as part of its financial contribution, insurance that meets the following parameters:

(1) The insurance policy or policies shall insure against damages incurred by third parties arising from covered activities;

(2) The amount of insurance applicable to each launch shall be [TBD]. The Government may subsequently increase the amount of insurance the Recipient is required to maintain to qualify for indemnification, for one or more launches, and the Recipient shall pay the additional cost of such increases from its financial contribution; and

(3) The insurance policy or policies shall name the parties and their related entities, and the employees of the parties and their related entities, as named insureds.

Nothing in this provision precludes the Recipient from obtaining, at no cost to the Government, such other insurance as the Recipient determines advisable to protect its business interests.

(d) *Proof of Insurance.* The Recipient shall provide proof of insurance that meets the parameters in paragraph (c) of this provision and that is acceptable to the Agreement Officer:

(1) Within 30/60 days after the execution of the modification adding this provision to the Agreement;

(2) No later than 30 days before each launch; and

(3) Within 7 days after a request by the Agreement Officer.

Moreover, the Recipient shall promptly notify the Agreement Officer of any termination, or of any change to the terms or conditions of an insurance policy or policies for which proof of insurance was provided.

(e) *Notification of Claims.* The Recipient shall—

(1) Promptly notify the Agreement Officer of any third party claim or suit against the Recipient, one of its related entities, any employee of the Recipient or its related entities, or any insurer of the Recipient for damages resulting from covered activities;

(2) Furnish evidence or proof of any such claim, suit or damages, in the form required by NASA; and

(3) Immediately furnish to NASA, or its designee, copies of all information received by the Recipient, or by any related entity, employee or insurer that is pertinent to such claim, suit or damages.

(f) *NASA Concurrence in Settlements.* NASA shall concur or not concur in each settlement of a third party claim by the Recipient's insurer(s). For purposes of determining the amount of indemnification under this cooperative agreement. Adjudicated claims shall be deemed concurred in by NASA.

(End of provision)

**§ 1274.942 Export licenses.****Export Licenses (XX/XX)**

(a) The Recipient shall comply with all U.S. export control laws and regulations, including the International Traffic in Arms Regulations (ITAR), 22 CFR parts 120 through 130, and the Export Administration Regulations (EAR), 15 CFR parts 730 through 799, in the performance of this Cooperative Agreement. In the absence of available license exemptions/exceptions, the Recipient shall be responsible for obtaining the appropriate licenses or other approvals, if required, for exports of hardware, technical data, and software, or for the provision of technical assistance.

(b) The Recipient shall be responsible for obtaining export licenses, if required, before utilizing foreign persons in the performance of this Cooperative Agreement, including instances where the work is to be performed on-site at [insert name of NASA installation], where the foreign person will have access to export-controlled technical data or software.

(c) The Recipient shall be responsible for all regulatory record keeping requirements associated with the use of licenses and license exemptions/exceptions.

(d) The Recipient shall be responsible for ensuring that the requirements of this provision apply to its subcontractors.

(e) The Recipient may request, in writing, that the Agreement Officer authorize it to export ITAR-controlled technical data (including software) pursuant to the exemption at 22 CFR 125.4(b)(3). The Agreement Officer or designated representative may authorize or direct the use of the exemption where the data does not disclose details of the design, development, production, or manufacture of any defense article.

(End of provision)

**Appendix to Part 1274—Listing of Exhibits****Exhibit A to Part 1274—Contract Provisions**

All contracts awarded by a recipient, including small purchases, shall contain the following provisions if applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, “Equal Employment Opportunity,” as amended by E.O. 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and as supplemented by regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

2. *Copeland “Anti-Kickback” Act* (18 U.S.C. 874 and 40 U.S.C. 276c)—All contracts in excess of \$50,000 for construction or repair awarded by Recipients and subrecipients shall include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each recipient or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to NASA.

