



**Department of Energy
Financial Assistance Regulation**

**No. 2006-03
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FINANCIAL ASSISTANCE LETTER

Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

Subject: Implementation Guidance for Awarding Technology Investment Agreements

References: 10 CFR Part 603 Technology Investment Agreements
 Pub. L. 109-58 Energy Policy Act of 2005, Section 1007 – Other Transaction Authority
 10 U.S.C. § 2371 Research projects: transactions other than contracts and grants
 DOE O 361.1 Acquisition Career Development Program
 DOE O 541.1B Appointment of Contracting Officers and Contracting Officer Representatives
 DOE O 540.1A Departmental Business Instrument Numbering System

When is this Financial Assistance Letter (FAL) effective?

This FAL is effective on July 10, 2006, the same day the Technology Investment Agreement rule is effective.

When does this FAL expire?

This FAL remains in effect until it is canceled.

Who is the Point of Contact?

Contact Trudy Wood of the Office of Procurement and Assistance Policy by telephone at (202) 287-1336 or by email at trudy.wood@hq.doe.gov.

What is the purpose of this FAL?

This FAL supplements the guidance in 10 CFR part 603 - Technology Investment Agreements (TIAs). It provides guidance relating to contracting officer warrant requirements, a format for the Memorandum for Record justifying the use of a TIA, the approval process, templates for TIAs, and Individual Procurement Action Report (IPAR) requirements.

What is the background?

Section 1007 of the Energy Policy Act of 2005 gives the Secretary of Energy authority to enter into transactions (other than the existing statutorily defined instruments - contracts, cooperative agreements, and grants), subject to the same terms and conditions as those given to the Secretary of Defense under 10 U.S.C. §2371. The purposes of this authority are to reduce barriers that prevent some for-profit firms from participating in DOE's research, development, and demonstration (RD&D) programs and broaden the technology base available to meet DOE mission requirements. On November 15, 2005, DOE implemented this new authority by publishing an interim final rule in the *Federal Register* (70 FR 69250), which established uniform policies and procedures for a new type of award, called a "technology investment agreement."

A TIA is a special type of assistance instrument used to increase the involvement of commercial firms in the Department's RD&D programs. A TIA may be either a type of cooperative agreement or a type of assistance transaction other than a cooperative agreement, depending on the intellectual property provisions. A TIA may be either expenditure based or fixed support.

On May 9, 2006, DOE published a final rule (71 FR 27158) that considered the comments received in response to the interim final rule. The final rule, like the interim final rule, establishes TIAs as a new type of assistance instrument, provides guidance and procedures for their use, and describes how to craft the award instrument. The guidance included in this FAL supplements the guidance in the final rule.

Guidance Included in this Financial Assistance Letter

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- I. Who may award a TIA?**
- II. How does the contracting officer document that the use of a TIA is appropriate?**
- III. What is the approval process for the award of a TIA?**
- IV. Are there templates for crafting a TIA and where are they located?**
- V. What are the IPAR requirements for each type of TIA?**
- VI. How does the contracting officer specify what the periodic audits should cover?**

Attachments

- 1. Standard format for Memorandum for Record, Justification for Use of a Technology Investment Agreement**
- 2. Coverage of Independent Audits of For-profit Firms**

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I. Who may award a TIA?

In accordance with 10 CFR 603.120, a contracting officer may award a TIA only if the contracting officer's warrant authorizes the award and administration of a TIA. 10 CFR 603 provides a contracting officer considerable latitude to negotiate provisions that vary from traditional, Government-unique requirements. Therefore, a contracting officer must possess a greater level of experience, business acumen, and judgment than is required for the award of standard assistance instruments. Since TIA contracting officers will be required to operate in a relatively unstructured business environment, the qualification standards for awarding a TIA are:

- Level III contracting certification, as defined in DOE O 361.1, Acquisition Career Development Program;
- Financial Assistance certification as defined in DOE O 361.1; and
- Completion of DOE TIA training.

