U.S. Department of Transportation
Federal Aviation Administration

Memorandum

Subject: PROGRAM GUIDANCE LETTER 88-1

Date: DEC 3 1987

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

Reply to Attn. of:

To: PGL Distribution List

88-1.1 Suspension and Debarment - Ben Castellano (267-8822).

On October 20 DOT published in the Federal Register an interim final rule effective on November 19 concerning debarment and suspension in DOT financial assistance programs. (OMB calls these "nonprocurement" programs.) Suspensions and debarments initiated before November 19 are governed by old regulation, 49 CFR Part 29. The new portion of this rule, which starts with 49 CFR 29.100, will apply to suspensions and debarments initiated after November 19 regardless of the date of the cause giving rise to initiation of the action. Suspensions and debarments under the new portion of the rule will continue to be effective throughout DOT. When the interim final rule is eventually replaced by a final rule, suspensions and debarments made in DOT will be applicable throughout the executive branch of the Federal government. Likewise, after other agencies have their final rules in place, DOT/FAA will be bound by their suspensions and debarments. The new Part 29 is attached.

88-1.2 AWOS - Ben Castellano (267-8822).

FAA has approved visibility sensors and ceilometers by both ARTAIS and Handar for AWOS equipment. As a result of this action, there are now an AWOS II and an AWOS III on the market manufactured by two companies and which meet FAA requirements. This cancels PGL-87.3, AWOS 2 Visibility Sensors. See attachments.

88-1.3 MBE - Ben Castellano (267-8822).

On October 21, DOT published in the Federal Register an amendment to 49 CFR Part 23, Participation by Minority Business Enterprise in Department of Transportation Programs. Only one change will effect the airport grant program. Effective October 21, a sponsor or contractor may count toward its MBE and WBE goals 60 percent of its expenditures for materials and supplies required under a contract and obtained from an MBE or WBE and 100 percent of such expenditures to an MBE or WBE manufacturer. This amendment is attached.

88-1.4 Construction Progress and Inspection Report (FAA Form 5370-1) - Ben Castellano (267-8822).

APP-500 and AAS-300 are periodically receiving original submittals of FAA Form 5370-1 (Airport Safety Data Program). This occurs when the form is provided to airport sponsors without being pre-addressed for return to the appropriate Airports regional or district office. Absent any address, the Post Office is delivering it to FAA Washington. Please recheck office procedures to ensure that sponsors are provided copies of the form with an appropriate Airports regional or district address.

88-1.5 Noise Compatibility Program Eligibility - Ellis Ohnstad (267-8824).

The AIP Handbook, Order 5100.38, currently contains little guidance for evaluating noise mitigation projects arising from FAA-approved Part 150 noise compatibility programs (NCPs). Land acquisition and noise insulation are discussed in some detail, but other projects are covered only by the statement in paragraph 701, which says that such a project is eligible if it is an element of an FAA-approved FAR Part 150 NCP or an environmental mitigation project.

As the number of approved NCPs continues to climb, we expect to see a greater variety of project proposals to implement measures other than land acquisition and noise insulation. The following guidance on noise monitoring projects is the first of several that we plan to develop covering a variety of noise compatibility projects. In order to minimize sponsor misunderstanding during NCP development, and to avoid disagreements at the time of preapplication/application, we encourage the regions/ADOs to contact APP-510 for early consultation on any noise project eligibility question. This will also assure national uniformity and program consistency in administering the grant program.

88-1.6 Noise Monitoring Equipment - Ellis Ohnstad (267-8824).

Noise monitoring equipment can run the gamut from one or two high quality portable noise monitors, with associated power supply, costing a few thousand dollars to sophisticated networks of two dozen or more fixed monitors linked to a central processing unit, perhaps incorporating air traffic, meteorological and land use data. The justification varies just as broadly, from simply establishing a visible object on which to build improved credibility in the community to compliance with State noise laws and managing other noise compatibilty projects.

The following guidance should be used to evaluate the eligibility of proposed noise monitoring projects:

- Noise monitoring must be an approved item in the sponsor's Part 150 NCP or a mitigation measure in an approved environmental impact statement. Procurement of noise monitoring equipment is not eligible as part of a planning project. Noise data collection needed for planning projects should be done with leased or contractor-owned equipment.

- To assure economy, efficiency, interface compatibility and accountability for noise monitoring systems, grants will ordinarily be issued to an airport sponsor, although one or more adjacent jurisdictions may be a

cosponsor with the airport. Equipment may be loaned by the airport sponsor to another jurisdiction for special studies when properly justified.

o The project narrative or other documentation must provide an adequate justification for the project. The project should not be an end in itself, but should provide an ongoing stream of useful products and data contributing to improved noise compatibility. Primarily, the monitoring system must be used to provide information necessary to carry out other noise compatibility projects in the approved NCP. There also must be an analysis showing that the particular proposal is a cost effective way to gather and process the needed information. Sample applications of noise monitoring data may include:

  - monitoring adherence to use of specified flight tracks,
  - selection of dwelling units or other structures for noise insulation,
  - pre- and post-insulation interior/exterior noise measurement,
  - compliance with a monitoring requirement of State noise law,
  - aid in the implementation of other noise compatibility projects, or
  - providing noise data for future revision of the NCP.

o In most instances, a limited number of portable units will be sufficient to provide needed information. Eligibility for a fixed (permanent) monitoring system will be limited to special circumstances where sponsors can clearly show that portable monitors are inadequate. Airports where Part 150 noise exposure maps (existing and forecast) show no noncompatible land uses as defined in Part 150, Appendix A, Table 1, are not eligible for permanent systems. In all cases, sponsors should be encouraged to acquire the least costly system that will satisfy the purposes used to justify the project.

o Land acquisition, site preparation and installation costs for permanent monitoring systems should be minimized. Sponsors should be encouraged to obtain free or low cost monitoring locations by using existing utility poles and easements, accessible public land, or donated access to private property. Reasonable costs to obtain suitable sites, guarantee access, erect facilities, and to provide adequate security are allowable. Costs for vehicles are not allowable. Extensive remodeling of existing structures, or construction of new structures to accommodate noise monitoring system equipment should be coordinated with APP-510 before approval.

o Allowable costs include system design, noise monitor equipment, dedicated data processing equipment and software, and one-time costs for electrical power and data transmission line hook-up.

o Sponsors should be reminded that they are required by Assurance 19b to operate and maintain the equipment for its useful life.

Lowell H. Johnson

Attachments

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 29

[OST Docket No. 45208]

Nonprocurement Debarment and Suspension

AGENCY: Office of the Secretary, DOT.

ACTION: Interim Final Rule.

SUMMARY: This interim final rule adopts rules concerning nonprocurement debarment and suspension in accordance with OMB Guidelines.

DATES: Effective November 19, 1987. To be assured of consideration, comments on the rule must be received on or before December 21, 1987. Comments should refer to specific sections in the regulations.

ADDRESS: Send comments on the rule to Documentary Services Division, C–55, Attention Docket No. 45208, Room 4107, Department of Transportation, 400 Seventh Street SW., Washington DC 20590. Comments are available for public examination at that address Monday through Friday, except Federal holidays, from 9:00 to 5:00 p.m. e.s.t.

FOR FURTHER INFORMATION CONTACT: Paul B. Larsen, Office of the General Counsel (C–10), U.S. Department of Transportation, Washington, DC 20590; (202) 366–9167.

SUPPLEMENTARY INFORMATION: As part of the Admininstration's initiatives to curb fraud, waste, and abuse, the President's Council on Integrity and Efficiency created an interagency task force to study the feasibility and desirability of a comprehensive debarment and suspension system encompassing the full range of Federal activities. The task force concluded, in its November 1982 report, that such a system was desirable and feasible.

As a result, the Office of Management and Budget (OMB) established an interagency Task Force on Nonprocurement Suspension and Debarment. This task force recommended in its November 1984 report that a governmentwide nonprocurement debarment and suspension system, similar to that currently in effect for procurement, be established. The Task Force concluded that the system should be as compatible as possible with the procurement debarment and suspension system included in the Federal Acquisition Regulation (FAR), while fully addressing the needs and concerns of nonprocurement programs. Following further efforts of the Task Force to shape a proposed system for use by all Executive agencies, the President issued on February 18, 1986, Executive Order 12549, "Debarment and Suspension." Simultaneously with the publication of the Executive Order on February 21, 1986, OMB published proposed guidelines for use by the Executive agencies (51 FR 6372–79). The guidelines were prepared in regulation format as a minimum model rule to facilitate the preparation of the agency regulations. The guidelines generally used the due process procedural structure of the FAR. Also, the proposed grounds for debarment and suspension were substantially similar to those in the FAR.

