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DEPARTMENT OF DEFENSE

Office of the Secretary

2 CFR Part 1108

Definitions for DoD Grant and Agreement Regulations in Subchapters A through F

[DOD-2016-OS-0051]

RIN 0790-AJ46

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) is the fifth of a sequence of six NPRMs in this section of this issue of the *Federal Register* that propose updates to the DoD Grant and Agreement Regulations (DoDGARs). In this NPRM, DoD is proposing definitions of terms that are common to most portions of those regulations, as well as a central location for the definitions.

DATES: To ensure that they can be considered in developing the final rule, comments must be received at either the web site or mailing address indicated below by *[insert date 90 days after publication of this notice in the Federal Register]*.

ADDRESSES: You may submit comments identified by docket number, or by Regulatory Information Number (RIN) and title, by either of the following methods:

The Web site: *http://www.regulations.gov*. Follow the instructions at that site for submitting comments.

Mail: Department of Defense, Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, ATTN: Box 24, Alexandria, VA 22350-1700.

Instructions: All submissions must include the agency name and docket number or RIN for this *Federal Register* document. The general policy for comments and other submissions from the public is to make the submissions available for public viewing on the Internet at <http://www.regulations.gov> without change (i.e., as they are received, including any personal identifiers or contact information).

FOR FURTHER INFORMATION CONTACT: Wade Wargo, Basic Research Office, telephone 571-372-2941.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

1. The need for the regulatory action and how the action meets that need

The Department of Defense Grant and Agreement Regulations (DoDGARs) need to be updated, in part due to the issuance of new Office of Management and Budget guidance to Federal agencies on administrative requirements, cost principles, and audit requirements that apply to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200). The DoDGARs part proposed by this NPRM is an important part of

the update in that it contains the definitions of terms used throughout most portions of the DoDGARs.

2. Legal authorities for the regulatory action

There are two statutory authorities for this NPRM:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense; and

- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

B. Summary of the Major Provisions of the Regulatory Action

This NPRM proposes a new part, 2 CFR part 1108, as the central location for definitions of terms that are needed in order to make the DoDGARs as clear as possible for DoD awarding and administering officials, recipients, auditors, and others who may need to use them. The following subsection B.1 of this Supplementary Information section explains why the proposed part 1108 does not include definitions of some terms. Subsections B.2 through B.8 provide additional information about selected definitions that are included in the proposed part.

1. Terms defined in other issuances that the DoDGARs adopt by reference.

The proposed part 1108 does not reiterate the definition of a term that is defined in a statute, regulation, Governmentwide guidance document, or other issuance that the DoDGARs adopt by

reference unless the DoDGARs also directly use that term and its definition is important to the interpretation of the regulations. Sections 1108.2 and 1108.3 of the proposed part 1108 provide more explanation and examples of issuances the DoDGARs adopt by reference, including national policy requirements, the cost principles and single audit requirements in Subparts E and F of 2 CFR part 200, and the cost principles in the Federal Acquisition Regulation (48 CFR part 31).

2. Terms for funding instruments and associated business relationships.

The proposed part 1108 includes definitions of some terms intended to help clarify the distinctions between types of funding instruments that DoD Components and recipients may use, as well as the business relationships for which those instruments appropriately are used. The part also has an appendix with additional background information on assistance and acquisition, which are different purposes for which DoD Components enter into transactions such as grants, cooperative agreements, and procurement contracts. Among the terms addressed in the definitions and appendix are:

- “Acquire” and the related terms “acquisition” and “acquisition cost.” The definition of “acquire” in section 1108.10 of the proposed part clarifies the very important distinction between a DoD Component’s action at the primary tier

and transactions by recipients and subrecipients at lower tiers. It also clarifies that the ways in which a recipient or subrecipient may acquire property under a DoD Component's award include construction, fabrication, or development of the property, as well as donation of the property to the project or program under the award. The definition of "acquisition cost" similarly clarifies what the term includes in conjunction with equipment that a recipient or subrecipient constructs or fabricates under an award, which parallels the wording in the definition of "acquisition cost" in 2 CFR part 200 concerning software that a recipient or subrecipient develops under an award.

- "Procurement contract," as distinct from "procurement transaction" or "contract." The proposed part defines the term "procurement contract" specifically to mean a DoD Component's acquisition transaction because a few portions of the DoDGARS refer to DoD Component's procurement contracts (e.g., in addressing the appropriate use of a grant or cooperative agreement, rather than a procurement contract). The part then defines the different term "procurement transaction" or "contract" to mean the funding instrument a recipient or subrecipient uses to buy goods or services it needs to carry out the program under its award or subaward. This distinction is important because the DoD Component's use of acquisition

transactions is governed by the Federal Grant and Cooperative Agreement Act (31 U.S.C., chapter 63), while a recipient's or subrecipient's acquisition transactions are not subject to that statute.

- "Cost-type contract," "cost-type subaward," and "fixed-amount subaward," which are terms for types of transactions into which a recipient or subrecipient would enter with an entity at the next lower tier. These terms are used in the administrative requirements portion of the general terms and conditions, which are in DoDGARs parts proposed in the third of the sequence of six NPRMs in this section of this issue of the *Federal Register*.

