On October 24, 1996, the Section submitted comments to the Office of Director of Defense regarding its proposed rule on DoD grant and agreement regulations (DoDGARS). The proposed rule would place various regulatory cost control mechanisms on DoD grants and agreements.

The Section expressed concern that the placement of cost control mechanisms on cooperative agreements would reduce their flexibility. The Section maintained that cooperative agreements have not been the subject of procurement reforms because they are already flexible and useful. For example, the cost principles should not apply to cooperative agreements because the commercial entity is using its own resources and can be expected to account for and control those resources in a responsible and cost-effective way. The Section also made several more specific comments directed towards removing any provisions of the proposed rule that added administrative and burdensome requirements for commercial organizations involved in cooperative agreements.

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October 24, 1996

Office of Director of Defense
Research and Engineering (ODDR&E(R))
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Dear Mr. Herbst:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by
Cooperative Agreements are not required by law or present regulations to include provisions required for procurement contracts. Primarily for that reason, they have been widely used by the civilian agencies and cooperating commercial entities to promote development of technology and to support the United States industrial base. DoD is gradually increasing its level of cooperative R&D in support of dual use technologies and products, leveraging its shrinking R&D resources with those of the commercial industrial base. While doing so, DoD should seek to achieve these new goals with minimum cost, disruption, or competitive harm to the commercial industrial base. Congress has enacted acquisition reform to enable the rule-bound procurement system to move in this direction. Cooperative agreements have not been the subject of the procurement reforms because they were already flexible and useful. The publication by DoD of the DoDGARs in its proposed form, however, reduces the flexibility of cooperative agreements and reverts to reliance on the discredited “command and control” approach to business relations. This is not required by law, and is clearly inconsistent with the spirit of recent procurement reform.

While dissatisfaction with the administration of grants by universities recently caused the extension of the Cost Principles to such transactions, there is no OMB directive requiring the use of Cost Principles in Cooperative Agreements with commercial entities. Unlike research grants to universities, cooperative agreements between commercial entities and the Government normally include cost-sharing. Since the commercial entity is using its own resources, it can be expected to account for and control those resources in a responsible and cost effective way. Thus, the application of cost control mechanisms designed for other circumstances is likely to introduce inefficiency without benefit to the program. Commercial entities will resist this approach, with negative results ranging from protracted transactional negotiations to limited participation or outright refusal to participate in otherwise mutually beneficial programs.

While some of these comments will likely be addressed in the forthcoming draft for more flexible cooperative agreements, we suggest the publication of the DoDGARs as drafted will send the wrong signal to the managers of the DoD scientific community.

1. On page 43868 (first column) of the Federal Register, under the section entitled "Additional Information About Proposed Part 34," it states that the proposed Part 34 specifies administrative requirements for grants and for most cooperative agreements with commercial organizations. The proposed Part 34 uses OMB Circular A-110 as its basis, even though such use is not mandatory and results in imposing administrative requirements on commercial companies which are burdensome, costly, and different from normal commercial practice. This OMB Circular A-110, concerning "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, & Other Non-Profit Organization," should not be made applicable to commercial organizations. Thus, we recommend that Part 34 not be subject to OMB Circular A-110.

2. On page 43868 of the Federal Register, under the section entitled "Remaining Step to Establish the DoD Grant and Agreement Regulations," it is stated that the final major step in establishing the DoDGARs will be to adopt one additional part on "selected research agreements with commercial organizations." That part, which is currently being prepared, is intended to provide more flexible administrative requirements than those in the proposed Part 34. The greater flexibility would be available for a certain class of research agreement (we assumed that mean what is called a "flexible cooperative agreement" in the 1994 Interim draft DoDGARs) which is designed to help integrate the defense and non-defense portions of the U.S. technology and industrial bases. That part is in all likelihood the most significant portion of the DoDGARs; and we want to ensure that, once written, it gives maximum flexibility to commercial companies. In this regard, we provide the following comments:

