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FEATURE COMMENT: DOE Technology Investment Agreements—A New Avenue For Public-Private Research Cooperation

The Department of Energy has issued proposed regulations to offer a new type of research, development and demonstration (RD&D) funding: the technology investment agreement or TIA. This new type of funding will be available to organizations of all types, including established technology companies, technology start-ups, universities, other nonprofit research institutions, and state and local governments. This funding method offers far more flexibility than other means currently available to DOE, such as procurement contracts, management and operating (M&O) contracts, and traditional cooperative agreements. This flexibility manifests itself primarily in two areas that are critical for research organizations: intellectual property rights, and cost accounting and auditing. The greater flexibility in these areas will enable DOE to leverage the intellectual capital and financial resources of many organizations that previously have been reluctant to participate in DOE programs.

Historical Background—The Department of Defense has had "other transaction" authority for many years. This authority allowed DOD to fund research in areas that did not lend themselves to the requirements of procurement contracts or cooperative agreements. DOD coined the term "technology investment agreement" in 1997. In 2003, DOD published policies and procedures for their award and administration. 68 Fed. Reg. 47150 (Aug. 7, 2003). Some DOE lawyers and officials have long sought authority to use such alternate procedures, particularly since the default rules under which they work are more restrictive in important respects than those employed by other federal agencies. The secretary of energy received "other transaction authority" for the first time in § 1007 of the Energy Policy Act of 2005. DOE has decided to implement its new authority through TIAs and on November 15 it issued an interim final rule to implement the program. 70 Fed. Reg. 69250. Written comments will be received until December 15, and the rule is scheduled to take effect March 15, 2006.

Nature and Uses of TIAs—Technology Investment Agreements are not procurement contracts and therefore are not subject to the Federal Acquisition Regulation or Department of Energy Acquisition Regulation (DEAR). They are a form of financial assistance that may be used for research, development and demonstration work (RD&D). They are awarded on a competitive basis, using the same kind of public agency announcement that DOE uses for other research awards. A key feature that distinguishes TIAs from many other types of funding agreements is that they normally require cost sharing of at least fifty percent. This non-federal cost share can include contributions such as facilities, equipment and materials, as well as direct funding of research effort.

TIAs are particularly appropriate for research in areas in which commercial or non-profit researchers are already active. They are designed to foster development activities by companies reluctant to participate in other DOE research programs because of cost accounting and auditing requirements and intellectual property restrictions. The regulation also notes that TIAs are well suited to bring together consortia of researchers, which may include different types of organizations, such as universities, non-profits and commercial technology ventures.

Liberalization of Intellectual Property Rules—The intellectual property provisions of TIAs represent a watershed for the DOE. Under the provisions of the Atomic Energy Act, DOE, by default owns inventions conceived or first reduced to prac-

tice in programs that it funds, except for inventions made by small businesses, non-profits or universities. 42 USCA §§ 2182, 5908. This contrasts sharply with the allocation of rights applicable to other agencies, in which the inventor/contractor owns his invention and the Government receives a perpetual royalty-free license for Government uses. Large for-profit companies may get title only to inventions they make under DOE funding agreements if DOE waives title to them. 48 CFR [DEAR] § 952.227-13. The requirement to obtain a DOE waiver for the contractor to obtain title to an invention discourages participation by companies that wish to license or use their inventions in the commercial market because DOE often imposes conditions, such as a commitment to manufacture products from the technology in the U.S.

The interim rule establishes two types of TIAs, distinguished by their approach to intellectual property. If DOE retains the standard approach, the TIA takes the form of a cooperative agreement. The other type of TIA, cleverly titled "other than a cooperative agreement," is used when DOE departs from the usual intellectual property rules. Under this second type, data produced under the TIA is normally handled according to 10 CFR § 600.325(e), which allows research results to be withheld from public disclosure for up to five years.

However, the regulation gives DOE authority to negotiate other arrangements. For patents, the regulation provides flexibility rather than dictating a specific result. The intellectual property deliberations should arrive at "a reasonable arrangement considering the circumstances, including past investments of the recipient to development of the technology, contributions under the current TIA, and potential commercial and government markets." (10 CFR § 603.860(b), 70 Fed. Reg. 69265.)

For example, if the recipient rather than the Government was the predominant past contributor to the technology, then less restrictive patent requirements would be appropriate. Similarly, if private IP ownership is necessary for private participants to invest (as is typically the case), this would weigh in favor of liberal IP provisions. Presumably, this will most often take the form prevalent in the rest of the Federal Government: The contractor will own inventions, and DOE will receive a royalty-free perpetual license for Government use without further conditions such as U.S. manufacturing. However, DOE could even go beyond that arrangement to negotiate a reduction or elimination of the Government's license.

Cost Accounting and Audit—TIAs normally require the recipient to bear at least fifty percent of the overall project cost. DOE can furnish its funding share under the TIA in two ways. An expenditure-based agreement provides for DOE funding in a defined proportion to expenditures of the recipient's own funds. Thus, if the total budget is under-spent for a project, DOE would retain its share of the unexpended funds. The other type of TIA is a fixed-support agreement under which a fixed DOE contribution is defined and paid according to a milestone schedule.

Because the expenditure-based model depends on tracking the recipient's expenditures, it requires use of allowable cost principles. The source of cost principles varies depending on the type of recipient. For example, recipients that have cost-type procurement contracts would use FAR pt. 31 cost principles. Universities are subject to Office of Management and Budget Circular A-21 cost principles, other nonprofits are governed by Circular A-122, and state and local governments are covered by Circular A-87.

The expenditure-based method also necessitates an audit function. The TIA, therefore, includes an access-to-records clause, and each recipient must have independent audit oversight. Organizations that, by virtue of their other Government contracts, already have a cognizant Government audit authority, such as the Defense Contract Audit Agency or Office of Naval Research (ONR), will use that audit authority. Other for-profit organizations may be audited by an independent public accountant or DCAA. Allocable portions of private-audit costs may be reimbursed under the TIA.

Under the fixed-support type of TIA, a substantial cost share is still expected, but the amount of DOE support is not tied to the volume of private expenditures. Therefore, the audit requirement may be eliminated for this type of agreement. This possibility opens the door to participation by many organizations that have no experience in Government cost-type contracting and are reluctant to establish the requisite accounting and audit systems. However, the fixed-support type of TIA may not be avail-

able in all instances. The interim rule provides that a fixed-support TIA may be used only if (1) the desired outcomes are "well defined, observable, and verifiable;" (2) "the resources required to achieve the outcomes can be estimated well enough to ensure the desired level of cost sharing;" and (3) "the agreement does not require a specific amount or percentage of recipient cost sharing." 10 CFR § 603.305, 70 Fed. Reg. 69257.

Conclusion—The authorization of technology investment agreements represents a major milestone for DOE. Clearly, the Department believes that the added flexibility offered by TIAs will enable it to leverage brains and private resources that would not otherwise be devoted to its initiatives. Innovators in commercial technology ventures and universities will also welcome this initiative. One can foresee a variety of research areas of interest to DOE, which could be fostered through TIAs, including energy conservation, hybrid systems, hydrogen fuel cells, wind, solar, nuclear and clean hydrocarbon technologies.

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This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by* David W. Burgett *and* Agnes P. Dover*, partners in the Government Contracts Group of Hogan & Hartson LLP.

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