3. Terms to distinguish DoD entities, officials, and programs.

There are a number of terms defined in the proposed part 1108 that are needed in order for the regulations to be able to specify different requirements for:

- DoD offices and officials with distinct responsibilities. "Agreements officer," for example, is a term associated with officials authorized to award Technology Investment Agreements, as distinct from officials authorized to award or do post-award administration for grants and cooperative agreements. For the same reason, the proposed part 1108 defines "DoD Components," "award administration office," and "contracting activity" as organizational entities; "agreements officer," "contracting

officer," and "grants officer" as categories of DoD officials; and "Technology Investment Agreement" as a type of funding instrument."

- One or more subcategories of "research and development (R&D)," a term defined in the OMB guidance in 2 CFR part 200. To make the distinctions, the proposed part 1108 separately defines "basic research," "applied research," "advanced research," "research," and "development."

4. *The terms "principal investigator" and "co-principal investigator."*

The proposed part 1108 includes definitions of "principal investigator" and "co-principal investigator" that are based on work done by an interagency group under the National Science and Technology Council and published in the *Federal Register* (72 FR 54257, September 24, 2007). The term "principal investigator" is used in multiple DoDGARs parts. The definition of the term "co-principal investigator" not only helps to complete the concept of "principal investigator" but also will be needed for a portion of the DoDGARs that DoD will propose for comment in the future.

5. *The term "approved budget."*

The definition of the term "approved budget" is included in the proposed part 1108 as the DoD implementation of the term "budget" defined in the OMB guidance in 2 CFR part 200. The

definition in the OMB guidance indicates that an agency may, at its option, include the non-Federal share of project costs in the budget for a project. The definition in the proposed part 1108 clarifies that the "approved budget" for a DoD award includes any cost sharing or matching that the award requires.

6. *The term "exempt property."*

The proposed part 1108 defines the term "exempt property" to mean tangible personal property acquired under a DoD award for which a DoD Component has, and elects to use, statutory authority to vest title to the property in the recipient either unconditionally or subject to fewer conditions than usually apply.

7. *The term "small award."*

The proposed part 1108 includes a definition of the term "small award" to mean an award or subaward with a total value that does not exceed the simplified acquisition threshold. The term is defined because the proposed DoDGARs part 1126 (2 CFR part 1126, which is proposed in the third of the sequence of six NPRMs in this section of this issue of the *Federal Register*) authorizes DoD Components to include fewer requirements in "small awards."

8. *The term "unique entity identifier."*

The proposed part 1108 includes a definition of the term "unique entity identifier." One purpose of the definition is to

clarify that the identifier currently is the Dun and Bradstreet Data Universal Numbering System, or DUNS, number.

C. Costs and Benefits

In providing a central source of definitions of terms used in the DoDGARs, this NPRM makes the regulations easier to use. It thereby may slightly reduce both burdens and costs for recipients and subrecipients, their auditors, DoD awarding and administering officials, and others who use the DoDGARs.

II. Invitation to Comment

DoD welcomes comments on all aspects of the proposed definitions—e.g., if any of them could be made clearer or causes any perceived issues.

III. Regulatory Analysis

Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Order 12866, as supplemented by Executive Order 13563, directs each Federal agency to: propose regulations only after determining that benefits justify costs; tailor regulations to minimize burdens on society, consistent with achieving regulatory objectives; maximize net benefits when

selecting among regulatory approaches; specify performance objectives, to the extent feasible, rather than the behavior or manner of compliance; and seek the views of those likely to be affected before issuing a notice of proposed rulemaking, where feasible and appropriate. The Department of Defense has determined that a central location for definitions of terms within the DoD Grant and Agreement Regulations will help maximize long-term benefits in relation to costs and burdens for recipients of DoD grant and cooperative agreement awards. This rule has been designated a "significant regulatory action" under section 3(f) of Executive Order 12866, although not an economically significant one. Accordingly, the rule has been reviewed by OMB.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) (2 U.S.C. 1532) requires that a Federal agency prepare a budgetary impact statement before issuing a rule that includes any Federal mandate that may result in the expenditure in any one year by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in 1995 dollars, updated annually for inflation. In 2015, that inflation-adjusted amount in current dollars is

approximately \$146 million. The Department of Defense has determined that this proposed regulatory action will not result in expenditures by State, local, and tribal governments, or by the private sector, of that amount or more in any one year.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires an agency that is proposing a rule to provide a regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. The Department of Defense certifies that this proposed regulatory action will not have a significant economic impact on substantial number of small entities beyond any impact due to provisions of it that implement OMB guidance at 2 CFR part 200.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; 5 CFR part 1320, Appendix A.1) (PRA), the Department of Defense has determined that there are no new collections of information contained in this proposed regulatory action.

Executive Order 13132, "Federalism"

Executive Order 13132 establishes certain requirements that an agency must meet when it proposes a regulation that has Federalism implications. This proposed regulatory action does not have any Federalism implications.

List of Subjects in 2 CFR Part 1108

Accounting, Business and Industry, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments

Accordingly, under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, 2 CFR chapter XI, subchapter A, is proposed to be amended by adding part 1108 to read as follows:

PART 1108—DEFINITIONS OF TERMS USED IN SUBCHAPTERS A THROUGH F OF THIS CHAPTER

Subpart A—General

Sec.