   a. The model "flexible cooperative agreement" found at the DoD/Air Force Material Command (AFMC) Internet web site is not based on OMB Circular A-110. (See, e.g., Module 3, the AFMC's
flexible cooperative agreement with a commercial organization, which is enclosed for your information.) As a result, the burdensome administrative requirements of OMB Circular A-110 are not imposed on a commercial organization. This approach should be the standard used with primarily commercial companies -- not the exception. As an example, this model Air Force "flexible cooperative agreement" has the potential (assuming the grants officer is willing to eliminate all unnecessary requirements) to be nearly as streamlined as an "other transaction." The only differences are that a flexible cooperative agreement (a) is subject to the Bayh-Dole Act patent requirements and (b) requires certain certification requirements to be flowed down to subcontractors. In contrast, DARPA interprets DoD's "other transaction" authority as not being subject to the Bayh-Dole Act and not requiring certification requirements -- applicable to the "other transaction" prime contractor -- to be flowed down to subcontractors. In order to strictly comply with the subcontractor certification requirements of a flexible cooperative agreement, a commercial company must adopt purchasing practices different from its normal commercial practice. This is frequently difficult and costly for commercial companies to do.

b. The AFMC module flexible cooperative agreement contains certain features that make it much less administratively burdensome. Therefore, this flexible cooperative agreement is much more attractive to commercial companies than the requirements set forth in the proposed Part 34. These features include:

i) The payment of fixed amounts based on accomplishment of technical milestones, rather than cost reimbursement payments based on actual costs incurred. The former eliminates the requirement for strict Government time-reporting requirements that otherwise would be imposed on all direct charge employees working in the department where the research is being performed (not just on those employees working on the cooperative agreement), to establish valid overhead rates. Instead, the company's standard commercial time reporting practices may be followed. Also, payment of fixed amounts rather than cost reimbursement payments eliminates the perceived need for the use of FAR cost principles.

ii) Elimination of the FAR cost principles and substitution of generally accepted accounting principles (GAAP).

iii) Elimination of Government unique purchasing requirements under OMB Circular A-110, and substitution of standard commercial purchasing practices.

iv) Elimination of Government property monitoring requirements.

3. Section 21.110(b) states that, in accordance with DoD Directive 3210.6, the DoDGARs may include rules that apply to other nonprocurement instruments when specifically required to implement a statute, Executive order, or Government-wide rule that applies to other nonprocurement instruments. It should be expressly stated that the DoDGARs does not apply to "other transactions."

4. Section 21.130, "Definitions," contains a definition of "assistance" which should be specifically defined to exclude "other transactions." "Other transactions" can be written to be in the nature of "assistance," but such legal instrument should not be considered to be "assistance" for purposes of applicable laws and regulations.

Section 21.130, "Definitions," also provides a definition of "contract." For this definition, the proposed rule simply says to "[s]ee the definition for procurement contract in this section." This statement implies that only a procurement contract is a contract. But this is incorrect. A "cooperative agreement" is also a contract. See, e.g., Thermalon Industries, Ltd. v. U.S., 14 FPD 98 (Fed. Cl. 1995). (In some cases, even a grant is a contract.) We therefore suggest this statement be revised to say: "See the definitions for procurement contract or cooperative agreement in this section."

Finally, in regard to the definition for "procurement contract," we suggest the use of the words "or entity" after the word "person." The word "person" isn't defined, and its sole use causes some confusion.
5. Part 21, Subpart C. It would appear to be more accurate to use the title "Grants, Cooperative Agreements, and Other NonProcurement Information." This subpart covers information for all three of these type legal instruments, not merely grants.

6. Section 22.205(a)(2), last sentence. In 1994, Congress authorized ARPA's (now DARPA's) use of "other transactions" to carry out military prototype projects relevant to weapons or weapons systems. See Section 845, National Defense Authorization Act for Fiscal Year 1994, P.L. 103-160. In 1996, the authority to use "other transactions" for prototype projects was extended to other DoD components. See Section 804, National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201. Although we recognize that a separate Part is being drafted to cover such flexible instruments, we recommend the last sentence be deleted in this general, overview section of the regulation.

7. Section 22.610(b) states that Appendix B provides certain model subcontract flowdown clauses to implement Federal statutes, Executive orders, and regulations that frequently apply to grants and cooperative agreements. As will be discussed later, Appendix B is not found in model defense flexible cooperative agreements, such as that used by the AFMC. We therefore suggest these model clauses not be included in the forthcoming Part xx (described at p. 43868), regarding flexible cooperative agreements.