DOE O 361.1, Attachment 3 - Financial Assistance Career Development Program Module, is being revised to include TIA qualification standards. In the meantime, contracting officers may be delegated authority to award a TIA if they meet the requirements in DOE O 541.1B, "Appointment of Contracting Officers and Contracting Officer Representatives," and the three qualification standards listed in this paragraph.

II. How does the contracting officer document that the use of a TIA is appropriate?

10 CFR 603.200 through 603.230 provide guidance on the appropriate use of a TIA and require that contracting officers, in conjunction with DOE program officials, consider the questions delineated in 10 CFR 603.225. The contracting officer must document the answer to each of these questions and include the answers in the award file (see 10 CFR 603.1020) using the Memorandum for Record format provided as an Attachment to this FAL.

III. What is the approval process for the award of a TIA?

A. Prior to Negotiation

Prior to initiating negotiations for a TIA, the Procurement Director at the awarding office should consult with DOE/NNSA Senior Procurement Executive and the officer having authority to approve the award to ensure that they support the objectives that could lead to the award of a TIA. In addition, the contracting officer must confer with the program official and assigned intellectual property counsel to develop an overall negotiation strategy for intellectual property (see 10 CFR 603.840).

B. Senior Procurement Executive Concurrence

A TIA award package must be submitted to the DOE/NNSA Senior Procurement Executive through the Office of Contract Management (MA-62) for DOE awards and through the NNSA Board of Awards, NA-63, Office of Procurement and Supply Management for NNSA awards at least 30 days before concurrence of the Senior Procurement Executive is required. The Senior Procurement Executive must concur with the award package before the packages is sent to the DOE/NNSA officer having authority to approve the award.

C. Approval Process

In accordance with 10 CFR 603.115, an officer of the Department who has been appointed by the President by and with the advice and consent of the Senate and who has been delegated the authority from the Secretary must approve the award of a TIA (e.g., Assistant Secretary or Deputy Administrator).

The following documents, at a minimum, must be included in the package submitted to the approving official:

- Brief description of program, the process that led to the award of the TIA, and the specific commercial benefits that should result from the project (10 CFR 603.1020(a) and (b));
- Memorandum for Record justifying the use of a TIA (10 CFR 603.1020(c));
- Determination of Noncompetitive Financial Assistance, if the award is to be made on a noncompetitive basis;
- Negotiation Memorandum, including how the recipient's cost sharing was valued (10 CFR 603.1020 (d) and (e));

- Negotiated Agreement (TIA);
- For a consortium that is not formally incorporated, the consortium's collaboration agreement or a summary of the collaboration agreement.
- Senior Procurement Executive's concurrence.

IV. Are there templates for crafting a TIA and where are they located?

The Office of Procurement and Assistance Policy is issuing templates for the following types of TIA awards:

- Consortium Template (Expenditure-Based)
- Company Template (Expenditure-Based)
- Consortium Template (Fixed Support)
- Company Template (Fixed Support)

These templates are on the TIA webpage at: <http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/TechnologyInvestmentAgreements?OpenDocument>. The templates have been developed to assist contracting officers in identifying provisions that should be included in a TIA (See 10 CFR 603.1010). Contracting officers may negotiate provisions that vary from those in the templates as long as the provisions comply with the requirements in 10 CFR part 603. In accordance with 10 CFR 603.840, a contracting officer must confer with the program official and the assigned intellectual property (IP) counsel to develop an appropriate strategy for IP. The IP counsel must approve any IP provision that varies from the standard DOE provisions for cooperative agreements.

The Office of Procurement and Assistance Policy plans to update the templates from time-to-time to incorporate lessons learned. Therefore, if a contracting officer is contemplating the award of a TIA, he/she should check the web site for the most recent templates.