OMB received sixty comments on the proposed guidelines. All comments were provided to the Task Force on Nonprocurement Suspension and Debarment for consideration in preparing the final guidelines that were issued on May 26, 1987 and published May 29, 1987 (52 FR 20360–69).

Section 3 of E.O. 12549 directs Federal agencies to issue regulations governing implementation of the Order; the regulations must be consistent with the OMB guidelines. In order to comply with these instructions, the Department of Transportation has generally adopted the OMB guidelines verbatim. Most of the changes are the result of the need to adapt the guidelines to the Department's organization.

At the present time, the Office of the Secretary and the operating administrations within the Department of Transportation have procedures for suspending and debarring individuals or companies doing business with recipients of DOT financial assistance when those individuals or companies have been involved in fraud or other improper practices affecting their present responsibility. 49 CFR Part 29. Suspensions or debarments of participants initiated before the effective date of the rule adopted herein shall be governed by those current regulations. The rule adopted herein will apply to suspensions and debarments of individuals and companies initiated after the effective date of this rule regardless of the date of the cause giving rise to initiation of the action.

This rule contains no provisions applicable to debarment and suspension in direct government contracting. It adopts a flexible procedure that will assure a party of fair opportunity to challenge a suspension or debarment. At the same time the parties to a proceeding under the rule will not be bound by formal rules of evidence or procedure. The rule generally covers DOT financial assistance. Suspensions and debarments will be effective throughout DOT and the executive branch of the Federal Government. Furthermore, persons excluded by other agencies will also be excluded from participation in DOT non-procurement programs.

A suspension or debarment will be initiated by notice to the persons affected. New awards may not be made to respondents. The suspension or debarment includes persons, their affiliates, subsidiaries, and other organizational elements.

The DOT Assistant Secretary for Administration will collect and provide the General Services Administration (GSA) with information concerning DOT suspensions, debarments, voluntary exclusions and ineligibilities. All participants in covered transactions will be required to certify whether persons have been suspended, declared ineligible, proposed for debarment, voluntarily excluded, indicted, covicted or had civil judgment rendered against them.

The Department will not extend reciprocity to suspensions and debarments of other agencies until this interim rule is replaced by a final rule. The purpose is to achieve government-wide effect at approximately the same time as other agencies implement their final rules.

The final OMB guidelines left to agency discretion whether to limit the coverage of agency rules to items charged as direct costs or to cover indirect costs as well. The Department has opted for the coverage of both direct and indirect costs because of its favorable experience with the broader coverage under its current regulations. The Department does not want its funds to benefit delinquent indirect contractors and does not want to assume the administrative burden of distinguishing between direct and indirect cost. It does not require that action be brought where only indirect costs are at issue, but it permits actions to be brought in especially aggravated circumstances.

The OMB guidelines authorized debarment on the basis of a conviction of, or a civil judgment for, offenses indicating a lack of business integrity or honesty affecting the present responsibility of a participant. The Department has decided, in addition, to specify that debarment is appropriate on the basis of a determination of liability pursuant to agency procedures under the Program Fraud Civil Remedies Act of 1986 (Pub. L. 99–509, 31 U.S.C. 3801–3812). That Act makes administrative remedies available to Federal agencies

in cases involving false claims or false statements. Defendants in such actions are afforded the opportunity for a full adversarial hearing before an Administrative Law Judge.

Reason for Adoption of an Interim Final Rule

This rule is exempt from the notice and comment provisions of the Administrative Procedure Act. In any event, we have decided not to issue this document as a notice of proposed rulemaking because we believe that it would be contrary to the public interest to delay the effectiveness of this rule. Our rule mirrors OMB's final guidelines. The Department believes that the public has had a fair opportunity to comment on the substance of this rule through OMB's publication of proposed guidelines in February 1986 (51 FR 6372). Second, the Department has an urgent need to clarify the current DOT suspension and debarment rule so that fraudlent actions can be stopped. This interim final rule clarifies that bids shall not be solicited from persons affected by the rule and that the rule applies to insurance companies. Furthermore, the Department needs to include final determinations under the Program Fraud Civil Penalties Act (31 U.S.C. 3801 et seq.) within the definition of civil judgment under the rule. The Department is asking for public comments and those comments will be considered before a final rule is adopted.

Regulatory Evaluation

This regulation is classified as a "non-major" regulation under Executive Order 12291. This regulation also has been evaluated under the Department of Transportation's Regulatory Policies and Procedures. The regulation is not significant under those procedures, and its economic impact is expected to be so minimal that a further economic evaluation is not warranted.

Regulatory Flexibility Act Determination

I certify that this regulation would not have a significant economic impact on a substantial number of small entities. As stated above, the economic impact of the rule is expected to be minimal. In this connection, debarment and suspension measures are triggered only by serious misconduct and, therefore, are avoidable. The Department has no reason to believe that small entities, in particular, would be seriously affected by this rule.

Environmental Impact

This regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, et seq.)

List of Subjects in 49 CFR Part 29

Administrative practice and procedure, Government contracts, Loan programs—transportation, Grant programs—transportation, Fraud.

Accordingly, the Department of Transportation hereby adopts a revised Part 29 of the Regulations of the Office of the Secretary (49 CFR Part 29) to read as set forth below:

PART 29—DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.

Subpart B—Effect of Action

Subpart C—Debarment

Subpart D—Suspension

Subpart E—General

Authority: E.O. 12549; OMB Guidelines for Nonprocurement Debarment and Suspension, 52 FR 20360, May 29, 1987; and section 322 of title 49, United States Code.

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 system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Section 1(a) of the Order provides that debarment or suspension of a participant in a program by one agency shall have government-wide effect. Section 6 of the Order authorizes the Office of Management and Budget (OMB) to issue guidelines concerning the Order. Those Guidelines (entitled "Guidelines for Government-wide Debarment and Suspension (Non-Procurement)") (OMB Guidelines) were published at 52 FR 20360 May 29, 1987.

(b) This part implements section 3 of Executive Order 12549 and the OMB Guidelines by:

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

(2) Prescribing the criteria and minimum due process procedures that the Department will use in implementing the Order;

(3) Providing for the compilation and dissemination of pertinent information concerning debarred and suspended participants, participants who voluntarily exclude themselves from participation in covered transactions, and participants declared ineligible (see the definition of "ineligible in § 29.120); and

(4) Setting forth the consequences of the actions under paragraph (b)(3) of this section.

§ 29.105 Authority.

This part is issued pursuant to Executive Order 12549 of February 18, 1986, the OMB Guidelines, and section 322 of title 49, United States Code.

§ 29.110 Coverage.

(a) *Covered transactions.* (1) *General.* Covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) include, except as noted in paragraph (a)(2) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements, including subawards, subcontracts and transactions at any tier that are charged as direct or indirect costs, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards).

(2) *Exceptions.* The following transactions are not covered: statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory); 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); incidental benefits derived from ordinary governmental operations; and other transactions where the application of Executive Order 12549, the OMB Guidelines, and this part would be prohibited by law.

(b) *Relationship to other sections.* This section, § 29.110, describes the

types of activities and transactions to which a debarment or suspension under this part will apply. Subpart B, Effect of Action, § 29.200, sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants in the covered transactions and activities described in § 29.110. Section 29.330, Scope of debarment, and § 29.420, Scope of suspension, govern 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 additional affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal acquisition activities.* Executive Order 12549, the OMB Guidelines, and this part do not apply to direct Federal acquisition activities. Debarment and suspension of Federal contractors and subcontractors 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 Department to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and this part, are appropriate means to effectuate 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. Debarment or suspension may be imposed for the causes and in accordance with the procedures set forth in this part.

§ 29.120 Definition.

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

Affiliate. Persons are affiliates of one another if, directly or indirectly, one owns, controls, or has the power to control the other, or a third person owns, controls, or has the power to control both.