8. Section 22.815(e)(3)(iii) states that a recipient's appeal of a grants officer's final decision is to be decided solely on the basis of the written record, unless the Grant Appeal Authority decides to conduct fact-finding procedures or an oral hearing on the appeal. It would be desirable to revise Section 22.815(e)(3)(iii) to give the recipient the right to a hearing before the Grant Appeal Authority, if requested.

9. Section 22.815, "Claims, Disputes, and Appeals." According to Section 22.820(c)(2)(iv), a DoD component's claim, based on a debt owed by a recipient, bears interest and may include penalties and administrative costs. Section 21.220(b)(3) mandates that grants officers ensure that "recipients of grants and cooperative agreements receive impartial, fair, and equitable treatment." Accordingly, it is only fair that recipients also receive interest on their own claims that are granted or settled by the parties. We therefore recommend a provision be added to provide that recipient claims bear interest.

Section 22.820(c)(2)(iv) does not state how the interest rate will be determined. This Section should provide for simple interest at the rate fixed by the Secretary of the Treasury under Public Law 92-41.

10. In regard to Appendix B to part 22, "Suggested Award Provisions for National Policy Requirements That Often Apply," we have the following comments:

   a. The Appendix contains a number of flowdown requirements to sub-recipients apparently not required by law. They include Nondiscrimination (items a, b, d and e), Cargo Preference, and Clean Air and Water Acts. These requirements should be deleted.

   b. The requirement to include a clause implementing "Officials Not to Benefit" clause at 41 U.S.C. 22 was eliminated by Section 6004 of FASA. This is an unnecessary clause, and should be deleted.

11. Appendix C to Part 22, "Administrative Requirements and Issues to be Addressed in Award Terms and Conditions," contains a number of burdensome requirements for commercial entities which are not required by law. These requirements include: allowable costs are to be subject to 32 CFR 34.17 (Part 31 of the FAR), property requirements are to be subject to 32 CFR 34.20-34.25 (Government unique administration requirements found at Section 34.23), procurement systems are to comply with 32 CFR 34.30-31, and subcontract flowdown requirements (32 CFR 32.5, 33.37, 34.1(b)(2)). These requirements should be eliminated.

12. Section 32.27, "Allowable Costs" -- found in Part 32, concerning "Administrative Requirements for Grants and Agreements with Institution of Higher Education, Hospitals, and Other Nonprofit Organizations" requires such organizations to flow down the FAR cost principles to subcontractors that are commercial organizations. It is very expensive for commercial organizations to comply with these FAR cost principles in order to participate in a small project. GAAP should be made applicable instead.
13. Section 34.1(b)(1) provides that DoD Components are to make these Part 34 provisions applicable to prime awards to commercial organizations. It makes no provision for awards of "flexible cooperative agreements" to commercial organizations that cannot meet the requirements of Part 34. We recommend that this section be revised to provide that for commercial organizations that cannot meet the Part 34 requirements, such organizations be made subject to the new Part xx (described at p. 43868), governing "flexible cooperative agreements."

14. Section 34.1(b)(2) states that commercial organizations that receive subawards must comply with the requirements of Part 34, even though many commercial concerns will be unable to meet such requirements. This requirement should be eliminated.

15. Section 34.11(a)(4) seems to permit time reporting to coincide with one or more pay periods and to permit time records to be prepared at least monthly. If this is intended to cover time reporting for work performed under a grant or cooperative agreement, this is a significant relaxation of the present DCAA requirement to prepare time cards daily. Is this what is intended?

16. Subpart 34.12 makes no provision for payments of fixed amounts for accomplishment of technical milestones. Perhaps this is intended to be covered in the new section on "flexible cooperative agreements" still in draft. Note that Section 34.12(b) states that cost reimbursement is the preferred method of payment, even though many commercial companies are unable or unwilling to contract with DoD on this basis. This policy should be changed.

17. Subpart 34.16 provides that any recipient that expends $300,000 or more in a year under Federal awards shall have an audit made that year by an independent auditor. This is a significantly favorable change from the traditional Government audit requirement. The Department of Commerce's Advanced Technology Program permits the recipient to include the cost of such an audit as a direct allowable cost under funding agreements. It would be desirable for Subpart 34.16 to be revised to permit the costs of the audit to be charged to the funding agreement as a direct allowable cost. Also, we recommend that the Section specify whether the cost of the audit is subject to cost sharing.