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1108.305 Procurement transaction.
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1108.340 Simplified acquisition threshold.
1108.345 Small award.
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1108.355 Subaward.
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1108.365 Supplies.
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1108.375 Technology investment agreement.
1108.380 Termination.
1108.385 Third-party in-kind contribution.
1108.390 Total value.
1108.395 Unique entity identifier.
1108.400 Unobligated balance.
1108.405 Voluntary (committed or uncommitted) cost sharing.
1108.410 Working capital advance.
Appendix A to Part 1108—Background on assistance, acquisition, and terms for types of awards

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

Subpart A—General

§ 1108.1 Purpose of this part.

(a) This part provides:

(1) Definitions of terms used in subchapters A through F of this chapter; and

(2) Background information as context for understanding terms related to assistance and acquisition purposes, awards that DoD Components make at the prime tier, and lower-tier transactions into which recipients and subrecipients enter when carrying out programs at lower tiers under DoD prime awards.

(b) This part is, for DoD, the regulatory implementation of OMB guidance in Subpart A of 2 CFR part 200.

§1108.2 Precedence of definitions of terms in national policy requirements.

(a) *General.* Some portions of the DoD Grant and Agreement Regulations (DoDGARs) may use a term in relation to compliance with a national policy requirement in a statute, Executive order, or other source that defines the term differently than it is defined in subpart B of this part. For purposes of that particular national policy requirement, the definition of a term provided by the source of the requirement and any regulation specifically implementing it takes precedence over the definition in Subpart B of this part. Using the definition of a term that takes precedence for each national policy requirement

is therefore important when determining the applicability and effect of that requirement on DoD grants and cooperative agreements subject to the DoDGARs.

(b) *Examples.* (1) Current portions of the DoDGARs that specifically implement national policy requirements, as described in paragraph (a) of this section, are:

(i) A Governmentwide regulation currently codified by DoD at 32 CFR part 26, which implements the Drug-Free Workplace Act of 1988 as it applies to grants (41 U.S.C. chapter 81, as amended);

(ii) A Government regulation currently codified by DoD at 32 CFR part 28, which implements restrictions on lobbying in 31 U.S.C. 1352;

(iii) A DoD regulation at part 1125 of this chapter, which implements Governmentwide guidance on nonprocurement debarment and suspension (2 CFR part 180) that has bases both in statute (section 2455 of Public Law 103-355, 108 Stat. 3327) and in Executive orders 12549 and 12689; and

(iv) Part 1122 of this chapter, which provides standard wording of terms and conditions related to a number of national policy requirements.

(2) To illustrate that a term may be defined differently in conjunction with specific national policy requirements than it is in this part, the term "State" as defined in the drug-free

workplace requirements (32 CFR part 26) is identical neither to the definition in the lobbying restrictions (32 CFR part 28) nor to the definition in Subpart B of this part.

§1108.3 Definitions of terms used in the Governmentwide cost principles or single audit requirements.

(a) This part includes the definition of a term used in the following issuances only if the DoDGARs uses that term directly:

(1) The Single Audit Act requirements for audits of recipients and subrecipients that are in subpart F of OMB guidance in 2 CFR part 200;

(2) The Governmentwide cost principles for institutions of higher education, nonprofit entities, States, local governments, and Indian tribes that are contained in subpart E of OMB guidance in 2 CFR part 200; and

(3) The cost principles for for profit entities at subpart 31.2 of the Federal Acquisition Regulation (FAR) at 48 CFR part 31, as supplemented by provisions of the Defense Federal Acquisition Regulation Supplement at subpart 231.2 of 48 CFR part 231.

(b) For any terms not covered by paragraph (a), a user of the DoDGARs should consult definitions in:

(1) Subpart A of the OMB guidance in 2 CFR part 200 for terms used in Subparts E and F of that part; and

(2) FAR part 2 (48 CFR part 2) for terms used in the cost principles at 48 CFR part 31.

§1108.4 Definitions of terms that vary depending on context.

DoDGARs definitions of some terms related to types of awards (e.g., "contract") and purposes for which they are used (e.g., "procurement" or "acquisition") may vary, depending on the context. Appendix A to this part provides additional information about those terms and their definitions.

Subpart B-Definitions

§1108.10 Acquire.

Acquire means to:

(a) When the term is used in connection with a DoD Component action at the prime tier, obtain property or services by purchase, lease, or barter for the direct benefit or use of the United States Government.

(b) When the term is used in connection with a recipient action or a subrecipient action at a tier under a DoD Component's award:

- (1) Purchase services;
- (2) Obtain property under the award by:
 - (i) Purchase;
 - (ii) Construction;
 - (iii) Fabrication;
 - (iv) Development;
 - (v) The recipient or subrecipient entity's donation of the property to the project or program under the

award to meet cost sharing or matching requirements (i.e., including within the entity's share of the award's project costs the value of the remaining life of the property or its fair market value, rather than charging depreciation); or

(vi) Otherwise.

§ 1108.15 Acquisition.

Acquisition means the process of acquiring as described in:

(a) Paragraph (a) of § 1108.10 when used in connection with DoD Component actions at the prime tier.

(b) Paragraph (b) of § 1108.10 when used in connection with recipient or subrecipient actions at lower tiers under a DoD Component's award.

