U.S. Department of Transportation
Federal Aviation Administration

Memorandum

Subject: Program Guidance Letter 88-5

Date: JUN 29 1988

From: Manager, Grants-in-Aid Division, APP-500

Reply to Attn. of:

To: PGL Distribution List

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88-5.1 Suspension and Debarment - Ben Castellano (267-8822)

On May 26 OMB and DOT published in the Federal Register a new common rule on suspension and debarment (see attachment A). It amends the previous DOT rule, 49 CFR Part 29, published in the FR on October 20, 1987, and includes two major changes which will go into effect on October 1, 1988:

1. A person or company suspended or debarred in any Government program is ineligible to receive contracts under the AIP. GSA will publish a list entitled "List of Parties Excluded From Federal Procurement or Nonprocurement Programs" and distribute it to the Airports field offices.

2. A standard clause (attachment B) is required in all solicitations, contracts, and subcontracts, which are expected to be for $25,000 or more, whether for services, equipment, materials, or construction. All contracts for audit services are covered, regardless of cost.

88-5.2 MLS Transition Policy - Ben Castellano (267-8822)

Grant requests for an ILS under the MLS Transition Policy should be forwarded directly to the MLS coordinator in the regional Flight Standards Division for action. They will send their recommendation to the Manager, Program Management Division, APR-100, who will handle coordination in Headquarters and forward for the Administrator's approval, as appropriate. If approved, APP-500 will notify the Airports Division to proceed with the programing of the ILS. The ten place-named ILSs in the FY88 Appropriations Bill Report language are exempted from this procedure, and regions may process the applications as they are ready.

88-5.3 Disadvantage Business Enterprises Program - Ben Castellano (267-8822)

On Monday, May 23, DOT published in the Federal Register (attachment C) the technical amendments to 49 CFR part 23. This puts the AIP under Subpart D of the regulation . The regional Civil Rights offices are sending a copy of a letter (attachment D) to all Airports sponsors who will be affected by this change. Between now and July 15, sponsors should change contract goals in their bid solicitations from MBE/WBE to a single DBE (which will total the separate MBE & WBE figures). Bids already solicited or contracts already awarded will not have to be amended. Any bid solicited after July 15 must specify the DBE contract goal. Further guidance will be forthcoming on additional changes in the civil rights program for airport sponsors.

88-5.4 Pavement Management Programs - Mark Beisse (267-8826).

Guidance currently contained in Paragraph 306 of Order 5100.38 allows pavement condition surveys as eligible but states that pavement management programs are ineligible. The following guidance amends this to allow funding of pavement management programs at the network level and establishes a level of detail appropriate to a management program.

Based on current experience with pavement condition index (PCI) surveys, the PCI survey alone is only an indicator of pavement condition at a point in time. To be more useful for identifying cost-effective maintenance and rehabilitation, the PCI survey may be used in conjunction with a systematic approach to inventory and process data. This allows the sponsor, a state for example, to use a network of pavement data.

Pavement data may be analyzed at both the network and project levels. The network level considers total pavement in a master or system plan context and examines alternatives and time frames to maximize benefits. It is directed toward keeping acceptable performance while minimizing maintenance and rehabilitation costs.

The project level is site specific and results in detail appropriate only to development project formulation, not planning. The objective is to assess causes of pavement deterioration, determine potential solutions, assess benefits of alternatives, carry out life-cycle costing, and select the solution. At this level, sufficient information must be obtained to evaluate the pavement's structural capacity and determine the causes of and extent of pavement deterioration. This level of detail is beyond that needed for a network of pavement information funded under master or system planning and should therefore be confined to an airport development project.

We recognize that sponsors of planning studies desiring to establish a network pavement management program may properly request it under that broad heading or some related title. It is the level of detail proposed that should be reviewed to determine eligibility for master or system planning as discussed below. In

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this regard, pavement management programs funded under master or system planning should include an action plan indicating how information developed will be used to help airport sponsors manage pavements. The action plan should clearly identify follow-on commitment on the part of both planning agency and airport sponsor to the study recommendations.

a. Work Eligible Under Master Or System Planning.

Funding to establish and implement a pavement management program at the network level is eligible as master or system planning under the Airport Improvement Program. Work items are limited to the following elements:

- Network definition to divide pavement data into components for storage, retrieval, and evaluation.

- Pavement condition survey to inspect pavement surfaces for signs of distress resulting from aircraft traffic or climatic conditions and development of a PCI.