18. Section 34.17(a) provides that allowability of costs incurred by commercial organizations as recipients of prime awards or sub-recipients under prime awards "be determined in accordance with 48 C.F.R. Parts 31 and 231 [the cost principles] in the . . . FAR and the . . . DFARS, respectively." There is no statute or Executive order that requires the FAR/DFARS cost principles be used for grants and cooperative agreements. Most commercial contractors are unable to comply with these FAR/DFARS cost principles. For this reason, such entities often refuse to enter procurement contracts with the Federal Government. By mandating that the FAR/DFARS cost principles apply to grants and cooperative agreements, these same commercial contractors will be unable or unwilling to enter such grants and cooperative agreements. The allowability of costs incurred based on GAAP is the more fair and equitable standard. Accordingly, it is recommended that GAAP replace the FAR/DFARS cost principles.

19. Section 34.21, "Real Property and Equipment," states that title to equipment vests in the recipient; however, such title is conditional. The conditions make compliance with Subpart 34.21 administratively burdensome and costly. We have the following comments on this subpart:

   a. Section 34.21(c) provides that the recipient may offer real property or equipment, purchased with the recipient's funds or donated by a third party, to meet a portion of any required cost sharing or matching. However, if this is done, the Government is deemed to have a financial interest in the property, a share of the value attributable to the Federal participation in the project. The property is to be considered as if it has been acquired in part with Federal funds and is subject to the provisions of paragraphs (b)(1), (b)(2), and (b)(3) of Section 34.21 and the property management system requirements of Section 34.23. This is inequitable, unnecessary, and will discourage commercial companies from seeking awards of DoD cooperative agreements. We are unaware of any Government agency taking this position with respect to real property or equipment purchased by the recipient or donated by a third party. We recommend that Section 34.21(c) be revised to state that such property shall not be subject to paragraphs (b)(1), (b)(2) and (b)(3), nor to Section 34.23.
b. Section 34.21(d)(1) states that during the time the property is used on the program, the recipient is to make it available for use on other programs on a non-interference basis and in a certain order of priority. Charges are to be assessed for use under Federal procurement contracts, or activities not sponsored by any Federal Agency. The use charges are to be treated as program income. Upon conclusion of the cooperative agreement or grant, the equipment is to be disposed of. (Section 34.21(e).) If the recipient wants title, the recipient is to compensate the Government for the percentage of the current fair market value of the equipment that is attributable to the Federal participation in the project. If the recipient doesn't want title, the grants officer is to determine if the equipment would be useful to a Federal agency and, if so, transfer title to such agency. In such event, the recipient is to be compensated for its attributable percentage of the current fair market value of the equipment. Meanwhile, during this time, the recipient must have a property management system that complies with Section 34.23 to keep track of such property.

In contrast to the foregoing administratively burdensome and inequitable requirements with respect to property purchased in part with Federal funds under the DoDGARS, DARPA is willing to negotiate a provision in its "other transactions," giving the contractor title to equipment purchased in part with Government funds and in part with the contractor's funds. It is recommended that the DoDGARS be made consistent with DARPA's approach.

20. Section 34.23, "Property Management System," contains administrative requirements for managing property purchased under the cooperative agreement. These requirements will result in commercial companies having to establish Government property management systems that are costly and administratively burdensome. It is therefore recommended that this requirement be eliminated, if DoD wants to encourage commercial companies to enter into cooperative agreements.

21. Section 34.24, "Supplies," states that upon completion of the program, the recipient is to retain any unused supplies. If the inventory exceeds $5,000 in value and the supplies are not needed for any other Federal project or program, the recipient is to retain the supplies for use on non-Federal projects or to sell them. But, in either case, the recipient is to compensate the Government for its share. The foregoing requirements mean that supplies will be subject to Section 34.23 controls, which are very costly and administratively burdensome. See our recommendation concerning Section 34.23.