§1108.20 Acquisition cost.

Acquisition cost means the cost of an asset to a recipient or subrecipient, including the cost to ready the asset for its intended use.

(a) For example, when used in conjunction with:

(1) The purchase of equipment, the term means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired.

(2) Equipment that a recipient or subrecipient constructs or fabricates--or software that it develops--under an

award, the term includes, when capitalized in accordance with generally accepted accounting principles (GAAP):

(i) The construction and fabrication costs of that equipment; and

(ii) The development costs of that software.

(b) Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation may be included in, or excluded from, the acquisition cost in accordance with the recipient's or subrecipient's regular accounting practices.

§1108.25 Administrative offset.

Administrative offset means an action whereby money payable by the United States Government to, or held by the Government for, a recipient is withheld to satisfy a delinquent debt the recipient owes the Government.

§1108.30 Advance payment.

Advance payment means a payment that DoD or a recipient or subrecipient makes by any appropriate payment mechanism, including a predetermined payment schedule, before the recipient or subrecipient disburses the funds for project or program purposes.

§1108.35 Advanced research.

Advanced research means advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a

general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (i.e., early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Advanced Technology Development (Budget Activity 3) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations.

§1108.40 Agreements officer.

Agreements officer means a DoD official with the authority to enter into, administer, and/or terminate Technology Investment Agreements.

§1108.45 Applied research.

Applied research means efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology, such as new materials, devices, methods and processes. It typically is funded in Applied Research (Budget Activity 2) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations. Applied research often follows basic research but may not be fully distinguishable from the related basic research. The term

does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition, efforts that are within the definition of "development."

§1108.50 Approved budget.

Approved budget means, in conjunction with a DoD Component award to a recipient, the most recent version of the budget the recipient submitted and the DoD Component approved (either at the time of the initial award or subsequently), to summarize planned expenditures for the project or program under the award. It includes:

(a) All Federal funding made available to the recipient under the award to use for project or program purposes.

(b) Any cost sharing or matching that the recipient is required to provide under the award.

(c) Any options that have been exercised but not any options that have not yet been exercised.

§1108.55 Assistance.

Assistance means the transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (see 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments that DoD Components use to provide assistance.

§1108.60 Award.

Award means a grant, cooperative agreement, technology investment agreement, or other nonprocurement instrument subject to one or more parts of the DoDGARs. Within each part of the regulations, the term includes only the types of instruments subject to that part.

§1108.65 Award administration office.

Award administration office means a DoD Component office that performs assigned post-award functions related to the administration of grants, cooperative agreements, technology investment agreements, or other nonprocurement instruments subject to one or more parts of the DoDGARs.

§1108.70 Basic research.

Basic research means efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Basic Research (Budget Activity 1) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations. For the purposes of the DoDGARs, basic research includes:

(a) Research-related, science and engineering education and training, including graduate fellowships and research traineeships; and

(b) Research instrumentation and other activities designed to enhance the infrastructure for science and engineering research.

§1108.75 Capital asset.

Capital asset means a tangible or intangible asset used in operations having a useful life of more than one year which is capitalized in accordance with GAAP. Capital assets include:

(a) Land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, lease-purchase, exchange, or through capital leases; and

(b) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

§1108.80 Claim.

Claim means a written demand or written assertion by one of the parties to an award seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of award terms, or other relief arising under or relating to the award. A routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by written notice to the grants

officer if it is disputed either as to liability or amount, or is not acted upon in a reasonable time.

§1108.85 Cognizant agency for indirect costs.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans and indirect cost proposals on behalf of all Federal agencies. The cognizant agency for indirect costs for a particular entity may be different than the cognizant agency for audit. The cognizant agency for indirect costs:

(a) For an institution of higher education, nonprofit organization, State, or local government is assigned as described in the appendices to OMB guidance in 2 CFR part 200. See 2 CFR 200.19 for specific citations to those appendices.

(b) For a for-profit entity, normally will be the agency with the largest dollar amount of pertinent business, as described in the Federal Acquisition Regulation at 48 CFR 42.003.

§1108.90 Contract.

Contract means a procurement transaction, as that term is defined in this subpart. A contract is a transaction into which a recipient or subrecipient enters. It is therefore distinct from the term "procurement contract," which is a transaction that a DoD Component awards at the prime tier.

§1108.95 Contracting activity.

Contracting activity means an activity to which the Head of a DoD Component has delegated broad authority regarding acquisition functions pursuant to 48 CFR 1.601.

§1108.100 Contracting officer.

Contracting officer means a DoD official with the authority to enter into, administer, and/or terminate procurement contracts and make related determinations and findings.

§1108.105 Contractor.

Contractor means an entity to which a recipient or subrecipient awards a procurement transaction (also known as a contract).

§1108.110 Cooperative agreement.

Cooperative agreement means a legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of "grant" in this subpart), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include "cooperative research and development agreements" as defined in 15 U.S.C. 3710a.

§1108.115 Co-principal investigator.

Co-principal investigator means any one of a group of individuals whom an organization that is carrying out a research

project with DoD support designates as sharing the authority and responsibility for leading and directing the research intellectually and logistically, other than the one among the group identified as the primary contact for scientific, technical, and related budgetary matters (see the definition of "principal investigator")."