- Construction history including dates and pavement structure of new construction, overlays, and rehabilitation work. A determination should be made on an airport by airport basis that FAA pavement files are not current before funding this element.

- Traffic volume and load intensity for each pavement section.

- Inspection scheduling based on minimum PCI and pavement deterioration rates.

- Pavement condition report which rates network deterioration or improvement to determine the impact of deferring maintenance and rehabilitation.

- Priority scheme and ranking of pavement sections by condition within various grouping options.

- Maintenance and rehabilitation cost scheduling to develop average unit costs based on surface type, PCI ranges, and distress severity.

- Budget planning to develop minimum target PCI values for each pavement type in the network. This element, in conjunction with maintenance and rehabilitation costs as well as projected inflation rates, is used to produce budgets required to maintain the network above a particular condition level.

- Acquisition of available software dedicated to the study, e.g. Micro-PAVER, and the cost of computer time to store, process, and analyze the data is eligible. Computer processing and graphics should not be required unless necessary and the least cost method.

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- o Periodic updating of pavement management programs is eligible as an element of master or system planning. Based on current experience, this should be limited to a three year cycle so that after initial surveys updating of information would not be accomplished until the third year. If desired, the process can be phased so that only a certain number of airports are reviewed in any given year.

b. Work Eligible Under Development Projects Only.

Work at the project level is eligible under development projects as follows:

- o Nondestructive testing such as deflection testing, ground penetrating radar, and video logging.
- o Destructive testing such as soil borings, pavement cores, and soil strength tests.
- o Analyzing alternatives and development of engineering solutions.
- o Engineering design work.

c. Ineligible Work.

Work ineligible under the Airport Improvement Program includes:

- o Developing software beyond that commercially available. This is considered research, not planning and design.
- o Computer hardware and common use software, e.g. word processing.
- o Pavement management programs at airports which are in state system plans but not National Plan of Integrated Airport Systems.
- o Day to day operational costs of running a pavement management program beyond periodic updating of the pavement management program.

d. Scope And Use Of Pavement Management Under System Planning.

Pavement management under system planning requires special consideration:

- o Normally, pavement management programs would be accomplished through master planning projects at most major airports with the state system plan covering other airports the state wishes to cover. However, only costs for airports in the National Plan of Integrated Airport Systems will be allowable under pavement management programs.
- o A pavement management program and updates for a particular airport are only eligible once, either in a master or system plan.

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- o Once a pavement management program is undertaken, the sponsor must commit to keeping the data current through a triennial update of the entire program or any other reasonable approach, e.g. a phased approach with one-third done each year.

- o Airport development work identified through a pavement management program should be reflected in the state's capital improvement program.

e. Cost Guidance.

The cost of PCI surveys and pavement management programs has varied widely. Each proposal should be reviewed carefully to determine that costs and manhours are necessary and reasonable. In order to develop national guidance for reasonableness of cost, we request that you send to APP-510 cost information on all pavement management system work proposed in your region. Until guidance is issued, questions about cost should be addressed to AAS-200.

We are revising Order 5100.38 to reflect this guidance.

Lowell Johnson

Lowell Johnson

Attachments

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Text of the Common Rule

The text of the common rule as adopted by the agencies in this document appears below.

PART __—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

49 CFR PART 29

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Appendix A—Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

Appendix B—Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

Authority: Executive Order 12549, [citation to Agency rulemaking authority]

Subpart A—General

§29.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in §29.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

§29.105 Definitions.

(a) *Adequate evidence.* Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate.* Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency.* Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) *Debarment.* An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official.* An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) *Debarring Official.* For DOT the designated official is the head of a Departmental operating administration, who may delegate any of his or her functions under this part and authorize successive delegations.

(h) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible.* Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for exemple, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings.* Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State of local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement List.* The portion of the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

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(l) *Notice.* A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of party, its identified counsel, its agent service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant.* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person.* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

(o) *Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) *Principal.* Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(q) *Proposal.* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) *Respondent.* A person against whom a debarment or suspension action has been initiated.

(s) *State.* Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) *Suspending official.* An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) *Suspending Official.* For DOT the designated official is the head of a Departmental operating administration, who may delegate any of his or her functions under this part and authorize successive delegations.

(u) *Suspension.* An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded.* A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(w) *DOT.* Department of Transportation.