22. Section 34.25, "Intellectual Property Developed or Produced Under Awards," states that awards are to include the "Patent" clause of 37 CFR 401.14. Section 34.25 should be modified to be similar to the NASA regulations concerning cooperative agreements with commercial companies that permit the commercial company to obtain rights in its subcontractor's subject inventions. Otherwise, the commercial company will be precluded by 37 CFR 401.14(g)(1) from obtaining rights in its subcontractors' subject inventions, even though the commercial company has paid in part for the costs of the subcontractor as part of its cost share. The pertinent NASA regulations are found at 61 Fed. Reg. 13398, 13401, and 13410 (March 27, 1996).

It is therefore recommended that sub-section (a)(2)(iii) be added to Section 34.25, to read as follows:

"(iii) The clause at 37 CFR 401.14 shall be modified if the recipient makes a cost share contribution (cash or in-kind) towards the project or program. This modification shall authorize the recipient to negotiate and reach agreement with its subcontractor for a grant-back of rights. Such grant back could be, e.g., an option for a exclusive license or an assignment, depending on the circumstances. If it is determined that the clause at 37 CFR 401.14 is to be so modified, the following sub-paragraph (g)(4) is to be added to this clause:

'(g)(4) Notwithstanding paragraph (g)(1) of this clause, and in recognition of the recipient's substantial contribution of funds, facilities and/or equipment to the work performed under this Agreement, the recipient is authorized, subject to the rights of the Government set forth elsewhere in this clause, to:

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

(ii) Request, in the event of inability to reach agreement pursuant to paragraph (g)(4)(i) of this clause, that the Government invoke exceptional circumstances as necessary pursuant to 37 CFR 401.3(a)(2) if the prospective subcontractor is a small business firm or organization or nonprofit organization. '

23. Section 34.25(b)(2)(i) should be revised to read as follows "(i) Obtain, reproduce, publish, or otherwise use the data first produced under an award for Federal purposes."

24. Section 34.25, "Intellectual Property Developed or Produced under Awards," should be revised to add a section which provides an "Authorization and Consent" clause to be included in cooperative agreements. The Air Force has authorized this type of clause. Also, the Department of Energy regulations provide for an "Authorization and Consent" clause to be included in its cooperative agreements. The clause we propose for use is as follows:

Authorization and Consent

1. The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this Cooperative Agreement or any subcontract/lower tier agreement at any tier.

2. The Recipient agrees to include, and require inclusion of, this Clause, suitably modified to identify the parties, in all subcontracts/lower tier agreements, at any tier, for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed $________); however, omission of this Clause from any subcontract/lower tier agreement, under or over $________, does not affect this authorization and consent.

25. Section 34.31, "[Procurement Standard] Requirements," contains procurement requirements for subcontracts that often differ significantly from standard commercial practice. For example, Section 34.31(b) provides that pre-award documents may be subject to pre-award review by the grants officer. Also, Section 34.31(c) requires that subcontracts contain certain Government flowdown and audit provisions. These requirements will require commercial companies to draft Government terms and conditions for subcontracts and to establish Government-unique purchasing requirements that comply with Section 34.1. This is costly, administratively burdensome, and unnecessary. Such requirements, for example, are not found in the AFMC's model flexible cooperative agreement. Thus, it is recommended these requirements be eliminated.

26. Section 34.42, "Retention and Access Requirements for Records." The following changes are recommended for Section 34.42(e): Fourth line -- revise to "authorized Government representatives"; and, in the fifth line -- "unrestricted access" should be revised to be "access during normal working hours." Finally, in the second to the last sentence, the Government is given the express right to interview contractor personnel during audits. This goes beyond existing law, and should be eliminated.

27. In the second and third lines of Section 34.51(a)(1), concerning "Termination," revise the phrase "comply with the terms and conditions" to read "comply with the material terms and conditions."

28. It should be expressly specified in Section 34.52(a) that the recipient is to be paid all its allowable costs incurred prior to the termination if the cooperative agreement is terminated for failure to comply with a material provision thereof.

29. Appendix A to Part 34, "Contract Provisions," contains Government flowdown clauses for subcontracts. These clauses are not required to be flowed down in the AFMC model flexible cooperative agreement. If this requirement is not eliminated, the recipient will have to prepare Government unique flowdown clauses and ensure they are included in all applicable subcontracts. Many commercial companies will either be unable or unwilling to agree to such a requirement. Accordingly, these clauses should be eliminated.
The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

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