§1108.120 Cost allocation plan.

Cost allocation plan means either a:

(a) Central service cost allocation plan, as defined at 2 CFR 200.9 and described in Appendix V to OMB guidance in 2 CFR part 200; or

(b) Public assistance cost allocation plan as described in Appendix VI to 2 CFR part 200.

§1108.125 Cost sharing or matching.

Cost sharing or matching means the portion of project costs not borne by the Federal Government, unless a Federal statute authorizes use of any Federal funds for cost sharing or matching.

§1108.130 Cost-type contract.

Cost-type contract means a procurement transaction awarded by a recipient or a subrecipient at any tier under a DoD Component's grant or cooperative agreement that provides for the contractor to be paid on the basis of the actual, allowable

costs it incurs (plus any fee or profit for which the contract provides).

§1108.135 Cost-type subaward.

Cost-type subaward means a subaward that:

(a) A recipient or subrecipient makes to another entity at the next lower tier; and

(b) Provides for payments to the entity that receives the cost-type subaward based on the actual, allowable costs it incurs in carrying out the subaward.

§1108.140 Debarment.

Debarment means an action taken by a Federal agency debarring official to exclude a person or entity from participating in covered Federal transactions, in accordance with debarment and suspension policies and procedures for:

(a) Nonprocurement instruments, which are in OMB guidance at 2 CFR part 180, as implemented by the DoD at 2 CFR part 1125; or

(b) Procurement contracts, which are in the Federal Acquisition Regulation at 48 CFR 9.4.

§1108.145 Debt.

Debt means any amount of money or any property owed to a Federal agency by any person, organization, or entity except another United States Federal agency. Debts include any amounts due from insured or guaranteed loans, fees, leases, rents,

royalties, services, sales of real or personal property, or overpayments, penalties, damages, interest, fines and forfeitures, and all other claims and similar sources. For the purposes of this chapter, amounts due a non-appropriated fund instrumentality are not debts owed the United States.

§1108.150 Delinquent debt.

Delinquent debt means a debt:

(a) That the debtor fails to pay by the date specified in the initial written notice from the agency owed the debt, normally within 30 calendar days, unless the debtor makes satisfactory payment arrangements with the agency by that date; and

(b) With respect to which the debtor has elected not to exercise any available appeals or has exhausted all agency appeal processes.

§1108.155 Development.

Development means, when used in the context of "research and development," the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of potential new products, processes, or services to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing. It typically is funded within programs in Budget

Activities 4 through 7 of DoD's Research, Development, Test and Evaluation (RDT&E) appropriations.

§1108.160 Direct costs.

Direct costs means any costs that are identified specifically with a particular final cost objective, such as an award, in accordance with the applicable cost principles.

§1108.165 DoD Components.

DoD Components means the Office of the Secretary of Defense; the Military Departments; the National Guard Bureau (NGB); and all Defense Agencies, DoD Field Activities, and other organizational entities within the DoD that are authorized to award or administer grants, cooperative agreements, and other non-procurement instruments subject to the DoDGARs.

§1108.170 Equipment.

Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of:

(a) \$5,000; or

(b) The recipient's or subrecipient's capitalization threshold for financial statement purposes.

§1108.175 Exempt property.

(a) *Exempt property* means tangible personal property acquired in whole or in part with Federal funds under a DoD Component's awards, for which the DoD Component:

(1) Has statutory authority to vest title in recipients (or allow for vesting in subrecipients) without further obligation to the Federal Government or subject to conditions the DoD Component considers appropriate; and

(2) Elects to use that authority to do so.

(b) An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306) for tangible personal property acquired under an award to conduct basic or applied research by a nonprofit institution of higher education or nonprofit organization whose primary purpose is conducting scientific research.

§1108.180 Expenditures.

Expenditures mean charges made by a recipient or subrecipient to a project or program under an award.

(a) The charges may be reported on a cash or accrual basis, as long as the methodology is disclosed and is consistently applied.

(b) For reports prepared on a cash basis, expenditures are the sum of:

(1) Cash disbursements for direct charges for property and services;

(2) The amount of indirect expense charged;

(3) The value of third-party in-kind contributions applied; and

(4) The amount of cash advance payments and payments made to subrecipients.

(c) For reports prepared on an accrual basis, expenditures are the sum of:

(1) Cash disbursements for direct charges for property and services;

(2) The amount of indirect expense incurred;

(3) The value of third-party in-kind contributions applied; and

(4) The net increase or decrease in the amounts owed by the recipient or subrecipient for:

(i) Goods and other property received;

(ii) Services performed by employees, contractors, subrecipients, and other payees; and

(iii) Programs for which no current services or performance are required, such as annuities, insurance claims, or other benefit payments.

§1108.185 Federal interest.

Federal interest means, in relation to real property, equipment, or supplies acquired or improved under an award or subaward, the dollar amount that is the product of the:

(a) Federal share of total project costs; and

(b) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

§1108.190 Federal share.

Federal share means the portion of the project costs under an award that is paid by Federal funds.

§1108.195 Fixed-amount award.

Fixed-amount award means a DoD Component grant or cooperative agreement that provides for the recipient to be paid on the basis of performance and results, rather than the actual, allowable costs the recipient incurs.

