



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

# Memorandum

Subject: Program Guidance Letter 88-4

Date: **APR 25 1988**

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

Reply to  
Attn. of:

To: PGL Distribution List

88-4.1 ARFF Equipment at Small Airports - Ben Castellano (267-8822).

The Airport and Airway Safety and Capacity Expansion Act of 1987 amends the AAIA to expand the definition of airport development to include "firefighting and rescue equipment at any airport which serves scheduled passenger operations of air carrier aircraft designed for more than 20 passenger seats."

Airports falling under this category and not certificated under FAR 139 will now be eligible for one airport rescue and firefighting (ARFF) vehicle carrying at least 450 pounds of potassium based dry chemical and water with a commensurate quantity of aqueous film forming foam (AFFF) to total 100 gallons, for simultaneous dry chemical and AFFF application.

The following special condition will be included in all grant agreements which provide for this equipment:

The sponsor agrees to maintain sufficiently trained personnel to operate the vehicle; to have the equipment available during scheduled operations of air carrier aircraft; and to notify the air carriers using the airport when the equipment is not available due to being out of service for maintenance or repair.

In addition to the vehicle, funding will also be available for protective clothing in accordance with AC 150/5210-14, as well as for other protective devices, such as airpacks.

88-4.2 Revision to OMB Circular A-102 - Ben Castellano (267-8822) and Dick Angle (267-8825).

On March 11, OMB published its revision of Circular A-102 in the Federal Register. The revision calls for each agency to issue its own regulations from a common rule designed by OMB. DOT on the same date published 49 CFR Part 18,

Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, which is effective October 1, except for the \$5000 threshold for the definition of "equipment" in section 18.3 and in the disposition of equipment in section 18.32(e) and the \$25,000 threshold for the use of small purchase procedures in section 18.36(d)(1), which are effective as of March 12.

As a result of this, in Order 5100.38, the \$1000 levels in paragraph 561e. should be changed to \$5000; and in paragraph 802d. the \$10,000 limit should be changed to \$25,000. Further guidance in the application of the new 49 CFR Part 18 will be forthcoming prior to October 1. A copy of the revised A-102 and the new Part 18 is attached.

88-4.3 NEXRAD - Ben Castellano (267-8822).

Attached is the final Procedures for Initiating Leasing Actions For NEXRAD Airport Sites Under the AALA. These procedures culminate an agreement reached between FAA and Department of Commerce for obtaining cost-free land on airports for NEXRAD sites and reflect the input from your offices.

88-4.4 Use of Recovered Funds For Grant Amendments - Angela Ferrari (267-8820).

Amendments to "old" grants signed in FY 1987 or earlier may only be funded with money recovered from adjustments to previously signed grants. Current year recoveries from new AIP grants may be used for such amendments, but no current year new funds or carryover funds may be used for such amendments. See section 512(b)(2)(B) of the recently amended AIP legislation for language to this effect.

Because of this requirement to fund amendments to "old" (1987 and earlier) program grants from recoveries only, we cannot use recovered funds that are subject to ceiling restrictions for new grants until we are certain that we have satisfied the amendments to "old" program grants nationwide. We will not know if we have satisfied all such amendments until very late in a fiscal year, perhaps as late as mid-September. Therefore, effective immediately, no region shall use AIP recoveries that are subject to a ceiling for any purposes except to satisfy amendments to "old" AIP grants unless permission for other use of these recoveries is received from headquarters. Headquarters will not be in a position to grant such permission before mid-September.

Recovered sponsor and state funds (entitlements) that are still within their active 3-year life cannot be withheld from their sponsor and state "owners" and are, therefore, not subject to the above restrictions. They continue to be subject to the ceiling on recoveries.

Amendments as discussed above pertain to amendments made with recoveries and do not include the amendments made to multi-year grants to include latest year entitlements.

88-4.5 Liability Insurance During Construction - Ellis Ohnstad (267-8824).

A question arose some time ago about "reasonable" costs for insurance during construction of an AIP project. The sponsor had required the contractor to obtain a large liability insurance policy to protect the sponsor from any consequences resulting from a mishap occurring during construction.

After reviewing the specifics of the case, contacting several regions/ADO's, and studying existing guidance, we determined that such costs will not be allowable in AIP projects. Our determination was based on guidance in Order 5100.38, paragraphs 34b. (OMB Circular A-102 - Attachment B, Bonding and Insurance), 310a. (Allowable Project Costs - General), and 1234a. (Sponsor's Force Account - Performance of Construction - Insurance). A full discussion of the issue and the basis for our determination was included in a letter to the region.