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

Civil judgment or judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, agreement, 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 1986 (31 U.S.C. 3801 *et seq.*).

Consolidated List. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and the OMB Guidelines, and those who have been determined to be ineligible.

Control. The power to exercise, directly or indirectly, a controlling influence over the management, policies, or activities of a person, whether through the ownership of voting securities, through one or more intermediary persons, or otherwise. For purposes of actions under this part, a person who owns or has the power to vote more than 25 percent of the outstanding voting securities of another person, or more than 25 percent of total equity if the other person has no voting securities, is presumed to control. Such presumption may be rebutted by evidence. Other 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; and establishment, following the debarment, suspension, or other exclusion of a participant, of an organization or entity which is to operate in the same business or activity and to have substantially the same management, ownership, or principal employees as the debarred, suspended or excluded participant.

Conviction. 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.

Debarment. An action taken by a debarring official in accordance with agency regulations implementing Executive Order 12549 (including his part) to exclude a person from participating in covered transactions. A person so excluded is "debarred."

Debarring official. The head of a Departmental operating administration or, with respect to programs administered by the Office of the Secretary, the Assistant Secretary for Administration, any of whom may delegate any of his or her functions under this part and authorize successive delegations.

Indictment. Indictment for a criminal offense. Any information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in covered transactions, programs, or agreements pursuant to statutory, Executive order, or regulatory authority other than Executive Order 12549 and its agency implementing and supplementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the equal employment opportunity acts and Executive orders, or the environmental protection acts and Executive orders.

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

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service or 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 Department.

Participant. Any person who submits proposals for, receives an award or subaward or performs services in connection with, or reasonably may be expected to be awarded or to perform services in connection with, a covered transaction. This term also includes any person who conducts business with the Department as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity however organized, including any subsidiary of any of the foregoing.

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.

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

Respondent. A person against whom a debarment or suspension action has been initiated.

Subsidiary. Any corporation, partnership, association or legal entity however organized, owned or controlled by another person.

Suspending official. The head of a Departmental operating administration or, with respect to programs administered by the Office of the Secretary, the Assistant Secretary for Administration, any of whom may delegate any of his or her functions under this part and authorize successive delegations.

Suspension. An action taken by a suspending official in accordance with agency regulations implementing Executive Order 12549 (including this part) to immediately exclude a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

§ 29.125 Savings clause.

Any debarment or suspension initiated before the effective date of this part shall be governed by Part 29 of the Department's regulations as Part 29 existed immediately before the effective date of this part.

Subpart B—Effect of Action

§ 29.200 Debarment or suspension.

(a) Except to the extent prohibited by law, a person's debarment or suspension shall, under Executive Order 12549 and the OMB Guidelines, be effective throughout the executive branch of the Federal Government. Except as provided in § 29.215, persons who are debarred or suspended by any departmental debarring or suspending official or by any other agency are excluded for the period of their debarment or suspension from participation in all covered transactions of the Department and, under Executive Order 12549 and the OMB Guidelines, all covered transactions of all agencies. Provided that debarments and suspensions by agencies other than the Department of Transportation shall not be effective throughout this Department until such time when the interim rule is replaced by a final rule. At such time, Departmental employees and participants may not, in connection with any covered transaction of the Department, make awards or agree to participation by such debarred or suspended persons during such period.

(b) In addition, persons who are debarred or suspended by any Departmental debarring or suspending official or by any other agency are excluded from participation in any of the following capacities in or under any covered transaction of the Department and, under Executive Order 12549 and the OMB Guidelines, any covered transaction of all agencies: as an owner or partner holding a controlling interest, director, or officer of the participant; as a principal investigator, project director, or other position involved in management of the covered transaction; as a provider of federally required audit services; in any other position to the extent that the incumbent is responsible for the administration of Federal funds; or in any other position charged as a direct cost under the covered transaction.

§ 29.205 Voluntary exclusion.

Participants who accept voluntary exclusions under § 29.320 are excluded in accordance with the terms of their settlements; their listing, pursuant to Subpart E of this part and the OMB Guidelines, is for informational purposes. Awarding officers and participants must contact the original action agency to ascertain the extent of the exclusion.

§ 29.210 Ineligible persons.

Persons who are ineligible are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

§ 29.215 Exception provision.

A suspending or debarring official may grant an exception permitting a debarred, suspended, or excluded person to participate in a particular transaction upon a written determination by such official stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. Exceptions to this policy should be granted only infrequently. Exceptions shall be reported in accordance with § 29.500.

§ 29.220 Continuation of current awards.

(a) Notwithstanding the debarment, suspension, voluntary exclusion or ineligible status of any person, agreements in existence at the time the person was debarred, suspended, declared ineligible or voluntarily excluded may continue in existence.

(b) Departmental employees and participants shall not renew or extend the duration of current agreements with any person who is debarred, suspended, declared ineligible or under a voluntary exclusion, except as provided in § 29.215.

§ 29.225 Failure to adhere to restrictions.

Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transaction, except as permitted under this part, 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.

Subpart C—Debarment

§ 29.300 General.

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

§ 29.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 29.300 and 29.310 for:

(a) Conviction of or civil judgment for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant, including but not limited to:

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

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(b) Violation of the terms of a public agreement so serious as to affect the present responsibility of a participant, including but not limited to:

(1) A willful or material failure to perform under one or more public agreements;

(2) A history of substantial noncompliance with the terms of one or more public agreements; or

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

(c) Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes

substantially the same as provided for by § 29.305;

(2) Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transactions;

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a participant;

(4) Loss of denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a participant;

(5) Failure to pay a debt (including disallowed costs and overpayments) 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

(6) Violation of a material provision of a voluntary exclusion 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 participant.

§ 29.310 Procedures.

(a) *Investigation and referral.* Anyone may contact the appropriate Departmental debarring official concerning the existence of a cause under this subpart. The debarring official shall review the matter and may also refer the matter to the Office of Inspector General for investigation. However, circumstances that involve possible criminal or fraudulent activities shall first be reported to the Office of Inspector General.

(b) *Decisionmaking process.* The decisionmaking process shall be as informal as practicable, consistent with principles of fundamental fairness and shall, at a minimum, provide the following:

(1) *Notice of proposed debarment.* A debarment proceeding shall be initiated by notice to the respondent advising:

(i) That debarment is being considered;

(ii) 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;

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

(iv) Of the provisions of § 29.310(b);

(v) Of the effect of the proposed debarment pending a final debarment decision; and

(vi) Of the potential effect of a debarment.

(2) *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.

(3) *Additional proceedings as to disputed material facts.* (i) In actions not based upon a conviction or judgment, if it is found that there exists a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any witness the Department presents.

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

(4) *Debarring official's decision*—(i) *No additional proceedings necessary.* In actions based upon a conviction or 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.

(ii) *Additional proceedings necessary.* (A) 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.

(B) The debarring official may refer matters involving disputed material facts to another official not under the supervision of the debarring official for findings of fact. Such official may be, but is not restricted to, a Contract Appeals Board judge or an administrative law judge. 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.

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

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

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

(A) Referring to the notice of proposed debarment;

(B) Specifying the reasons for debarment;

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

(D) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless a Departmental debarring official makes a determination under § 29.215 or the head of another agency or his or her designee makes such a determination under a comparable regulation.

(ii) 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 on the same grounds by any other agency.

§29.315 Effect of proposed debarment.

Upon issuance of a notice of proposed debarment by a Departmental debarring official and until the final debarment decision is rendered, new awards may not be made to the respondent. This exclusion may be waived pending a debarment decision upon a written determination by the debarring official identifying the reasons for doing so. In the absence of such a waiver, the provisions of § 29.215 allowing exceptions for particular transactions may be applied.

§ 29.320 Voluntary exclusion.

A participant and a debarring official may enter into a settlement providing for the exclusion of the participant. Information of such exclusion shall be transmitted to the General Services Administration (GSA) for entry on the Consolidated List (see Subpart E).

§ 29.325 Period of debarment.

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

debarment, the suspension period may 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 §29.310 shall be followed to extend the debarment.

(c) The debarring official may reduce the period or scope of debarment, upon the respondent's request, supported by documentation, for reasons such as:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or 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.