V. What are the IPAR requirements for each type of TIA?

- A. Changes to the IPAR Handbook.** The IPAR Handbook is being revised to add the following assistance award instruments:

| <u>Code</u> | <u>Definition</u> |
|-------------|---|
| FT | <p>Technology Investment Agreement – Cooperative Agreement</p> <p>A legal instrument that is a type of cooperative agreement with more flexible provisions tailored for commercial firms, but with the intellectual property provisions in full compliance with the DOE intellectual property statutes.</p> |
| FO | <p>Technology Investment Agreement – Other Transaction</p> <p>A legal instrument that is an assistance transaction other than a cooperative agreement or a grant, because its intellectual property provisions vary from the Bayh-Dole statute and 42 U.S.C. 2182 and 5908, which require the Government to retain certain intellectual property rights and require differing treatment between large businesses and nonprofit organization or small businesses.</p> |

B. What are the reporting requirements for TIA awards?

The contracting officer must select the appropriate award code for each type of TIA. The contracting officer must also provide some additional information if the award is a “Technology Investment Agreement – Other Transaction” (FO).

EPACT of 2005 requires the Secretary to submit to Congress a report on the Department’s use of transactions (other than contracts, grants, or cooperative agreements), not later than 90 days after the end of each fiscal year. The statute requires that the report contain specific information. Therefore, if the award is a “Technology Investment Agreement – Other Transaction,” the contracting officer must complete the following additional text fields in the Procurement and Assistance Data System (PADS):

- Technical objectives, including the technology area in which the project was conducted
- Dollars returned to Government Account. (This field will default to \$0 since EPACT 2005 prohibits requiring repayment of the Federal share of a cost-shared activity as a condition of making an award.)
- Extent to which the other transaction has contributed to a broadening of the technology and industrial base available for meeting the Department of Energy’s needs.
- Extent to which the other transaction has fostered within the technology and industrial base new relationships and practices that support the energy or national security of the United States.

The last two bullets are similar to the questions in 10 CFR 603.225 that the contracting officer must consider and document on the attachment to the Memorandum for Record (See paragraph II of this FAL). Contracting officers may use the responses in the Memorandum for Record to complete the PADS text fields, as appropriate.

VI. How does the contracting officer specify what the periodic audits should cover?

If an expenditure-based TIA provides for audits of a for-profit participant by an independent public accountant (IPA), the contracting officer must specify what the periodic audits are to cover (See 10 CFR 603.660). Attachment 2, “Coverage of Independent Audits of For-profit Firms,” to this FAL provides audit guidance that contracting officer may use for this purpose. This guidance is also available on the Applicant and Recipient Page at <http://grants.pr.doe.gov>.

Standard Format

MEMORANDUM FOR RECORD

Justification for Use of a Technology Investment Agreement

1. The nature of the project (10 CFR 603.205)

- a. *Is the principal purpose of the project the support and stimulation of research, development or demonstration (assistance) or the acquiring of goods and services (acquisition)?*
- b. *Does the proposed project duplicate other RD&D being conducted under existing DOE programs?*

2. The type of recipient (10 CFR 603.210)

List name(s) of recipient (s)/consortium. Include statement regarding types of organizations performing under the effort-the focus here is the requirement of performance by a for-profit organization.

3. The recipient's commitment and cost sharing (10 CFR 603.215)

Provide evidence of recipient's commitment to and self-interest in the success of the project. Generally, evidence is in the form of cost-sharing (to the maximum extent practicable); however, if cost-sharing is impracticable, provide other evidence of self-interest.

4. Degree of involvement of the Government program official (10 CFR 603.220)

State that greater involvement is required of the program manager and provide examples of the involvement, e.g., voting member for project management decisions, reviews and approves program plans.

5. Benefit(s) in using a TIA (i.e., standard grant or cooperative agreement is not feasible or appropriate) 10 CFR 603.205(c) and 603.225. See attached questions and responses.
[Provide responses to the question on the attached page.]

For the above stated reasons, the use of a TIA is appropriate and justified.

Contracting Officer

Date

Concur:

Project Officer

Date

ATTACHMENT TO
MEMORANDUM FOR RECORD

10 CFR 603.225 provides a set of questions that contracting officers, in conjunction with program officials, must consider and report. The following is a summary to the questions (See 10 CFR 603.225 for full set of questions):

1. Will the use of a TIA permit the involvement in the RD&D of any commercial firms or business units of firms that would not otherwise participate in the project?
2. Will the use of a TIA allow the creation of new relationships among participants at the prime or subtier levels, among business units of the same firm, or between non-Federal participants and the Federal Government that will foster better technology?
3. Will the use of a TIA allow firms or business units of firms that traditionally accept Government awards to use new business practices in the execution of the RD&D project that will foster better technology, new technology more quickly or less expensively, or facilitate partnering with commercial firms?
4. Are there any other benefits to the use of a TIA that could help the Department of Energy better meet its objectives in carrying out the project?