(x) *Operating administration* includes the Office of the Secretary, the head of which, for the purposes of this rule, is the Assistant Secretary for Administration.

§ 29 110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(1) Principal investigators.

(2) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 29 200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 29 110(a). Sections 29 325, "Scope of debarment," and 29 420, "Scope of suspension," govern

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the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

§ 29.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

§ 29.120 Saving clause.

Any debarment or suspension initiated before October 1, 1988, shall be governed by Part 29 of the Department's regulations as Part 29 existed immediately before October 1, 1988, including § 29.125 thereof.

Subpart B—Effect of Action

§ 29.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, no agency shall enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to § 29.215.

(b) ~~Lower~~ *tier covered transactions.* Except to the extent prohibited by law, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 29.110(a)(1)(ii)) for the period of their debarment or suspension.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

§ 29.205 Ineligible persons.

Persons who are ineligible, as defined in § 29.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 29.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 29.315 are excluded in accordance with the terms of their settlements. [~~Agency~~ DOT] shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 29.215 Exception provision.

[~~Agency~~ DOT] may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 29.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 29.505(a).

(a) A debarring or suspending official may grant exceptions and make written determinations under this section.

§ 29.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in § 29.215.

§ 29.225 Failure to adhere to restrictions.

Except as permitted under § 29.215 or § 29.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see Appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

Subpart C—Debarment

§ 29.300 General.

The debarring official may debar a person for any of the causes in § 29.305, using procedures established in §§ 29.310 through 29.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

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§ 29.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 29.300 through 29.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 29.215 or § 29.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 29.315 or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

§ 29.310 Procedures.

DOT [~~Agency~~] shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 29.311 through 29.314.

§ 29.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§ 29.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 29.305 for proposing debarment;

(d) Of the provisions of § 29.311 through § 29.314, and any other DOT [~~Agency~~] procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

§ 29.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§ 29.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 29.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

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§ 29.315 Settlement and voluntary exclusion.

(a) When in the DOT best interest of the Government, [~~Agency~~] may, at any time, settle a debarment or suspension action.

(1) An operating administration may settle a debarment or suspension action under this section.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see Subpart E).

§ 29.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the causes(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed. If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 29.311 through 29.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

§ 29.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 29.311 through 29.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D—Suspension

§ 29.400 General.

(a) The suspending official may suspend a person for any of the causes in § 29.405 using procedures established in §§ 29.410 through 29.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 29.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 29.405. Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 29.400 through 29.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 29.305(a); or

(2) That a cause for debarment under § 29.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 29.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* DOT [~~Agency~~] shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 29.411 through § 29.413.

§ 29.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 29.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of § 29.411 through § 29.413 and any other DOT [~~Agency~~] procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

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§ 29.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§ 29.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 29.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 29.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 29.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 29.325), except that the procedures of §§ 29.410 through 29.413 shall be used in imposing a suspension.

Subpart E—Responsibilities of GSA, Agency and Participants

§ 29.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 29.505 [~~Agency~~ DOT] responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all DOT transactions in which [~~Agency~~] has granted exceptions under § 29.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 29.500(b) and of the exceptions granted under § 29.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§ 29.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this Part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its

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erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[FR Doc. 88-11561 Filed 5-25-88; 8:45 am]

BILLING CODES 6450-01-M, 8025-01-M, 7510-01-M, 3510-FE-M, 4710-24-M, 6116-01-M, 8230-01-M, 4210-32-M, 4830-01-M, 4410-18-M, 4510-23-M, 6372-01-M, 3810-01-M, 4000-01-M, 7515-01-M, 8320-01-M, 8560-50-M, 6820-24-M, 4310-RF-M, 6718-01-M, 4150-04-M, 7555-01-M, 7537-01-M, 7536-01-M, 7036-01-M, 6050-23-M, 4910-62-M

Canceled

principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this Part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(i) However, an operating administration may require that a person who enters into a primary covered transaction require the next lower tier participant to include, with conforming modifications, the certification in Appendix A.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to ~~[Agency]~~ DoT if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Appendix A—Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall privide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix B—Certification Regarding Debarment, Suspension, Ineligibilty and Voluntary Exclusion—Lower Tier Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was

Canceled

STANDARD CLAUSE FOR SOLICITATIONS, CONTRACTS, AND SUBCONTRACTS REQUIRED FOR 49 CFR PART 29.

Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion:

The bidder/offeror certifies, by submission of this proposal or acceptance of this contract, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency. It further agrees by submitting this proposal that it will include this clause without modification in all lower tier transactions, solicitations, proposals, contracts, and subcontracts. Where the bidder/offer/contractor or any lower tier participant is unable to certify to this statement, it shall attach an expanation to this solicitation/proposal.

Canceled

adopted April 7, 1988, and released May 10, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments for Iowa is amended by revising the entry for *Ida Grove* to delete Channel 224A and add Channel 225C2.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-11518 Filed 5-20-88; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 87-393; RM-5966; RM-6170]

Radio Broadcasting Services; Roland and Heavener, OK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Family Broadcasting Company, allocates Channel 222A to Roland, Oklahoma, as the community's first local FM service. Channel 222A can be allocated to Roland in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) north to avoid a short-spacing to the pending application for Channel 223A at Heavener, Oklahoma (ARN-871124NZ). The Commission also denies the counterproposal of Double Eagle Broadcasting Corp. to substitute Channel 223C2 for Channel 222A at Heavener, Oklahoma. With this action, this proceeding is terminated.

DATES: Effective June 24, 1988. The window period for filing applications will open on June 27, 1988, and close on July 27, 1988.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 87-393, adopted April 5, 1988, and released May 10, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments for Oklahoma is amended by adding the following entry, Roland, Channel 222A.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-11519 Filed 5-20-88; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[Docket No. 64h]

Participation by Minority Business Enterprise in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: Congress recently enacted section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987. This section requires the application to the Federal Aviation Administration's airport financial assistance program of the provisions of the Department's disadvantaged business enterprise (DBE) rule previously applicable only to the Federal Highway Administration's and Urban Mass Transportation Administration's programs. This rule makes this change.

DATES: This rule is effective on May 23, 1988.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street SW., Washington, DC 20590, (202) 366-9306.

SUPPLEMENTARY INFORMATION: Congress recently passed, and the President signed, section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987. This provision establishes a statutory disadvantaged business enterprise (DBE) program in Federal Aviation Administration (FAA) financial assistance programs for airports. The content of the provision is taken virtually verbatim from section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987.

Because the Department had already made changes to its DBE program regulation in response to section 106(c) (52 FR 39225; October 21, 1987), it is not necessary to make further substantive changes in the regulations as a result of the new FAA statutory provision. However, it is necessary to make technical and conforming amendments to the regulation in order to specify that Subpart D of the rule (which previously has applied only to the Department's highway and mass transit financial assistance programs) now applies to FAA recipients as well as to UMTA and FHWA recipients. This final rule makes those needed amendments.

The October 21 amendments to Part 23 have not yet appeared in the printed volumes of the Code of Federal Regulations, and many persons interested in the airport program probably were not aware of Part 23 amendments many of which, when made, pertained only to highways and mass transit. Therefore, we are providing the following summary of the October 21 amendments, which now will apply to the airport program as well:

Section 23.45 (e) and (f) were amended to require that addresses of DBE firms be listed in recipients' directories and that recipients take a number of procedural steps when certifying DBEs (on-site visits, obtaining work histories of the firm and its principal owners, interviewing the principal owners, analysis of stock ownership, analysis of bonding and financial capacity of the firm, list of equipment and licenses held by the firm and its key personnel, and a statement of the type of work the firm prefers to do).

Section 23.45(g) was amended to require a single overall and a single contract goal for DBEs (as opposed to separate goals for WBEs and DBEs).

Section 23.47(e) was amended to provide that 60 percent of the value of supplies

Canceled

purchased from a DBE "regular dealer" could be counted toward DBE goals (formerly, only 20 percent could be counted). The amendment also included a definition of "regular dealer" and clarification of the "commercially useful function" concept.

Section 23.62 was amended to exclude from the definition of "small business concern" firms whose average gross annual receipts over three years exceed $14 million and to include women in the definition of "socially and economically disadvantaged individuals".

Technical amendments and conforming changes to the explanatory material in Appendix A to Subpart D of the regulation were also made.

The Department's action is required by statute. Since the Department has no discretion in the matter, and because it is important to conform to a Congressional enactment as soon as possible, the Department is issuing this rule as a final rule, effective upon publication.