§ 29.330 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person or affiliate under Executive Order 12549 constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the debarment decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of transactions.

(2) The debarment action may include any other affiliate of the participant that is (i) specifically named and (ii) given notice of the proposed debarment and an opportunity to respond (see § 29.310).

(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 presumptive 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 or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval or acquiescence.

Subpart D—Suspension

§ 29.400 General.

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

(b) Suspension is a serious action to be imposed on the basis of adequate evidence of one or more of the causes set out in § 29.405 when it has been determined that immediate action is necessary to protect the public interest.

§ 29.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 29.400 and 29.410 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.* Anyone may contact the appropriate Departmental suspending official concerning the existence of a cause under this subpart. The suspending official shall review the matter and may also refer the matter to the Office of Inspector General for investigation. However, circumstances that involve possible criminal or fraudulent activities shall first be reported to the Office of Inspector General.

(b) *Decisionmaking process.* The decisionmaking process shall be as informal as practicable, consistent with principles of fundamental fairness and shall, at a minimum, provide the following:

(1) *Notice of suspension.* When a respondent is suspended, notice shall immediately be given:

(i) That suspension has been imposed;

(ii) 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;

(iii) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the evidence of the Federal or any other level of government;

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

(v) That the suspension is for a temporary period pending the completion of an investigation and such legal or debarment proceedings as may ensue;

(vi) Of the provisions of § 29.410(b); and

(vii) Of the effect of the suspension.

(2) *Submission in opposition.* Within 30 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.

(3) *Additional proceedings as to disputed material facts.* (i) If it is found that there exists a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any witness the Department presents, unless—

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

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

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

(4) *Suspending official's decision.* The suspending official may modify or terminate the suspension (for example, see § 29.325(c) for the 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, on the same grounds, or suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(i) *No additional proceedings necessary.* In actions (A) based on an indictment, conviction, or judgment, (B) in which there is no genuine dispute over material facts, or (C) 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.

(ii) *Additional proceedings necessary.* (A) 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.

(B) The suspending official may refer matters involving disputed material facts to another official not under the supervision of the suspending official for findings of fact. Such an official may be, but is not restricted to, a Contract Appeals Board judge or an administrative law judge. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

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

(5) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent and any affiliates involved.

§ 29.415 Period of suspension.

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

(b) If legal or debarment proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, 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 shall be the same as the scope of debarment (see § 29.330), except that the procedures of § 29.410 shall be used in imposing a suspension.

Subpart E—General

§ 29.500 Information collection and dissemination.

(a) The Assistant Secretary for Administration shall act as liaison with GSA respecting GSA's responsibilities under subpart E of the OMB Guidelines (maintenance of Consolidated List). The Assistant Secretary shall maintain and provide GSA with current information concerning debarments, suspensions, voluntary exclusions and ineligibilities taken by the Department. Until February 18, 1989, the Assistant Secretary shall also provide GSA and OMB with information concerning all transactions in which the Department has granted exceptions under § 29.215 permitting participation by debarred, suspended, or excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the Assistant Secretary shall, within five working days after the Department takes each action, advise GSA of the information set forth below and of the exceptions granted under § 29.215:

(1) The names and addresses of all debarred, suspended, voluntarily excluded, and ineligible participants 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 name and telephone number of the Departmental point of contact for the action.

(c) In order to ensure that listed persons do not participate in any covered tansaction in a manner inconsistent with their listed status:

(1) The Assistant Secretary shall establish procedures applicable to obtaining, maintaining, distributing, and using list information;

(2) Each administrator of a Departmental operating administration shall designate a liason officer responsible for assisting the Assistant Secretary in keeping list information current and shall establish procedures applicable to the distribution and use of list information; and

(3) The Assistant Secretary and each administrator shall establish procedures for the dissemination and use of information concerning participants whose debarment has been proposed by a Departmental debarring official (See §§ 29.315 and 29.310(b)(6)(ii)).

§ 29.505 Participant certification requirements.

(a) All participants are required to certify whether the participant, or any person acting in a capacity listed in § 29.200(b) with respect to the participant or the particular covered transaction, is currently or within the proceeding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation, or

(4) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § 29.305(a).

(b) Adverse information in the certification need not necessarily result in denial of participation. Information provided by the certification and any additional information required of participants shall be considered in the administration of covered transactions.

Issued in Washington, DC, on October 16, 1987.

Jim Burnley,

Deputy Secretary of Transportation.

[FR Doc. 87-24311 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-62-M

raw agricultural commodity hops to read as follows:

§ 180.1046 Dimethylformamide; exemption from the requirement of a tolerance.

(a) * * *

Commodities

* * * * *

Hops

* * * * *

[FR Doc. 87-24122 Filed 10-20-87; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[CC Docket No. 80-57]

Revision and Update of Public Mobile Service Rules; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: This document corrects the amendatory language for § 22.15, as appearing in the Final Rule document in this proceeding concerning Part 22.

FOR FURTHER INFORMATION CONTACT: Carmen Borkowski (202) 632-6450.

SUPPLEMENTARY INFORMATION: On April 2, 1987, the Commission published a final rule concerning the revision of Part 22 (52 FR 10571).

§ 22.15 [Correctly amended]

The amendatory language for § 22.15 is hereby corrected to read: "Section 22.15 is amended by revising paragraphs (b)(1), (i), (ii) and (b)(2)(i) and by adding paragraph (b)(1)(iii) to read as follows:"

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 87-24375 Filed 10-20-87; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

49 CFR Part 23

[Docket No. 64f and 64g; Notice No. 87-21]

Participation by Minority Business Enterprise in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; request for comments.

SUMMARY: Congress recently enacted section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). This section requires amendments in the Department's disadvantaged business enterprise (DBE) program, the most important of which is making women a presumptively disadvantaged class for purposes of the program. This rule makes the changes mandated by the new statute. In addition, the rule amends the definition of "Hispanic" to include Portuguese-Americans, consistent with Small Business Administration practice. It also changes the way in which purchases of materials and supplies from minority, women-owned, and disadvantaged business enterprises are counted toward recipients' and contractors' goals.

DATES: This rule is effective on October 21, 1987. Comments in response to the request for public comment are due December 21, 1987. Late-filed comments will be considered to the extent practicable.

ADDRESS: Comments should be addressed to Docket Clerk, Docket 64g, Department of Transportation, Room 4107, 400 7th Street SW., Washington, DC 20590. Comments will be available for review by the public at this address from 9:00 a.m. through 5:30 p.m., Monday through Friday. Commenters wishing acknowledgment of their comments should include a stamped, self-addressed postcard with their comment. The Docket Clerk will date stamp and sign the card and return it to the commenter.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy, Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street SW., Room 10424, Washington, DC 20590. (202) 366-9306.

SUPPLEMENTARY INFORMATION: This final rule serves three purposes. First, and most important, it amends the Department's disadvantaged business enterprise (DBE) regulations to conform with recent Congressional action that modified the statutory basis for the DBE program. These changes make women presumptively disadvantaged individuals for purposes of the program, set an average annual gross revenue limit of $14 million (over a three-year period) for being considered a small business under the program, and require the Department to establish certification process guidelines for recipients.

Second, the rule makes a minor modification to the definition of "Hispanic" used in the DBE program. The amendment would include Portuguese Americans within the definition of Hispanic, in order to make the Department's administration of this program consistent with Small Business Administration (SBA) administrative practice in similar programs.

Third, the Department is taking final action concerning the credit allowed toward goals for the use of MBE, DBE and WBE suppliers, in the FAA and FRA as well as in the FHWA and UMTA programs. This action is based on an October 1985 notice of proposed rulemaking (NPRM). This action would permit 60 percent of the value of goods purchased from an MBE, DBE, or WBE "regular dealer" to be counted toward a contractor's or recipient's goal. The percentage of goods countable toward goals would be reevaluated after two years. This rule also clarifies the application of the "commercially useful function" concept.

Request for Comments

The Department is seeking comments on the first two portions of the rule—changes to reflect section 106(c) of the STURAA and the amendment to the definition of Hispanic—since the Department has not previously provided interested persons the opportunity to comment on these matters. Following the receipt of comments on these subjects, the Department will publish a notice responding to the comments and, if appropriate, will promulgate amendments to the affected regulatory provisions.

