

resource contribution is \$5 million or more.

(c) *Cost and payment matters.* (1) The expenditure of Government funds by the recipient and the allowability of costs recognized as a resource contribution by the recipient shall be governed by the FAR cost principles, 48 CFR part 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." Recipient's method for accounting for the expenditure of funds must be consistent with Generally Accepted Accounting Principles.

(2) A substantial resource contribution on the part of the recipient is required. The recipient is expected to contribute at least 50 percent of the total resources required to accomplish the cooperative agreement. Recipient contributions may be either cash or non-cash or both. In those cases in which a contribution of less than 50 percent is anticipated from the 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.

(3) Cooperative agreements are funded by NASA in a fixed amount. Payments in fixed amounts will be made by NASA in accordance with "Milestone Billings" which are discussed in paragraph (c)(4) of this section. If the recipient completes the final milestone, final payment is made, and NASA will have completed its financial responsibilities under the agreement. However, if the cooperative agreement is terminated prior to achievement of all milestones, NASA's funding will be limited to milestone payments already made plus NASA's share of costs required by the recipient to meet 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 costs or payment exceed the amount of the next payable milestone billing amount.

(4) Milestone billings is the method of payment to the recipient under cooperative agreements. Performance based milestones are used as the basis of establishing a set of verifiable milestones for payment purposes. Each milestone payment shall be established so that the Government payment is at the same share ratio as the cooperative agreement share ratio. If the recipient is a consortium, the Articles of Collaboration is required to contain an extensive list of performance based milestones that the consortium has agreed to. Generally, payments should not be made more than once monthly; ideally, payments will be made about every 60 to 90 days but in all cases should be made on the basis of verifiable, significant events as opposed to the passage of time. The last payment milestone should be large enough to ensure that the recipient completes its responsibilities under the cooperative agreement (or funds should be reserved for payment until after completion of the cooperative agreement). The Government technical officer must verify completion of each milestone to the Grant Officer as part of the payment process.

(5) Cooperative agreements may be incrementally funded subject to the following:

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(i) The total value of the NASA cash contribution is \$50,000 or more.

(ii) The period of performance overlaps the succeeding fiscal year.

(iii) The funds are not available to fully fund the cooperative agreement at the time of award.

(6) Cost sharing requirements on cooperative agreements with commercial firms are based on section 23 of OMB Circular A-110. Only cash or certain non-cash resources are acceptable sources for the recipient contribution to a cooperative agreement. Acceptable non-cash resources include such items as purchased equipment, equipment, labor, office space, etc. The actual or imputed value of intellectual property such as patent rights, data rights, trade secrets, etc., are not acceptable as sources for the recipient contribution. The Government's cost share should fully reflect the total cost of the cash and non-cash contributions. With respect to the non-cash contribution, a fully burdened cost estimate of personnel, facilities, and other expenses should be utilized. It is recognized that this will be an estimate in some cases, but the cost principles in section 9091-5 of the NASA Financial Management Manual should be adhered to.

(7) 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.

(8) The recipient's resource share of the cooperative agreement may be allocated as part of its IR&D program.

(9) The CAN must provide a description of the non-cash Government contribution (personnel, equipment, facilities, etc.) as part of the Government's contribution to the cooperative agreement in addition to funding. The offeror may propose that additional non-cash Government resources be provided under two conditions. First, the offeror is responsible for verifying the availability of the resources and their suitability for their intended purpose and, second, those resources are part of the Government contribution (which must be matched by the recipient) and paid

for directly by the awarding organization.

(d) *Consortia as recipients.* (1) The use of consortia as recipients for cooperative agreements is encouraged. Consortia will tend to bring to a cooperative agreement a broader range of capabilities and resources. 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 which normally compete for commercial or Government business or may be made up of firms which perform complementary functions in a given industry. 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.

(2) 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. It should also address to the extent appropriate: Commitments of financial, personnel, facilities and other resources, a detailed milestone chart of consortium activities, accounting requirements, subcontracting procedures, disputes, term of the agreement, insurance and liability issues, internal and external reporting requirements, management structure of the consortium, obligations of organizations withdrawing from the consortia, allocation of data and patent rights among the consortia members, agreements, if any, to share existing technology and data, 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, employee policy issues, etc.

(3) An outline of the Articles of Collaboration should be required as part of the proposal and evaluated during the source selection process.

(e) *Metric system of measurement.* 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.

(f) *Term of agreement.* 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 a Government cash contribution 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.

#### § 1274.203 Intellectual property.

(a) 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) 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) There are five situations in which inventions may arise under a cooperative agreement: recipient inventions, subcontractor inventions, NASA inventions, NASA support contractor inventions, and joint inventions with recipient.

(d)(1) *Recipient inventions.* (i) 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 inven-

tion 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.

(ii) 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 (26 U.S.C.). The Government obtains an irrevocable, nonexclusive, royalty-free license.

(2) *Subcontractor inventions.* (i) Large business. If a recipient enters 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 done 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)(i) 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