3. *Contract Work Hours and Safety Standards Act* (40 U.S.C. 327–333)—Where applicable, all contracts awarded by recipients in excess of \$2,000 for construction contracts and in excess of \$50,000 for other contracts, other than contracts for commercial items, that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Subsection 102 of the Act, each recipient shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work

in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

4. Rights to Inventions Made Under a Contract or Agreement—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the Recipient in any resulting invention in accordance with 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

5. Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), as amended—Contracts, other than contracts for commercial items, of amounts in excess of \$100,000 shall contain a provision that requires the Recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to NASA and the Regional Office of the Environmental Protection Agency (EPA).

6. Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the Recipient.

7. Debarment and Suspension (E.O.s 12549 and 12689)—No contract shall be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O.s 12549 and 12689, "Debarment and Suspension." This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principal employees.

#### Exhibit B to Part 1274—Reports

##### 1. Individual Procurement Action Report (NASA Form 507)

The Agreement Officer is responsible for submitting NASA Form 507 for all cooperative agreement actions.

##### 2. Property Reporting

As provided in paragraph (f) of § 1274.923, an annual NASA Form (NF) 1018, NASA Property in the Custody of Contractors, will be submitted by October 31 of each year. Negative annual reports are required. A final report is required within 30 days after expiration of the agreement (also see paragraph (g) of § 1274.923 for electronic submission guidance).

##### 3. Disclosure of Lobbying Activities (SFLLL)

(a) Agreement Officers shall provide one copy of each SF LLL furnished under 14 CFR 1271.110 to the Procurement Officer for transmittal to the Director, Analysis Division (Code HC).

(b) Suspected violations of the statutory prohibitions implemented by 14 CFR part 1271 shall be reported to the Director, Contract Management Division (Code HK).

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 648

[Docket No. 011005245-1245-01; I.D. 092401C]

RIN 0648-AP37

#### Fisheries of the Northeastern United States; Atlantic Herring Fishery

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed 2002 specifications for the Atlantic herring fishery; request for comments.

**SUMMARY:** NMFS proposes specifications for the 2002 Atlantic herring fishery. The regulations for the Atlantic herring fishery require NMFS to publish specifications for the upcoming year and to provide an opportunity for public comment. The intent of the specifications is to conserve and manage the herring resource and provide for sustainable fisheries. This rule would also correct and clarify the final rule implementing the Atlantic Herring Fishery Management Plan (FMP) by clarifying the vessel owners' or operators' reporting requirements.

**DATES:** Comments must be received no later than 5 p.m., Eastern Standard Time, on November 28, 2001.

**ADDRESSES:** Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis (EA/RIR/IRFA),

Essential Fish Habitat Assessment, and the Stock Assessment and Fishery Evaluation (SAFE) Report for the 2000 Atlantic Herring Fishing Year are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. Comments may also be sent via fax to (978) 465-0492. The EA/RIR/IRFA is accessible via the Internet at <http://www.nefmc.org>.

Written comments on the proposed specifications should be sent to the Regional Administrator at the above address. Mark on the outside of the envelope: "Comments—2002 Herring Specifications." Comments may also be sent via facsimile (fax) to (978) 281-9371. Comments will not be accepted if submitted via e-mail or the Internet.

Written comments regarding the collection-of-information requirements contained in this final rule should be sent to the Regional Administrator and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attn: NOAA Desk Officer).

#### FOR FURTHER INFORMATION CONTACT:

Myles Raizin, Fishery Policy Analyst, (978) 281-9104, e-mail at [myles.raizin@noaa.gov](mailto:myles.raizin@noaa.gov), fax at (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

Regulations implementing the FMP require the New England Fishery Management Council's (Council) Atlantic Herring Plan Development Team (PDT) to meet at least annually, no later than July each year, with the Atlantic States Marine Fisheries Commission's (Commission) Atlantic Herring Plan Review Team (PRT) to develop and recommend the following specifications for consideration by the Council's Atlantic Herring Oversight Committee: Allowable biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPT), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing (USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), and reserve (if any). The PDT and PRT also recommend the total allowable catch (TAC) for each management area and sub-area identified in the FMP. As the basis for its recommendations, the PDT reviews available data pertaining to: Commercial and recreational catch; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and