The third portion of the rule, concerning suppliers, was the subject of an NPRM (50 FR 40422, October 2, 1985), and comments were obtained concerning the matters it covers. Consequently, comments are not being sought on the provisions of the final rule provisions on this subject. However, the Department is seeking comments on whether a different percentage of credit for the use of DBE suppliers is appropriate for Urban Mass Transportation Administration (UMTA) programs than is applied to the rest of the Department's programs. Specifically, the Department seeks comment on whether, on a permanent or pilot program basis, goods purchased from DBE regular dealers in the UMTA program should be counted at 100 percent of their value.

Changes to Conform to Section 106(c) of the STURAA

Section 106(c) continues the DBE program established in 1983 by section 105(f) the Surface Transportation Assistance Act of 1982. The basic structure of the DBE program remains intact, with the exceptions discussed below. Funds authorized by the 1982

legislation which have not been obligated by the date of enactment of the STURAA (April 2, 1987) are governed by the DBE provisions of section 106(c) of the STURAA, not by the provisions of section 105(f) of the 1982 Act.

The rule makes technical changes to § 23.61, the definition of "Act" in § 23.62, and the applicability language of § 23.63 to reflect the enactment of section 106(c) of the STURAA as the replacement for section 105(f) of the Surface Transportation Assistance Act of 1982. Appendix A, which follows Subpart D of the rule and provides a section-by-section explanation of its operation, is also being amended to conform to all changes made to the Part 23 by this rule.

Section 106(c)(2)(B) provides that women, like Black Americans, Hispanic Americans, and the other groups currently designated in the regulations, are presumed to be socially and disadvantaged individuals for purposes of the DBE program. To implement this provision, the Department is amending the definition of "socially and economically disadvantaged individuals" by adding a reference to women.

This change has an important implication for the administration of the Department's program. Heretofore, each recipient has had to have two separate goals: One for DBEs and one for WBEs. With the addition of women as a "presumptive" group, it no longer is practicable to retain this two-goal system. The legislative history of section 106(c) indicates that Congress intended the Department to adopt a one-goal system for DBEs under the new legislation.

Consequently, the Department is amending § 23.45(g)(4) to specify that, from now on, the DBE program will have only one goal. That is, each recipient's DBE program will have a single overall goal for DBEs, and each contract on which a goal is required will have a single contracting goal for DBEs. There will no longer be separate DBE and WBE goals.

Section 106(c)(4) of the STURAA requires the Department to establish uniform standards for recipients' certifications of DBE eligibility. In this rule, the Department is requiring recipients to take those steps specifically listed in the legislation. The steps listed in the amended § 23.45(f) are not the only possible things that recipients should do in certification. The Department seek comments on what additions or modifications should be made to this list.

Congress determined, in order to ensure that the DBE program meets its objective of helping small minority businesses become self-sufficient and able to compete in the market with non-disadvantaged firms, that DBE firms should "graduate" from the program once their average annual receipts reached $14 million. Section 106(c)(2)(A) of the STURAA mandates this result. An amendment to the definition of "small business concern" in § 23.62 implements this provision of the statute.

Section 106(c) makes the $14 million figure subject to adjustment by the Secretary for inflation. The regulation provides that the Secretary shall make such adjustments from time to time. The Department seeks comment on the methodology for and frequency of these adjustments.

Finally, section 106(c)(3) requires an annually-updated list of eligible DBEs. Section 23.45(e) of the regulation already requires recipients to compile a directory. This rule implements the new statute by requiring the directory to be updated annually. Recipients will be expected, when they make their next annual update, to list all DBE firms, those owned and controlled by women as well as those owned and controlled by minorities. It is likely that most or all recipients already include the addresses of firms listed in their directories; however, in order to ensure conformity with section 106(c)'s requirement that the location of firms be stated, the regulation is amended specifically to require the listing of firms' addresses.

The DBE program—and hence the changes this rule makes in response to section 106(c) of the STURAA—continues to apply only to the Department's financial assistance programs for highways and urban mass transportation; it does not apply to other DOT financial assistance programs, such as the programs for airports and intercity rail service. Consequently, for example, airport sponsors receiving financial assistance from the FAA would continue to set separate goals for MBEs and WBEs.

The portion of the Congressional Conference Report on section 106(c) (House Report 100-27, at p. 148) urges the Secretary to reexamine existing waiver provisions (i.e., 49 CFR 23.65) and revise them to permit any state to more readily adjust its goal from the ten percent requirement, if that percentage does not reflect a reasonable goal. The Department seeks comment on what modifications to § 23.65, if any, are appropriate in light of this recommendation.

The Conference Report also expressed the view that participation of minorities and women should be equitably distributed throughout the highway construction industry and that the implementation of the DBE program should not fall disproportionately on any one segment of the industry. Neither 106(c) nor the Conference report contains any directions or recommendations to the Secretary concerning what steps it would be reasonable for the Department to take in light of this expressed view. The Department seeks comment on any modifications of Part 23 that would be appropriate in response to the views expressed on this point in the Conference Report.

Amendment to Definition of Hispanic

The Department's DBE rule defines eligible businesses as being small business concerns owned and controlled by socially and economically disadvantaged individuals. It does so because section 105(f) of the Surface Transportation Assistance Act of 1982, and its successor, section 106(c) of the STURAA, explicitly direct the Department to use this definition, which derives from section 8(d) of the Small Business Act and implementing regulations issued by the Small Business Administration (SBA).

One of the groups presumed to be disadvantaged, under this definition, is "Hispanic Americans." Because an applicable government-wide definition of the term "Hispanic" did not include Portuguese-Americans, and because the SBA has never, through regulation, determined that Portuguese-Americans were disadvantaged, the Department's 1983 rule implementing section 105(f) did not treat Portuguese-Americans as part of the presumptively disadvantaged "Hispanic Americans" group.

Subsequently, the Department learned that internal SBA guidance directed that agency's personnel to regard Portuguese-Americans as Hispanics. Specifically, SBA provided a copy of a March 1986 internal directive, SBA Notice No. 8000-68, to the Department in December 1986. The notice provides in pertinent part:

> [W]ith respect to Portuguese Americans and Section 8(a) eligibility * * * such individuals are eligible as Hispanic Americans. In practice, the Agency has applied the phrase Hispanic Americans as including those individuals whose ancestry and culture are rooted in South American, Central American, Cuba, Dominican Republic, Puerto Rico, or the Iberian Peninsula, including Portugal.

While the Department's existing definition is consistent with applicable statutes, the Department has determined, as a policy matter, to amend the definition of "Hispanic

Americans" to include persons of Portuguese culture or origin. The Department believes it would be beneficial to make its DBE program consistent with the minority business programs of the SBA in this respect in order to avoid confusion. In addition, this change would make the definitions of Subpart D of Part 23 (applying to highway and mass transit programs) more consistent with those of Subpart A (applying to aviation and rail programs). Portuguese-Americans have been eligible to participate in the airport and rail programs since 1981.

Credit for Use of Suppliers and "Commercially Useful Function"

The Department's current MBE/DBE rules limit the credit toward goals that a recipient or contractor can obtain for purchasing materials and suppliers from an MBE, WBE, DBE firm that does not manufacture the materials or supplies. Section 23.47(e) of the regulation provides as follows:

(e) A recipient or contractor may count toward its MBE goals expenditures for materials and supplies obtained from MBE suppliers and manufacturers, provided that the MBEs assume the actual and contractual responsibility for the provision of the materials and supplies.

(1) The recipient or contractor may count its entire expenditure to an MBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(2) The recipient may count 20 percent of its expenditures to MBE suppliers that are not manufacturers, provided that the MBE supplier performs a commercially useful function in the supply process.

The Department proposed to change this provision. In an October 2, 1985, notice of proposed rulemaking (NPRM), the Department proposed to allow an unspecified, but increased, percentage of the cost of materials purchased from an MBE, WBE, or DBE supplier who was a "regular dealer" to count toward goals. In addition, the NPRM proposed refinements to the concept of "commercially useful function" that would more precisely define the credit allowable toward goals for use of MBE, WBE, and DBE firms performing such functions as hauling, professional and technical services, manufacturers' representatives, and insurance agents.