§1108.200 Fixed-amount subaward.

Fixed-amount subaward means a subaward:

(a) That a recipient or subrecipient makes to another entity at the next lower tier; and

(b) Under which the total amount to be paid to the other entity is based on performance and results, and not on the actual, allowable costs that entity incurs.

§1108.205 Foreign organization.

Foreign organization means an entity that is:

(a) A public or private organization that is located in a country other than the United States and its territories and is subject to the laws of the country in which it is located, irrespective of the citizenship of project staff or place of performance;

(b) A private nongovernmental organization located in a country other than the United States and its territories that solicits and receives cash contributions from the general public;

(c) A charitable organization located in a country other than the United States and its territories that is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes; or

(d) An organization located in a country other than the United States and its territories that is not recognized as a foreign public entity.

§1108.210 Foreign public entity.

Foreign public entity means:

- (a) A foreign government or foreign governmental entity;
- (b) A public international organization, which is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f);
- (c) An entity owned (in whole or in part) or controlled by a foreign government; or
- (d) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

§1108.215 Grant.

Grant means a legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the DoD's direct benefit or use.

(b) In which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

§1108.220 Grants officer.

Grants officer means a DoD official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.

§1108.225 Indian tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See the annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

§1108.230 Indirect costs (also known as "Facilities and Administrative," or F&A, costs).

Indirect costs means those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved.

§1108.235 Institution of higher education.

Institution of higher education has the meaning specified at 20 U.S.C. 1001.

§1108.240 Intangible property.

Intangible property means:

(a) Property having no physical existence, such as trademarks, copyrights, patents and patent applications; and

(b) Property such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether the property is considered tangible or intangible.

§1108.245 Local government.

Local government means any unit of government within a State, including a:

- (a) County;
- (b) Borough;
- (c) Municipality;
- (d) City;
- (e) Town;
- (f) Township;
- (g) Parish;
- (h) Local public authority, including any public housing agency under the United States Housing Act of 1937;
- (i) Special district;
- (j) School district;
- (k) Intrastate district;
- (l) Council of governments, whether or not incorporated as a nonprofit corporation under State law; and
- (m) Any other agency or instrumentality of a multi-, regional, or intra-state or local government.

§1108.250 Management decision.

Management decision means a written decision issued to an audited entity by a DoD Component, another Federal agency that has audit or indirect cost cognizance or oversight responsibilities for the audited entity, or a recipient or subrecipient from which the audited entity received an award or subaward. The DoD Component, cognizant or oversight agency, recipient, or subrecipient issues the management decision to specify the corrective actions that are necessary after evaluating the audit findings and the audited entity's corrective action plan.

§1108.255 Nonprocurement instrument.

Nonprocurement instrument means a legal instrument other than a procurement contract that a DoD Component may award. Examples include an instrument of financial assistance, such as a grant or cooperative agreement, or an instrument of technical assistance, which provides services in lieu of money.

§1108.260 Nonprofit organization.

Nonprofit organization means any corporation, trust, association, cooperative, or other organization, not including an institution of higher education, that:

- (a) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
- (b) Is not organized primarily for profit; and

(c) Uses net proceeds to maintain, improve, or expand the operations of the organization.

§1108.265 Obligation.

Obligation means:

(a) When used in conjunction with a DoD Component's action, a legally binding agreement that will result in outlays, either immediately or in the future. Examples of actions through which a DoD Component incurs an obligation include the signature of a grant, cooperative agreement, or technology investment agreement authorizing the recipient to use funds under the award.

(b) When used in conjunction with a recipient's or subrecipient's use of funds under an award or subaward, an order placed for property and services, a contract or subaward made, or a similar transaction during a given period that requires payment during the same or a future period.

§1108.270 Office of Management and Budget.

Office of Management and Budget means the Executive Office of the President, United States Office of Management and Budget.

§1108.275 Outlays.

Outlays means "expenditures," as defined in this subpart.

§1108.280 Participant support costs.

Participant support costs means direct costs for items such as stipends or subsistence allowances, travel allowances, and

registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences, or training projects.

§1108.285 Period of performance.

Period of performance means the time during which a recipient or subrecipient may incur new obligations to carry out the work authorized under an award or subaward, respectively.

§1108.290 Personal property.

Personal property means property other than real property. It may be tangible, having physical existence, or intangible, such as copyrights, patents, and securities.

§1108.295 Principal investigator.

Principal investigator means either:

(a) The single individual whom an organization that is carrying out a research project with DoD support designates as having an appropriate level of authority and responsibility for leading and directing the research intellectually and logistically, which includes the proper conduct of the research, the appropriate use of funds, and administrative requirements such as the submission of scientific progress reports to the DoD program office; or

(b) If the organization designates more than one individual as sharing that authority and responsibility, the individual within that group identified by the organization as

the one with whom the DoD Component's program manager generally should communicate as the primary contact for scientific, technical, and related budgetary matters concerning the project (others within the group are "co-principal investigators," as defined in this subpart).

§1108.300 Procurement contract.

Procurement contract means a legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. A procurement contract is a prime tier transaction and therefore distinct from a recipient's or subrecipient's "procurement transaction" or "contract" as defined in this subpart.