ARCHIVED: NO LONGER ACTIVE

COVERAGE OF INDEPENDENT AUDITS OF FOR-PROFIT FIRMS**TABLE OF CONTENTS****Part 1. General Information**

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PART 1. GENERAL INFORMATION

What is the purpose of this document?

This document provides guidance for an independent public accountant (IPA) who is asked by a for-profit firm to conduct an audit of its systems, due to the firm's having received a technology investment agreement (TIA) from the Department of Energy (DOE).

Why does the Federal Government need an audit?

Federal officials are accountable to the public for the resources provided to carry out Government programs. Financial auditing contributes to accountability by providing an independent assessment to assure that recipients are handling Government funds properly.

Can the audit be integrated with the regular audit of a firm's financial statements?

Yes, the intent is to cause the minimum possible disruption to the firm's activities, so the IPA is encouraged to do the needed transaction sampling for DOE awards as part of the regularly scheduled audit of the firm's financial statements. In some cases, it may be even more efficient and economical to separately audit the individual DOE awards, and the firm may elect to have the IPA do so.

What are the objectives of the audit?

The auditor is to determine and report on whether:

- The firm has an internal control structure that provides reasonable assurance that it is managing DOE awards in compliance with the award terms and conditions, including applicable Federal laws and regulations.
- Based on a sampling of DOE award expenditures, the firm has complied with award terms and conditions, including applicable Federal laws and regulations, that may have a direct and material effect on DOE awards.

What is the source of the requirement for the audit?

The source of the requirement stated in the award document stems from sections 603.640 through 603.660 of 10 CFR part 603.

What should the IPA do if he or she finds that the Defense Contract Audit Agency is performing audits of the firm?

The IPA should consult with officials of the firm to ensure that:

- DOE contracting officer was aware of the DCAA audit presence at the time they made awards; and
- The DOE agreement authorizes the IPA to perform the audit, rather than requiring that the DCAA do so. If the IPA is authorized to perform the audit, he or she must consider the nature, timing, and extent of his or her own auditing procedures, to avoid unnecessary duplication of the DCAA effort.

PART 2. AUDIT OBJECTIVES AND COMPLIANCE REQUIREMENTS

A. ALLOWABLE COSTS

What is the objective of this portion of the audit?

The objective is to determine, by testing a sample of transactions, whether the firm complied with the requirements concerning allowability of costs charged to DOE awards.

What standards or cost principles determine the costs that are allowable as charges to the award?

Each technology investment agreement should specify the standards or cost principles that the for-profit firm is to use to determine the costs that it is allowed to charge to that award. While the TIA may specify use of the for-profit cost principles in the Federal Acquisition Regulation (FAR, at 48 CFR part 31), it could specify an alternative standard. The minimum standard in the latter case is that Federal funds and the firm's cost sharing contributions will be used only for costs that a reasonable and prudent person would incur in carrying out the RD&D project contemplated by the agreement.

What compliance requirements for allowability of costs should the audit address?

For a firm that is subject to the cost principles in the FAR, the IPA should determine and report on whether costs charged to DOE awards are in compliance with those cost principles and indirect cost rates are applied in accordance with approved rate agreements. For a firm that is subject to alternative standards that may be used for a TIA, the IPA should determine and report on whether costs charged to the DOE awards are:

- Necessary and reasonable for the performance of the RD&D projects supported by the awards, or for related administration. Generally, elements of cost that appropriately are charged are those identified with RD&D and development activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, "Accounting for RD&D and Development Costs," October 1974).

- Allocable to the RD&D projects (i.e., costs are charged to DOE projects in a manner that is in accordance with the benefits the projects received).
- Given consistent treatment with costs allocated to the firm's other RD&D and development activities (e.g., activities supported by the firm itself or by non-Federal sponsors).
- In conformance with any limitations in the award documents or regulations that they cite (e.g., any restrictions on types or amounts of costs, or requirements for prior approval of DOE contracting officer).
- Supported by appropriate documentation in the firm's records. The documentation may be in electronic form.