The Department received 56 comments on the NPRM. Of these, 27 favored increasing the percentage to 100 percent. Another 16 favored raising the percentage to a figure less than 100 percent (most of these comments recommended a percentage between 30 and 80 percent). The remaining comments did not take a position on this issue.

The reasons for increasing the percentage cited by those commenters favoring an increase were essentially those mentioned in the preamble to the NPRM. First, the current provision may have an adverse effect on MBE, DBE, or WBE suppliers, in that it provides less incentive for recipients and contractors to use their services than the services of other kinds of eligible firms (which are counted at 100 percent of the value of their products or services).

Second, it is likely to be more cost-effective for a recipient to use its resources to develop contacts with or provide technical assistance to a firm the use of which will result in 100 percent credit than one for which the "payoff" in terms of credit towards goals will be 20 cents on the dollar. As a result, the rule could unintentionally skew recipient's programs toward construction contractors and other service providers and away from dealers and suppliers of products.

Third, the provision may make it more difficult for some recipients to meet goals than others. For example, Urban Mass Transportation Administration (UMTA) recipients of operating assistance must meet their DBE goals largely through procurements of materials and supplies (e.g., bus fuel, spare parts). Since these recipients can get only 20 percent credit for the use of the MBE/DBE firms that provide these materials and supplies, the recipients will have a more difficult time meeting goals than those recipients (e.g., transit authorities or highway departments that do substantial amounts of construction contracting) 100 percent of the value of whose DBE contracts can be counted toward goals.

Fourth, some commenters also pointed out that the present rule is inconsistent with respect to treatment of the costs of supplies. If an MBE, DBE or WBE construction contractor buys supplies for a job from a non-minority firm, the entire cost of those supplies is credited toward the goal, since it becomes part of the contract price. If a recipient or non-minority contractor purchases the same supplies from an MBE, WBE, or DBE supplier, however, only 20 percent of the value of the supplies is credited toward the recipient's goals.

Commenters who opposed raising the percentage basically did so for the reasons cited in the original rule on this subject. That is, the commenters were concerned that prime contractors would rather meet goals through purchasing supplies than by using MBE, DBE, or WBE subcontractors, and that increasing the percentage of supply costs allowable toward goals would adversely affect subcontractors. In addition, these commenters cited the relatively low portion of "value added" by suppliers, as contrasted with other sorts of contractors. They also expressed the concern that the proposal might increase the participation of brokers and manufacturers' representatives, which they viewed as inconsistent with the intent of the program.

The commenters who supported increasing the percentage, but to a figure less than 100 percent, generally did so in the belief that a compromise recognizing the validity of arguments for not changing the rule and for changing it to 100 percent was desirable. These commenters proposed percentages ranging from 30 to 80 percent. Some of these comments also recommended sliding scales (e.g., 100 percent for the first $25,000 worth of materials, smaller percentages for additional amounts).

The Department recognizes that commenters on all sides of this issue have legitimate concerns. Consequently, the Department has concluded that the most appropriate response to these concerns is to raise the percentage of the value of goods purchased through regular dealers to 60 percent. Choosing this percentage will mitigate significantly the problems cited by recipients and suppliers with the current 20 percent figure. As a percentage significantly less than 100, however, it will avoid to a considerable degree the problems cited by other commenters. The Department will reevaluate this decision after two years to determine whether, on the basis of recipients', contractors' and suppliers' experience, it is appropriate to raise it, lower it, or leave it at 60 percent.

The most significant support for counting 100 percent of goods purchased from DBE suppliers came from transit authorities and suppliers to transit authorities. Some of these commenters appeared to believe that there are considerations specific to the transit program (especially for smaller transit authorities) that make 100 percent counting especially appropriate in that program. The Department is seeking comment on whether there should be a different percentage used for the transit program from that used in the rest of the Department's programs (e.g., 100 percent). The Department also seeks comment on whether, if a different percentage is used for the UMTA program, it should be used on a pilot program basis, subject to reevaluation after a certain amount of time, or whether the change should be permanent.

With respect to the "regular dealer" concept, a number of commenters asked for clarification. Some commenters asked whether recipients were required to certify firms as regular dealers. The Department does not intend to require certification, as such. Before a recipient may count (or permit a contractor to count) 60 percent of the value of a product toward a goal, the recipient must ensure that the firm is a regular dealer in the product involved. (Obviously, a firm may be a regular dealer in one product but not in another. It is intended that 60 percent credit be permitted only where the firm is a regular dealer in the product involved in the particular transaction.) This determination could be made on a case-by-case basis or could be done through a certification process. The choice is up to the recipient.

One commenter suggested that, in order that recipients could avoid the administrative burden of determining whether firms were regular dealers, firms should be able to self-certify as regular dealers. The Department believes that this approach would be too open to abuse, and we have not adopted it.

A number of commenters addressed the NPRM's provision concerning suppliers of bulk goods, such as fuel oil dealers. The NPRM said that bulk goods suppliers did not have to keep such products in stock, but must own, operate, or maintain distribution equipment and have, as their principal business, and in their own name, the purchase and sale of the products. Some comments approved this proposal. Some said that even bulk goods suppliers should have to maintain an inventory of the product; others said that distribution equipment should not be required.

A key purpose of the "regular dealer" definition is to distinguish between firms that supply a product on a regular basis to the public and those that supply the product on only an ad hoc basis in relation to a particular contract or contractor. Such indications of being a regular, established, supplier as maintaining an inventory or distribution equipment are very useful in making this distinction. At the same time, business practices may differ for suppliers of different types of goods or in different parts of the country, and an absolute, across-the-board requirement for either the maintenance of an inventory or possession of distribution equipment could be unrealistic.

For this reason, the final rule will permit a supplier of bulk goods to be regarded as a regular dealer if, in addition to meeting other parts of the definition, it either maintains an inventory of the product in stock or owns or operates distribution equipment. The final rule will not require both an inventory and distribution equipment.

There were few comments on the NPRM's proposals to clarify the counting provisions applicable to contractors who are neither suppliers nor construction contractors. These comments generally supported the NPRM's approach of counting fees and commissions for such participants. One comment suggested that fees and commissions for brokers and manufacturer's representatives should be counted. This is consistent with the Department's intent in the NPRM, and such fees and commissions may be counted under the final rule, provided, of course, that the broker or manufacturer's representative performs a commercially useful function in a given transaction.

Another commenter said that counting fees and commissions would be too administratively burdensome, and suggested a flat 10 percent rate for counting the contributions of firms that were not regular dealers. The Department did not adopt this suggestion. The Department does not believe that its approach is burdensome, and a 10 percent rate might well overstate the credit due such firms in many instances. Consequently, the NPRM provision has been retained with only minor changes.

In implementing the amended rule, recipients should keep in mind the concept of "commercially useful function." According to § 23.47(d), work performed by an MBE, DBE or WBE firm in a particular transaction can be counted toward goals only if the recipient determines that it involves a commercially useful function. That is, in light of industry practices and other relevant considerations, does the MBE, DBE or WBE firm have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the MBE/DBE/WBE program, or is the firm's role a superfluous step added in an attempt to obtain credit toward goals? If, in the recipient's judgment, the firm does not perform a commercially useful function in the transaction, no credit toward goals may be awarded, and the counting provisions of the regulation never come into play.

It should be noted that the question of whether a firm is performing a commercially useful function is completely separate from the question of whether the firm is an eligible MBE, DBE, or WBE. A firm is eligible if it meets the definitional criteria (see §§ 23.5 or 23.62) and ownership and control requirements (see § 23.53) of the regulation.

The issue of whether an eligible firm performs a commercially useful function arises only in the context of how much, if any, "credit" toward MBE, DBE, or WBE goals can be counted for the firm's participation in a contract (see § 23.47). An eligible firm may perform a commercially useful function on one contract and not on another.

The fact that a firm does not perform a commercially useful function in a certain transaction does not mean that the firm loses eligibility (i.e., that it should be decertified or not recertified, as though it were no longer owned and controlled by its minority, disadvantaged, or women participants), only that no credit can be counted for its participation in the transaction.