While the rule will cause recipients to make certain administrative changes in their programs (e.g., have a single DBE goal instead of separate minority and women's business enterprise goals, as in the past, and establishing a third-party challenge procedure), we do not believe that these administrative changes are likely to be unduly disruptive. For example, the same recipients who have had MBE programs will now have DBE programs. The FAA will shortly issue guidance to its grantees concerning the transition to administering their programs under Subpart D.

Another provision of the Airport and Airway Safety and Capacity Expansion Act concerns participation by DBE firms in the airport concessions business. This rule does not attempt to implement this statutory provision, which will require the development of new substantive regulations. The Department hopes to propose these new regulations for public comment along with other revisions to Part 23 which are now being reviewed within the Department.

Regulatory Process Matters

The Department has determined that this rule does not constitute a major rule under the criteria of Executive Order 12291. It is a nonsignificant rule under the Department's Regulatory Policies and Procedures. Since the regulation simply makes administrative adjustments to an existing program expressly required by statute, its economic impacts are expected to be small, and the Department has consequently not prepared a regulatory evaluation. For this reason, the Department certifies that the rule does not have a significant economic impact on a significant number of small entities. Also, the Department certifies, in accordance with Executive Order 12612, that the rule does not have significant Federalism implications to warrant the preparation of a Federalism assessment.

The rule concerns matters under Federal grants, and hence is exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(a)(2)). In addition, the rule must be implemented rapidly, in order to ensure that the provisions apply to funds authorized by the Act, as Congress intended. For these reasons, the Department has determined that there is good cause to promulgate these portions of the rule without prior notice and comment (see 5 U.S.C. 553(b)(B)) and to make the rule effective immediately, rather than after a 30-day period (see U.S.C. 553(c)(3)).

List of Subjects in 49 CFR Part 23

Minority businesses, Highways, Mass Transportation.

Issued in Washington, DC, on May 17, 1988.

Jim Burnley,

Secretary of Transportation.

In consideration of the foregoing, the Department of Transportation amends 49 CFR Part 23 as follows:

PART 23—[AMENDED]

1. The authority citation for Part 23 is revised to read as follows:

Authority: Sec. 905 of the Regulatory Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); sec. 30 of the Airport and Airway Development Act of 1970, as amended; sec. 520 of the Airport and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987; sec. 19 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1615); sec. 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17); sec. 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100–223); Title 23 of the U.S. Code (relating to highways and traffic safety, particularly sec. 324 thereof); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); Executive Order 12265; Executive Order 12138.

2. Section 23.61(a) is amended by revising the first sentence up to the first comma to read as follows:

§ 23.61 [Amended]

(a) The purpose of this subpart is to implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17) and section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100–223) so that, * * *

3. Section 23.61(b) is amended by adding the words "and section 105(f)" after the words "section 106(c)".

4. Section 23.62 is amended by revising the definition of "Act" to read as follows:

§ 23.62 [Amended]

* * * * *

"Act" means the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17), with respect to financial assistance programs of the FHWA and UMTA, and the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100–223), with respect to FAA programs.

5. Section 23.63 is amended by adding a new paragraph (d), to read as follows:

§ 23.63 [Amended]

* * * * *

(d) Funds authorized under section Title I of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100–223).

§ 23.64 [Amended]

6. Section 23.64 is amended, in paragraph (b)(2) thereof, by adding the words "or airport" after the words "urban mass transportation" and by adding the words "or FAA" after the word "UMTA".

7. Section 23.64 is amended, in paragraph (c) thereof, by substituting the words "Federal-aid highway funds, urban mass transportation funds, or airport funds" for the words "Federal-aid highway funds or urban mass transportation funds"; and, in paragraphs (c) and (e) thereof, by adding the words "or FAA" after the word "UMTA" in each instance in which the word "UMTA" occurs.

8. Section 23.64 is amended, in paragraph (e)(2), by deleting the word "or" following the words "(* * * state transportation agency)", by inserting a comma (,) at that point, and by adding, after the semicolon, the words "or, with respect to an airport sponsor, the elected official, head of the board, or other official responsible for the operation of the sponsor,".

§ 23.65 [Amended]

9. Section 23.65 is amended, in its first line, by adding the words "or FAA" following the word "UMTA".

§ 23.68 [Amended]

10. Section 23.68 is amended, in paragraph (e)(2), by adding the words "or FAA" after the word "UMTA", both times the word "UMTA" occurs.