§1108.305 Procurement transaction.

Procurement transaction means a legal instrument by which a recipient or subrecipient purchases property or services it needs to carry out the project or program under its prime award or subaward, respectively. A procurement transaction is distinct both from "subaward" and "procurement contract," as those terms are defined in this subpart.

§1108.310 Program income.

Program income means gross income earned by a recipient or subrecipient that is directly generated by a supported activity or earned as a result of an award or subaward (during the period of performance unless the award or subaward specifies continuing requirements concerning disposition of program income after the end of that period).

(a) Program income includes, but is not limited to, income from:

(1) Fees for services performed;

(2) The use or rental of real or personal property for which the recipient or subrecipient is accountable under the award or subaward (whether acquired under the award or subaward, or other Federal awards from which accountability for the property was transferred);

(3) The sale of commodities or items fabricated under the award or subaward;

(4) License fees and royalties on patents and copyrights;
and

(5) Payments of principal and interest on loans made with award or subaward funds.

(b) Program income does not include:

(1) Interest earned on advances of Federal funds;

(2) Proceeds from the sale of real property or equipment under the award; or

(3) Unless otherwise specified in Federal statute or regulation, or the terms and conditions of the award or subaward:

(i) Rebates, credits, discounts, and interest earned on any of them; or

(ii) Governmental revenues, taxes, special assessments, levies, fines, and similar revenues raised by the recipient or subrecipient.

§1108.315 Project costs.

Project costs means the total of:

(a) Allowable costs incurred under an award by the recipient, including costs of any subawards and contracts under the award; and

(b) Cost sharing or matching contributions that are required under the award, which includes voluntary committed (but not voluntary uncommitted) contributions and the value of any third-party in-kind contributions.

§1108.320 Property.

Property means real property and personal property (equipment, supplies, intangible property, and debt instruments), unless stated otherwise.

§1108.325 Real property.

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

§1108.330 Recipient.

Recipient means an entity that receives an award directly from a DoD Component. The term does not include subrecipients.

§1108.335 Research.

Research means basic, applied, and advanced research.

§1108.340 Simplified acquisition threshold.

Simplified acquisition threshold means the dollar amount set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1, which is adjusted periodically for inflation in accordance with 41 U.S.C. 1908.

§1108.345 Small award.

Small award means a DoD grant or cooperative agreement or a subaward with a total value over the life of the award that does not exceed the simplified acquisition threshold.

§1108.350 State.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

§1108.355 Subaward.

Subaward means a legal instrument by which a recipient or subrecipient at any tier below a DoD Component prime award, transfers--for performance by an entity at the next lower tier-- a portion of the substantive program for which the DoD Component's prime award provided financial assistance.

§1108.360 Subrecipient.

Subrecipient means an entity that receives a subaward.

§1108.365 Supplies.

Supplies means all tangible personal property, including a computing device, acquired under an award that does not meet the definition of equipment in this subpart.

§1108.370 Suspension.

Suspension means either:

(a) When used in the context of a specific award or subaward to an entity, the temporary withdrawal of authority for that entity to obligate funds under the award or subaward, pending its taking corrective action or a decision to terminate the award or subaward.

(b) When used in the context of an entity, an action by a DoD Component's suspending official under 2 CFR part 1125, DoD's regulation implementing OMB guidance on nonprocurement debarment and suspension in 2 CFR part 180, to immediately exclude the entity from participating in covered Federal Government

transactions, pending completion of an investigation and any legal or debarment proceedings that ensue.

§1108.375 Technology investment agreement.

Technology investment agreement means one of a special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes related to integration of the commercial and defense sectors of the nation's technology and industrial base.

Technology investment agreements include one kind of cooperative agreement with provisions tailored for involving commercial firms, as well as one kind of assistance transaction other than a grant or cooperative agreement. Technology investment agreements are subject to, and described more fully in, 32 CFR part 37.

§1108.380 Termination.

Termination means the ending of an award or subaward, in whole or in part, at any time prior to the planned end of period of performance.

§1108.385 Third-party in-kind contribution.

Third-party in-kind contribution means the value of a non-cash contribution (i.e., property or services) that:

(a) A non-Federal third party contributes, without charge, either to a recipient or subrecipient at any tier under a DoD Component's award; and

(b) Is identified, and included in the approved budget of the DoD Component's award, as a contribution being used toward meeting the award's cost sharing or matching requirements (which includes voluntary committed, but not voluntary uncommitted, contributions).

§1108.390 Total value.

Total value of a DoD grant, cooperative agreement, or TIA means the total amount of costs that are currently expected to be charged to the award over its life, which includes amounts for:

(a) The Federal share and any non-Federal cost sharing or matching required under the award; and

(b) Any options, even if not yet exercised, for which the costs have been established in the award.

§1108.395 Unique entity identifier.

Unique entity identifier means the identifier required for System for Award Management registration to uniquely identify entities with which the Federal Government does business (currently the Dun and Bradstreet Data Universal Numbering System, or DUNS, number).

§1108.400 Unobligated balance.

Unobligated balance means the amount of funds under an award or subaward that the recipient or subrecipient has not obligated. The amount is computed by subtracting the cumulative

amount of the recipient's or subrecipient's unliquidated obligations and expenditures of funds from the cumulative amount of funds that it was authorized to obligate under the award or subaward.

