

Department of Defense

§ 1128.710

third-party in-kind contributions for cost sharing or matching purposes.

(b) *Award terms and conditions*—(1) *General*. To implement the OMB guidance described in paragraph (a) of this section as it applies to valuation and documentation of third-party in-kind contributions, a DoD Component's general terms and conditions must use the wording Section VI of appendix F to this part provides as Section F of FMS Article VI.

(2) *Exception*. A DoD Component's general terms and conditions may reserve any paragraph of the wording appendix F to this part provides for Section F of FMS Article VI if the DoD Component determines that there will be no possibility of third-party in-kind contributions under awards using those terms and conditions.

Subpart G—Program Income (FMS Article VII)

§ 1128.700 Purpose of FMS Article VII.

FMS Article VII of the general terms and conditions specifies requirements for program income that recipients earn. The article thereby implements OMB guidance in 2 CFR 200.80 and 200.307.

§ 1128.705 Content of FMS Article VII.

(a) *Requirement*. A DoD Component's general terms and conditions must address the kinds of income included as program income, the way or ways in which a recipient may use it, the duration of the recipient's accountability for it, and related matters.

(b) *Award terms and conditions*. A DoD Component's general terms and conditions must include as FMS Article VII the wording appendix G to this part provides, unless, as authorized by §§ 1128.710 through 1128.725, there are revisions to the wording of Sections A and E of the article or Section D is reserved.

§ 1128.710 What program income includes.

(a) *OMB guidance*. Under the definition of “program income” at 2 CFR 200.80 and related OMB guidance at 2 CFR 200.307, an agency's regulations or terms and conditions of grants and co-

operative agreements may include as program income:

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

(2) Taxes, special assessments, levies, fines and other similar revenue raised by a governmental recipient.

(b) *DoD implementation*. Unless a statute or program regulation adopted in the Code of Federal Regulations after opportunity for public comment specifies otherwise, each DoD Component must exclude the types of income listed in paragraphs (a)(1) and (2) of this section from program income for which recipients are accountable to the Federal Government.

(c) *Award terms and conditions* — (1) *General*. Except as provided in paragraph (c)(2) of this section, a DoD Component must use the wording provided in appendix G to this part as Section A of FMS Article VII in its general terms and conditions. Doing so excludes the types of income listed in paragraphs (a)(1) and (2) of this section from program income for which recipients are accountable to the Federal Government.

(2) *Exceptions*. If a DoD Component has a statutory or regulatory basis for including either or both types of income described in paragraphs (a)(1) and (2) of this section, it may do so by appropriately revising the wording appendix G provides for Section A of FMS Article VII. For example, to include as program income:

(i) Rebates, credits, discounts, and interest earned on them, a DoD Component would reserve paragraph A.3.c and insert the wording of that paragraph as a new paragraph at the end of section A.2, thereby adding them to the list of items included as program income subject to FMS Article VII.

(ii) Taxes, special assessments, levies, fines and other similar revenue raised by a governmental recipient, a DoD Component would reserve paragraph A.3.d and insert that wording as a new paragraph at the end of section A.2, thereby adding them to the list of items included as program income subject to FMS Article VII.

§ 1128.715 Recipient obligations for license fees and royalties.

(a) *Policy.* Unless a statute or program regulation adopted in the Code of Federal Regulations after opportunity for public comment provides otherwise, a DoD Component's general terms and conditions may not specify that recipients have obligations to the Federal Government with respect to program income from license fees and royalties for patents or patent applications, copyrights, trademarks, or inventions produced under DoD awards.

(b) *Award terms and conditions—(1) General.* Except as provided in paragraph (b)(2) of this section, a DoD Component's general terms and conditions must implement the policy in paragraph (a) of this section by including the wording provided in appendix G to this part as Section D of FMS Article VII.

(2) *Exception.* If a DoD Component has a statutory or regulatory basis for establishing recipient obligations for the license fees and royalties described in paragraph (a) of this section, it may reserve Section D of FMS Article VII in its general terms and conditions.

§ 1128.720 Program income use.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.307(e) identifies alternative ways that a Federal agency might specify that recipients use program income they earn.

(b) *DoD implementation.* A DoD Component's general terms and conditions must specify how recipients are to use program income under awards using those terms and conditions.

(1) The terms and conditions may specify one of the following ways for recipients to use program income:

(i) *Addition.* A recipient under this alternative adds program income to the total amount of the approved budget, which consists of the Federal share of funding and any required matching or cost sharing.

(ii) *Deduction.* A recipient using this alternative subtracts program income from total allowable costs to determine net allowable costs for purposes of determining the Federal share of funding and any required cost sharing or matching.

(iii) *Cost sharing or matching.* Under this alternative, a recipient counts program income toward its required cost sharing or matching.

(iv) *Combination.* The fourth alternative is a combination of any of the three alternatives described in paragraphs (b)(1)(i) through (iii) of this section. For example, an agency might specify one alternative to be used for program income up to a dollar limit and a second alternative for any program income beyond that amount.

(2) For research awards, absent compelling reasons to do otherwise for a specific set of general terms and conditions, a DoD Component must specify the addition alternative described in paragraph (b)(1)(i) of this section.

(3) For general terms and conditions of other awards, a Component may specify any of the alternatives described in paragraph (a) of this section. However, the cost sharing or matching alternative is best used as part of a combination alternative, as described in paragraph (b)(1)(iv) of this section, unless the DoD Component knows at the time awards are made how much program income recipients will earn in relation to the amounts of their required cost sharing or matching.

(c) *Award terms and conditions.* (1) *Default—addition alternative.* In accordance with the DoD implementation in paragraph (b) of this section, a DoD Component must use the wording provided in appendix G to this part as Section E of FMS Article VII in:

(i) Research awards; and
(ii) Other awards for which it elects to specify the addition alternative for use of program income.

(2) *Deduction alternative.* A DoD Component electing to specify the deduction alternative for use of program income must modify the wording appendix G to this part provides for Section E by:

(i) Substituting the following wording for the wording of paragraph E.1: “1. You must use any program income that you earn during the period of performance under this award as a deduction from the total approved budget of this award. The program income must be used for the purposes and in accordance with the terms and conditions of the award.”