Cancelled

Appendix A—[Amended]

11. The portion of Appendix A, following Subpart D, entitled "Section 23.61 Purpose" is amended by adding, before the period (.) at the end of the first sentence, the words "and section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987" and by adding the words "and section 105(f)" after the words "section 106(c)" in both places in the last sentence of the paragraph in which the words "section 106(c)" appear.

12. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by adding before the period in the first sentence, the words "Airport and Airway Safety and Capacity Expansion Act of 1987".

13. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by removing from the second sentence of the second paragraph under the title "Socially and economically disadvantaged individuals" the word ",FAA" following the word "FRA" and, in the same sentence, by substituting the words "FHWA, UMTA and FAA" for the words "FHWA and UMTA".

14. The portion of Appendix A, following Subpart D, entitled "Section 23.63 Applicability." is amended, in the first paragraph, in the first sentence thereof, by substituting the words "a number of" for the word "two"; in the third and fifth sentences thereof, by adding the words "or FAA" after the word "FWHA" in both instances in which the word "FHWA" occurs; and in the fifth sentence thereof, by adding the words "or otherwise to acquire land" after the words "to acquire right-of-way".

15. The portion of Appendix A, following Subpart D, entitled "Section 23.63 Applicability." is amended by adding the following sentence to the second paragraph thereof.

The provisions of Subpart D also apply to the FAA-administered airport funds authorized by the Airport and Airway Safety and Capacity Expansion Act of 1987.

16. The portion of Appendix A, following Subpart D, entitled "Section 23.64 Submission of Overall Goals." is amended by adding the words "or FAA" after the word "UMTA" in the last sentence of the first paragraph thereof and by adding a new sentence before the present last sentence of the first paragraph, to read as follows:

Recipients of FAA airport program funds who receive planning funds in excess of $75,000 or more than $250,000 (general aviation airports), $400,000 (non-hub airports), or $500,000 (hub airports) in FAA assistance also must submit overall goals.

17. The portion of Appendix A, following Subpart D, entitled "Section 23.64 Submission of Overall Goals." is amended by adding, in the second paragraph, the words "or FAA" after the word "UMTA", in both instances in which the word "UMTA" appears.

18. The portion of Appendix A, following Subpart D, entitled "Section 23.64 Submission of Overall Goals." is amended, in the fourth paragraph, in the first sentence, the words "or FAA" after the word "UMTA" in the first instance in which the word "UMTA" appears and by substituting for the subsequent words "UMTA and FHWA" the words "UMTA, FHWA, or FAA".

19. The portion of Appendix A, following Subpart D, entitled "Section 23.64 Submission of Overall Goals." is amended by adding, in the seventh paragraph, the second sentence thereof, the words "or airport sponsor" after the words "mass transit agency".

20. The portion of Appendix A, following Subpart D, entitled "Section 23.65 Content of Justification." is amended, in the last sentence thereof, by substituting the words "FHWA, UMTA, or FAA" for the words "FHWA and UMTA".

21. The portion of Appendix A, following Subpart D, entitled "Section 23.66 Approval and Disapproval of Overall Goals." is amended by substituting, in the third sentence thereof, the words "FHWA, UMTA or FAA" for the words "FHWA and UMTA".

22. The portion of Appendix A, following Subpart D, entitled "Section 23.68 Compliance." is amended by substituting, in the final sentence of the last paragraph thereof, the words "FHWA, UMTA or FAA" for the words "UMTA or FHWA".

[FR Doc. 88-11537 Filed 5-20-88; 8:45 am]
BILLING CODE 4910-62-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 14

Humane and Healthful Transport of Wild Animals and Birds to the United States; Enforcement Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of enforcement policy.

SUMMARY: The U.S. Fish and Wildlife Service announces the policy for the enforcement of Humane and Healthful Transport regulations. This policy aids affected members of the public in better understanding the regulations.

EFFECTIVE DATE: February 8, 1988.

FOR FURTHER INFORMATION CONTACT: Mary E. Monaghan, Division of Law Enforcement, U.S. Fish and Wildlife Service, P.O. Box 28006, Washington, DC 20038-8006, telephone (202) 343-9242.

SUPPLEMENTARY INFORMATION: The Service published a final rule on November 10, 1987, (52 FR 43274) that set the standards for the humane and healthful transport of wild mammals and birds into the United States. After publication of the rule, the Service received additional comments from affected members of the public maintaining some of its provisions were not clear, were unreasonable, or could actually result in inhumane shipping conditions.