Of course, there may be circumstances in which the participation of a firm in transactions in which it perform no commercially useful function may constitute part of a pattern of relationships with non-minority businesses that brings the firm's independence and control into question. In this sense, connection between "no commercially useful function" and program eligibility could exist. There may also be circumstances in which performing no commercially useful function (e.g., in an intentional pass-through scheme) could involve fraud or other disreputable conduct, leading to a firm to being subject to a declaration of non-responsibility, suspension or debarment, or even criminal prosecution.

If the recipient determines that the firm is performing a commercially useful function, the recipient must then decide what that function is. If the commercially useful function is that of a regular dealer, the recipient may then count 60 percent of the value of the product supplied toward MBE, DBE, or WBE goals.

A regular dealer must be engaged in selling the product in question *to the public*. This is important in distinguishing a *regular* dealer, which has a regular trade with a variety of customers, from a firm which performs supplier-like functions on a *ad hoc* basis or for only one or two contractors with whom it has a special relationship.

As noted above, a supplier of bulk goods may qualify as a regular dealer if it either maintains an inventory or owns or operates distribution equipment. With respect to the distribution equipment (e.g., a fleet of trucks), the term "or operates" is intended to cover a situation in which the supplier leases the equipment on a regular basis for its

entire business. It is not intended to cover a situation in which the firm simply provides drivers for trucks owned or leased by another party (e.g., a prime contractor) or leases such a party's trucks on an *ad hoc* basis for a specific job.

If the commercially useful function being performed is not that of a regular dealer, but rather that of delivery of products, obtaining bonding or insurance, procurement of personnel, acting as a broker or manufacturer's representative in the procurement of supplies, facilities, or materials, etc., the counting rules of § 23.47(f) would apply.

Under paragraph (f), for example, a business that simply transfers title of a product from manufacturer to ultimate purchaser (e.g., a sales representative who reinvoices a steel product from the steel company to the recipient or contractor) or a firm that puts a product into a container for delivery would not be considered a regular dealer. The recipient or contractor would not receive credit based on a percentage of the cost of the product for working with such firms.

Subparagraph (f)(1) concerns the use of services that help the recipient or contractor obtain needed supplies, personnel, materials or equipment to perform a contract or program function. Only the fee received by the service provider could be counted toward goals. For example, use of a minority sales representative or distributor for a steel company, if performing a commercially useful function at all, would entitle the recipient or contractor receiving the steel to count only the fee paid to the representative or distributor toward its goal. No portion of the price of the steel would count toward the goal. This provision would also govern fees for professional and other services obtained expressly and solely to perform work relating to a specific contract or program function.

Subparagraph (f)(2) concerns transportation or delivery services. If an MBE, DBE or WBE trucking company picks up a product from a manufacturer or regular dealer and delivers the product to the recipient or contractor, the commercially useful function it is performing is not that of a supplier, but simply that of a transporter of goods. Unless the trucking company is itself the manufacturer of or a regular dealer in the product, credit cannot be given based on a percentage of the cost of the product. Rather, credit would be allowed for the cost of the transportation service.

Subparagraph (f)(3) applies the same principle to bonding and insurance matters. Contractors often are required to obtain bonding and insurance concerning their work in DOT-assisted contracts. When they obtain a bond or an insurance policy from an MBE, DBE, or WBE agent, the amount allowable toward goals is not any portion of the face value of the policy or bond or the total premium, but rather the fee received by the agent for selling the bond or insurance policy.

The Department is aware that the rule's language does not explicitly mention every kind of business that works in DOT financial assistance programs. In administering this rule, the Department's operating administrations would, on a case-by-case basis, determine the appropriate regulatory provision to apply in a particular situation.

These provisions would apply to prime contracts and purchases by recipients as well as to subcontracts let by prime contractors. The rule provides that only services required by a DOT-assisted contract are eligible for credit; a DOT-assisted contract, for this purpose, can mean a direct purchase of goods or services by a transit authority as well as by a prime construction contractor under a highway contract. The amendments to § 23.47 apply to all financial assistance programs in the Department (e.g., the airport and intercity rail programs as well as the highway and urban mass transportation programs).

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 significant rule under the Department's Regulatory Policies and Procedures. Since the regulation simply makes administrative adjustments to an existing program, its economic impacts are expected to be small, and the Department has consequently not prepared a regulatory evaluation.

Since proposed rules have not been issued with respect to the portions of this rule implementing section 106(c) of the STURAA and concerning the definition of Hispanic, the Regulatory Flexibility Act does not apply to these provisions. With respect to the supplier credit and commercially useful function portions of the rule, the Act does apply.

As noted in the NPRM, the Department considered whether the proposal for these amendments would have a significant economic impact on a substantial number of small entities. The entities in question are small businesses who act as suppliers to DOT recipients and contractors. The changes in counting procedures will benefit regular dealers by increasing the credit that may be counted toward DBE/WBE goals for the purchase of supplies. For businesses that do not perform supply services, the proposal will clarify existing policy that only the fee for their service may be counted toward goals. The overall effect of the proposal will be to increase opportunities for participation in DOT financial assistance programs.

Comments to the rule did not suggest that even these benefits would be of major magnitude, however, and none of the comments suggested that the proposal would have any adverse consequences for small entities. Consequently, the Department certifies that the rule will not have a significant economic effect on a substantial number of small entities.

The portions of the rule which have not previously been the subject of an NPRM concern matters under Federal grants, and hence are exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(a)(2)). In addition, the portions of the rule implementing section 106(c) of the STURAA must be implemented rapidly, in order to ensure that the provisions apply to funds authorized by the Act, as Congress intended. It is reasonable to promulgate the amendment to the definition of Hispanic at the same time as other changes are made to the definition of "socially and economically disadvantaged individuals," in order to avoid confusion by recipients administering the program. 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 5 U.S.C. 553(c)(3)).

List of Subjects in 49 CFR Part 23

Minority businesses, Highways, Mass transportation.

Issued in Washington, DC on October 6, 1987.

Jim Burnley,

Acting 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 and the authority citation for Subpart D is removed:

Authority: Sec. 905 of the Railroad 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 (49 U.S.C. 1730); sec. 19 of the Urban Mass Transportation Act 1964, as amended (Pub. L. 95–599); Title 23 of the U.S. Code (relating to highways and highway safety); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); The Federal Property and Administrative Services Act of 1949 (49 U.S.C. 471 *et seq.*); sec. 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17); Executive Order 11625; Executive Order 12138.

2. Section 23.45(e) is amended by adding the following sentence at the end of the paragraph:

§ 23.45 [Amended]

* * * * *

(e) * * * Recipients subject to the disadvantaged business enterprise program requirements of Subpart D of this Part shall compile and update their directories annually. The directories shall include the addresses of listed firms.

* * * * *

3. Section 23.45(f)(3) is added to read as follows:

* * * * *

(f) * * *

(3) Recipients covered by the disadvantaged business program requirements of Subpart D of this Part shall, in determining whether a firm is an eligible disadvantaged business enterprise, take at least the following steps:

(i) Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation;

(ii) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(iii) Analyze the ownership of stock in the firm, if it is a corporation;

(iv) Analyze the bonding and financial capacity of the firm;

(v) Determine the work history of the firm, including contracts it has received and work it has completed;

(vi) Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as part of the DBE program; and

(vii) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program.

* * * * *

4. Section 23.45(g)(4) is revised to read as follows:

§ 23.45 [Amended]

(g) * * *

* * * * *

(4) Recipients covered by the disadvantaged business enterprise program requirements of Subpart D of this Part shall establish an overall goal and contract goal for firms owned and controlled by socially and economically disadvantaged individuals. Other recipients shall establish separate overall and contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively.

* * * * *

5. Section 23.47 is amended by revising paragraph (e) and by adding a new paragraph (f), to read as follows:

§ 23.47 [Amended]

* * * * *

(e) (1) A recipient or contractor may count toward its MBE, DBE or WBE goals 60 percent of its expenditures for materials and supplies required under a contract and obtained from an MBE, DBE or WBE regular dealer, and 100 percent of such expenditures to an MBE, WBE, or DBE manufacturer.

(2) For purposes of this section, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the recipient or contractor.

(3) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

(f) A recipient or contractor may count toward its MBE, DBE, or WBE goals the following expenditures to MBE, DBE, or WBE firms that are not manufacturers or regular dealers:

(1) The fees or commissions charged for providing a *bona fide* service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

6. 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) so that, * * *

* * * * *

7. Section 23.61(b) is amended by removing the words "section 105(f)" and substituting the words "section 106(c)".

8. 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).