§1108.405 Voluntary (committed or uncommitted) cost sharing.

(a) *Voluntary cost sharing* means cost sharing that an entity pledges voluntarily in its application or proposal (i.e., not due to a stated cost sharing requirement in the program announcement to which the entity's application or proposal responds).

(b) *Voluntary committed cost sharing* means voluntary cost sharing that a DoD Component accepts through inclusion in the approved budget for the project or program and as a binding requirement of the terms and conditions of the award made to the entity in response to its application or proposal.

(c) *Voluntary uncommitted cost sharing* means voluntary cost sharing that does not meet the criteria in paragraph (b) of this section.

§1108.410 Working capital advance.

Working capital advance means a payment method under which funds are advanced to a recipient or subrecipient to cover its estimated disbursement needs for a given initial period, after which payment is made by way of reimbursement.

Appendix A to Part 1108—Background on Assistance, Acquisition, and Terms for Types of Awards

I. Purpose of this appendix

This appendix provides background intended to help avoid confusion about some terms:

A. That are used in this chapter to describe either types of awards that DoD Components, recipients, and subrecipients make, or the purposes for which those types of awards are used; and

B. For which this part provides definitions that vary depending on the context within which the terms are used.

II. Why definitions of some terms are context-dependent

A. The DoDGARs contain both:

1. Direction to DoD Components concerning their award of grants and cooperative agreements at the prime tier; and

2. Terms and conditions that DoD Components include in their grants and cooperative agreements to specify the Government's and recipients' rights and responsibilities, including post-award requirements with which recipients' actions must comply.

B. In some cases, the same defined term or two closely related terms are used in relation to both DoD Component actions at the prime tier and recipient or subrecipient actions at lower

tiers under DoD Components' awards. But a given defined term may have meanings that differ at the two tiers. For example, in part because the Federal Grant and Cooperative Agreement Act applies to DoD Component actions at the prime tier but not to recipient or subrecipient actions at lower tiers (see sections III and IV of this appendix):

1. The terms "acquire" and "acquisition" do not have precisely the same meaning in conjunction with actions at the prime and lower tiers.

2. The meaning of the term "procurement contract" used to describe DoD Component prime-tier actions is not precisely the same as the meaning of "procurement transaction" or "contract" used to describe recipient or subrecipient actions at lower tiers.

III. Background: distinguishing prime-tier relationships and awards

A. The Federal Grant and Cooperative Agreement Act (31 U.S.C. chapter 63) specifies that the type of award a DoD Component is to use when making a prime award to a recipient is based on the nature of the relationship between the DoD Component and the recipient that the prime award reflects.

B. Specifically, except where another statute authorizes DoD to do otherwise, 31 U.S.C. chapter 63 specifies use of:

1. A procurement contract as the instrument reflecting a relationship between a DoD Component and a recipient when the principal purpose of the relationship is to acquire property or services for the direct benefit or use of the Federal Government.

2. A grant or cooperative agreement as the instrument reflecting a relationship between those two parties when the principal purpose of the relationship is to carry out a public purpose of support or stimulation authorized by Federal statute.

C. The terms "acquisition" and "assistance" are defined in this part to correspond to the principal purposes described in paragraphs III.B.1 and 2 of this section, respectively. Using those terms, paragraphs III.B.1 and B.2 may be restated to say that grants and cooperative agreements are assistance instruments that DoD Components use at the prime tier for assistance purposes, as distinct from procurement contracts they use at that tier for acquisition.

IV. Background: distinguishing types of recipients' and subrecipients' awards

A. While the Federal Grant and Cooperative Agreement Act applies to Federal agencies, it does not govern types of awards that recipients and subrecipients make, whether or not they are lower-tier awards under a Federal prime grant or cooperative

agreement. That statute therefore does not require a recipient or subrecipient to:

1. Consider any award it makes at a lower tier under a Federal assistance award as a grant or cooperative agreement. Therefore, at its option, a recipient or subrecipient may consider all of its lower-tier awards to be "contracts."

2. Associate an "assistance" relationship, as that term is defined in this part and used in this chapter, with any lower-tier transaction that it makes.

B. However, the DoDGARS in this chapter do distinguish between two classes of lower-tier transactions that recipients and subrecipients make: subawards and procurement transactions. The distinction promotes uniformity in requirements for lower-tier transactions under DoD grants and cooperative agreements. It is based on a long-standing distinction in OMB guidance to Federal agencies, currently at 2 CFR part 200, which DoD implements in this chapter.

C. The distinction between a subaward and procurement transaction is based on the primary purpose of that transaction.

1. The transaction is a subaward if a recipient or subrecipient enters into it with another entity at the next lower tier in order to transfer--for performance by that lower-tier entity--a portion of the substantive program for which the prime DoD grant or cooperative agreement provided

financial assistance to the recipient. Because the Federal Grant and Cooperative Agreement Act does not apply to the recipient or subrecipient, it may make a subaward as defined in this part using an instrument that it considers a contract.

2. The transaction is a procurement transaction if the recipient or subrecipient enters into it in order to purchase goods or services from the lower-tier entity that the recipient or subrecipient needs to perform its portion of the substantive program supported by the prime DoD award.

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