Pursuant to court order these regulations were made effective retroactively to February 8, 1988. The Service is reviewing the regulations for the purpose of making improvements and clarifications (See 53 FR 15041). During this period of review, and any subsequent proposal to amend the rule, the Service intends to enforce the provisions of the regulations in a reasonable and prudent manner.

Responsible parties are expected to comply with these regulations and insure that any wildlife is transported under humane and healthful conditions The Service recognizes that there may be special circumstances where strict compliance with these regulations

Cancelled

Memorandum

U.S. Department of Transportation
Federal Aviation Administration

Subject: **ACTION:** Implementation of DBE Provisions

Date: JUN 15 1988

Reply to Attn. of:

From: Assistant Administrator for Civil Rights, ACR-1

To: Regional Directors
ATTN: Civil Rights Officers

The General Counsel's Office has requested that we begin implementation of certain of the disadvantaged business (DBE) provisions in Subpart D of 49 CFR Part 23. In particular, it is concerned that DBE goals be incorporated into bid solicitations as soon as possible.

Therefore, we ask that you notify sponsors in your region. We have attached a letter outlining the steps that should be taken at this time. It is important to forward the information quickly so that sponsors will be able to act at once. We recommend that you xerox and send the attached letter without including the inside address in order to save time.

We have coordinated this action with the Offices of Chief Counsel and Airport Planning and Programming. Their regional personnel will be receiving copies of this correspondence.

We will be providing additional guidance in the near future. If airport sponsors contact you regarding a third-party complaint or a claim of social and economic disadvantage, you should call Dave Micklin on 267-3270 for discussion.

Leon C. Watkins

Attachment

Canceled

Dear Airport Sponsor:

An amendment to Department of Transportation Regulation 49 CFR Part 23 was published in the Federal Register on May 23, 1988, (53 Fed. Reg. 18285). The amendment, which became effective upon publication, requires certain sponsors to comply with the disadvantaged business (DBE) provisions of Subpart D of the regulations.

This letter provides guidance on immediate changes you should make in order to comply with the amendment. These changes affect only those sponsors subject to Subpart D, that is, sponsors who receive an Airport Improvement Program (AIP) grant after January 1988, and who are one of the following:

(1) A recipient of planning funds in excess of $75,000.

(2) A sponsor of a general aviation airport receiving funds in excess of $250,000.

(3) A sponsor of a non-hub airport receiving funds in excess of $400,000.

(4) A sponsor of a hub airport receiving funds in excess of $500,000.

We request that you include the single DBE goal, rather than separate goals for minority- and women-owned firms (MBE/WBE), in bid solicitations subject to Subpart D. This change should be made as soon as possible, but is mandatory for any bid issued after July 15, 1988. Bids that have already been solicited do not need to be amended.

The DBE goal should be the sum of the MBE and WBE percentage goals. We encourage you to establish your DBE contract goals at a minimum of 10 percent overall if you currently have approved goals which total less than 10 percent.

We have enclosed a sample bid specification which you may use. This or similar language is required when the contract will have subcontracting possibilities.

If annual approval of your overall goal has expired or will expire prior to October 1, 1988, you may continue to base your DBE goal on the figures (combined MBE/WBE) that were most recently approved by the FAA.

Please note that women, like Black Americans, Hispanic Americans, and the other groups identified in the bid specification, are rebuttably presumed to be socially and economically disadvantaged. Thus, a bidder may meet the DBE goal by using any combination of disadvantaged businesses.

Canceled

SAMPLE LANGUAGE FOR BID SOLICITATIONS
(49 CFR 23.45(h))

The bidder shall make good faith efforts, as defined in Appendix A of 49 CFR Part 23, Regulations of the Office of the Secretary of Transportation, to subcontract _____ percent of the dollar value of the prime contract to small business concerns owned and controlled by socially and economically disadvantaged individuals (DBE). In the event that the bidder for this solicitation qualifies as a DBE, the contract goal shall be deemed to have been met. Individuals who are rebuttably presumed to be socially and economically disadvantaged include women, Blacks, Hispanics, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans. The apparent successful competitor will be required to submit information concerning the DBE's that will participate in this contract. The information will include the name and address of each DBE, a description of the work to be performed by each named firm, and the dollar value of the contract. If the bidder fails to achieve the contract goal stated herein, it will be required to provide documentation demonstrating that it made good faith efforts in attempting to do so. A bid that fails to meet these requirements will be considered nonresponsive.

Canceled