* * * * *

9. Section 23.62 is amended by removing the period(.) at the end of the definition of "Small business concern," and adding the following words:

* * * * *

"Small business concern" * * * except that a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of $14 million over the previous three fiscal years. The Secretary shall adjust this figure from time to time for inflation.

* * * * *

10. Section 23.62 is amended by adding, in the definition of "Socially and economically disadvantaged individuals," immediately following the words "(or lawfully admitted permanent residents) and who are" the word

"women,"; and by adding, in the definition entitled "(b) 'Hispanic Americans'," immediately after the words "or other Spanish" the words "or Portuguese."

11. Section 23.63 is revised to read as follows:

§ 23.63 Applicability.

This subpart applies to all DOT financial assistance in the following categories that recipients expend in DOT-assisted contracts:

(a) Federal-aid highway funds authorized by Title I of the Act;

(b) Urban mass transportation funds authorized by Title I or III of the Act or the Urban Mass Transportation Act of 1964, as amended; and

(c) Funds authorized by Title I, II (except section 203) or III of the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424) and obligated on or after April 2, 1987.

Appendix A—[Amended]

12. The portion of Appendix A, following Subpart D, entitled "Section 23.61 Purpose." is amended in its first sentence, by removing the words "105(f) of the Surface Transportation Assistance Act of 1982." and substituting the words "106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987."; and, in the third sentence, by removing the word "105(f)" in both places where it occurs and substituting the word "106(c)".

13. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by removing the words "Surface Transportation Assistance Act of 1982." in the first sentence and substituting the words "Surface Transportation and Uniform Relocation Assistance Act of 1987."

14. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by adding the following new paragraphs following the end of the paragraph entitled "small business concerns":

Congress determined, in order to ensure that the DBE program meets its objective of helping small minority businesses become self-sufficient and able to compete in the market with non-disadvantaged firms, that DBE firms should "graduate" from the program once their average annual receipts reached $14 million.

In implementing this provision, recipients should note that a firm is not "graduated" from the program, and hence no longer an eligible DBE, until its average annual gross receipts over the previous three-year period exceed $14 million. The fact that a firm exceeds $14 million in gross receipts in a single year does not necessarily result in "graduation." For example, suppose a firm has the following history:

1985—$11 million
1986—$13 million
1987—$14 million
1988—$14 million
1989—$15 million

The firm makes $14 million in 1987. However, the firm's average annual gross receipts for 1985–87 are $12.67 million, so the firm remains eligible in 1988. This hypothetical firm would remain eligible in 1989 as well, since its average annual gross receipts for 1986–88 would be $13.67 million. However, the firm's average annual gross receipts for 1987–89 would be $14.3 million. As a result, the firm would not be an eligible DBE in 1990.

It should also be pointed out the $14 million ceiling, like small business size limits under section 3 of the Small Business Act, includes revenues of "affiliates" of the firm as well as the firm itself. This is the import of the "any concern or group of concerns" language. In addition, firms still are subject to applicable lower limits on business size established by the Small Business Administration in 13 CFR Part 121. For example, if SBA regulations say that $7.5 million average gross annual revenues is the size limit for a certain type of business, that size limit, rather than the overall $14 million ceiling, determines whether the firm qualifies in terms of its size to be a DBE.

15. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by adding, at the end of the list of designated groups in the fourth sentence of the paragraph entitled "Socially and economically disadvantaged individuals", following the words "Asian Indian Americans," the words "or women."

16. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by removing the words "Burma, Thailand, and Portugal" from the last sentence of the paragraph entitled "Socially and economically disadvantaged individuals" and from the first sentence of the paragraph immediately following the paragraph entitled "Socially and economically disadvantaged individuals" and substituting, in each case, the words "Burma and Thailand."

17. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by removing the words "non-minority women," from the second sentence of the last paragraph.

18. The portion of Appendix A, following Subpart D, entitled "Section 23.63 Applicability." is amended by revising the second paragraph to read as follows:

The first category of program funds to which Subpart D applies is Federal-aid highway funds authorized by Title I of the Act. The second category is urban mass transportation funds authorized by Title I (i.e., interstate transfer and substitution funds) or Title III of the Act. The third category is funds authorized by Title I, Title II (except section 203), or Title III of the Surface Transportation Assistance Act of 1982 which were obligated on or after April 2, 1987 (the enactment date of the STURAA).

19. The portion of Appendix A, following Subpart D, entitled "Relationship Between Subpart D and the Remainder of 49 CFR Part 23" is amended by revising the second paragraph to read as follows:

With respect to FHWA and UMTA-assisted programs, recipients will now set only one DBE goal, at both the overall and contract goal level. There are no longer separate DBE and WBE goals. Rather, the single DBE goal applies to all DBEs, whether they are owned and controlled by minorities or by women.

[FR Doc. 87–24233 Filed 10–16–87; 10:09 am]
BILLING CODE 4910–62–M

U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., S.W.
Washington, D.C. 20591

OCT 22 1987

Mr. Darwin Throne
HANDAR, Incorporated
1380 Borregas Avenue
Sunnyvale, CA 94086

Dear Mr. Throne:

The HANDAR AWOS II-1 and AWOS II-2 are approved (effective as of the above date) as meeting the requirements of FAA Advisory Circular (AC) 150/5220-16, Automated Weather Observing Systems (AWOS) for Non-Federal Applications.

The assigned configuration identification (HANDAR AWOS II-1 or HANDAR AWOS II-2) will remain with the approved system configuration until modified. The system configurations must be in compliance with your submittals as of the above date for type II certification approval. Commissioning of a specific location will require compliance with the siting criteria of FAA Order 6560.20, Siting Criteria for Automated Weather Observing Systems (AWOS), and the establishment of the maintenance program specified in the documentation submitted for type approval.

We request that a copy of the type approval package be sent to the Non-Federal AWOS Coordinator in each FAA region where an AWOS is planned.

Sincerely,

Norman Solat
Manager, Communications and Weather
Facilities Division

U.S. Department
of Transportation

**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

OCT 22 1987

Mr. Darwin Throne
HANDAR, Incorporated
1380 Borregas Avenue
Sunnyvale, CA 94086

Dear Mr. Throne:

The HANDAR AWOS IIIA-1 and AWOS IIIA-2 are approved (effective as of the above date) as meeting the requirements of FAA Advisory Circular (AC) 150/5220-16, Automated Weather Observing Systems (AWOS) for Non-Federal Applications.

The assigned configuration identification (HANDAR AWOS IIIA-1 or HANDAR AWOS IIIA-2) will remain with the approved system configuration until modified. The system configurations must be in compliance with your submittals as of the above date for type III certification approval. Commissioning of a specific location will require compliance with the siting criteria of FAA Order 6560.20, Siting Criteria for Automated Weather Observing Systems (AWOS), and the establishment of the maintenance program specified in the documentation submitted for type approval.

We request that a copy of the type approval package be sent to the Non-Federal AWOS Coordinator in each FAA region where an AWOS is planned.

Sincerely,

Norman Solat
Manager, Communications and Weather
Facilities Division

U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

DEC 2

Mr. James K. Ferguson
General Manager
ARTAIS Incorporated
4660 Kenny Road
Columbus, OH 43220

Dear Mr. Ferguson:

The ARTAIS Weather Check V-2-A and V-3-A (AWOS II and III configured with an indoor processor) are approved (effective as of the above date) as meeting the requirements of FAA Advisory Circular (AC) 150/5220-16, Automated Weather Observing Systems (AWOS) for nonFederal Applications.

The assigned configuration identification (ARTAIS Weather Check V-2-A or V-3-A) will remain with the approved system configuration until modified. The system configurations must be in compliance with your submittals as of the above date for type certification approval. Commissioning of a specific location will require compliance with the siting criteria of FAA Order 6560.20, Siting Criteria for Automated Weather Observing Systems (AWOS), and the establishment of the maintenance program in the documentation submitted for type approval.

We request that a copy of the type approval be sent to the nonFederal AWOS Coordinator in each FAA region where an AWOS is planned.

Sincerely,

Robert M. Valone

Robert M. Valone
Assistant Manager, Communications and Weather
Facilities Division