B. COST SHARING

What is the objective of this portion of the audit?

The objective is to determine, by testing a sample of cost sharing contributions, whether the firm made the contributions that the agreements required.

What are the compliance requirements for cost sharing?

The provisions of the award documents will specify requirements for the firm's cost sharing, which may be contributions of a specified amount or a percentage of total project costs. The cost sharing may be in the form of allowable costs incurred or in-kind contributions (including third-party in-kind contributions).

The values of the firm's contributions are determined in accordance with sections 603.530 through 603.555 of 10 CFR part 603.

What standards or cost principles determine the costs that are allowable as charges to the award?

C. FINANCIAL REPORTING

What are the objectives of this portion of the audit?

The primary objective is to determine whether the firm's financial reports for DOE awards:

- Fairly and completely represent the expenditures and status of resources for projects supported by those awards; and
- Are supported by applicable accounting records and the accounting basis used (e.g., cash or accrual).

What are the compliance requirements for financial reporting?

The agreements will specify the frequency and content of business/financial reports. They may specify the use of standard financial forms or periodic reports that include information on both programmatic and business status.

Each financial report (and the business portion of any report that also has programmatic information) will contain at least summarized details on the status of resources (Federal funds and any non-Federal cost sharing that the agreements require), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from these schedules; and discuss actions that will be taken to address the deviations.

D. EQUIPMENT AND REAL PROPERTY MANAGEMENT

Is a review of a firm's property management system usually required?

No, the IPA needs to review the property management system only if:

- There is Federally owned property associated with the award; or
- The firm charged the full purchase price of any equipment or real property as project costs (i.e., to Federal funds or the firm's funds that are counted toward required cost sharing); and
- The award under which the property was purchased provides for a continuing Federal interest in the property.

Note that the IPA generally will not need to review the property management system because most DOE awards will not have Federally owned property associated with them and will allow the firm to charge to the project only depreciation or use charges for real

property or equipment.

What are the objectives of the review?

The objectives are to determine whether the firm:

- Obtained the necessary prior approval for the equipment or real property purchase from the contracting officer.
- Keeps proper records for equipment and adequately safeguards and maintains equipment.
- Handles disposition or encumbrance of equipment or real property acquired under DOE awards in accordance with the applicable requirements.

What are the compliance requirements for Federally owned property and for equipment or real property purchased under DOE awards?

To protect the Federal interest in property, the DOE Assistance Regulations include standards for the firm's property management, use, and disposition, as shown in this table:

| If the property is . . . | Then the property management standards for the for-profit firm are in . . . |
|---|---|
| Real property or equipment purchased under a TIA, | Section 603.685 of 10 CFR part 603. |
| Federally owned property, | Section 603.690 of 10 CFR part 603. |

Note that a for-profit firm may include the full acquisition cost of real property or equipment as a charge to the project only with the prior approval of the contracting officer. The title to the real property or equipment vests conditionally in the for-profit firm upon acquisition, and there is a continuing Federal interest in the property unless a contracting office has statutory authority to do otherwise and elects to use that authority for a particular award. The Federal Government recovers its interest in the property through the disposition process at the project's end.

E. PROGRAM INCOME

Can program income be award audited?

Yes, but most awards will not involve any program income.

What is program income?

Program income is gross income earned by the recipient that is generated by a supported activity or earned as a result of the award. For example, if the purpose of an award is to support the firm's delivery of services and the firm collects fees for doing so, those fees are program income. As another example, if samples of materials or biological specimens are generated as a result of a supported RD&D effort, and the firm sells samples to other RD&D organizations, the proceeds of those sales would be program income. If authorized by the terms and conditions of the award costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

What is the objective of this portion of the audit?

The objective is to determine whether program income is correctly recorded and used in accordance with the award terms and applicable standards.

What are the applicable standards for program income?

The standards for program income are in section 603.835 of 10 CFR part 603.