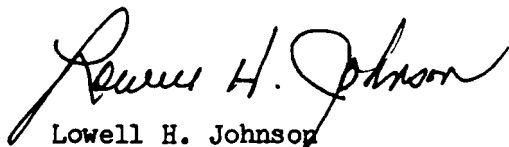
The region applied the guidance but has recently received comments from contractors that this is treated as an allowable cost in other parts of the country. We are now distributing this guidance for use by all regions to establish consistency in all projects. A copy of our memorandum to ASW-610 on this matter is included for your information.

88-4.6 Title Insurance - Ellis Ohnstad (267-8824).

We have had several inquiries about the eligibility of title insurance as part of land acquisition projects, even though Order 5100.38, paragraph 620, states that title insurance costs are not allowable. Frequently, the question is stimulated by a sponsor's claim that title insurance is less costly than an attorney's title opinion, and that the protection for the FAA and sponsor investment is as good or better.

Section 509(b)(2) of the AAIA requires that the sponsor holds good title, satisfactory to the Secretary, to the landing area in order to receive a grant. The purpose of a title opinion is to satisfy that requirement, and to assure the FAA and the sponsor that the land or interest in land being paid for is actually what is being acquired. The title opinion (or similar evidence), therefore, is necessary for the project and its cost is allowable. Title insurance, however, is not necessary and its cost is not allowable. However, if a title opinion or equivalent evidence of good title is prepared in the course of obtaining title insurance, the cost of producing that evidence would be an eligible project cost.

The attached memoranda (11/20/87 and 4/11/88) expand upon this discussion.

  
Lowell H. Johnson

## OFFICE OF MANAGEMENT AND BUDGET

### Grants and Cooperative Agreements with State and Local Governments

**AGENCY:** Office of Management and Budget.

**ACTION:** Revision of Circular A-102.

**SUMMARY:** This notice sets forth the final revision of Office of Management and Budget Circular A-102, "Grants and Cooperative Agreements with State and Local Governments".

**FOR FURTHER INFORMATION CONTACT:** Jonathan Breul, Financial Management Division, Office of Management and Budget, Washington, DC 20503. (202) 395-3050.

**SUPPLEMENTARY INFORMATION:** An interagency task force under the President's Council on Management Improvement (PCMI) was established to review existing guidance for managing Federal aid programs. On June 18, 1984, OMB published a Notice in the Federal Register (49 FR 24958) announcing the review and seeking public comment on over 50 issues and possible options for each. Federal agencies, States, local governments, interest groups, business organizations, and nonprofit organizations, as well as members of Congress submitted several hundred comments.

Five agency-chaired teams studied the comments, Circular A-102, and the existing Federal agency regulations implementing it to develop and draft two products: a revised OMB Circular—addressed solely to Federal agencies, and a "common" government-wide regulation—addressed to State and local grantees. The proposed government-wide "common rule" stated the fiscal and administrative conditions governing grants to State and local governments and subgrantees which are State and local governments.

On March 12, 1987, the President directed OMB to revise Circular A-102 and all affected Federal agencies to simultaneously propose a common rule to adopt verbatim government-wide grants management terms and conditions. The revised Circular and common rule were to be proposed within 90 days, and issued final within one year.

OMB published a proposed revision to Circular A-102 as a Notice in the June 9, 1987 issue of the Federal Register (52 FR 21816-21818). Simultaneously in the same issue (52 FR 21820-21852), Federal grant-making agencies proposed a common rule

### Comments and Changes to the Proposed Revision

While OMB and the agencies received nearly 100 comments on the proposed common rule, only a handful addressed the revision to Circular A-102 itself.

*Advance Public Notice and Priority Setting (paragraph 6b.)* A number of Federal agencies questioned the need for, and type of official responsible for, advance public notice and priority setting in discretionary grant and cooperative agreement programs. Consistent with recent recommendations by the U.S. General Accounting Office (GAO) ("Discretionary Grants: Opportunities to Improve Federal Discretionary Award Practices"), this section aims to improve managerial accountability for the discretionary award process by emphasizing the need for upfront priority setting and policy-level sign-off on grant and cooperative agreement awards. "Policy-level official" was deliberately not defined in order for agency heads to determine the appropriate placement of such responsibilities. Such officials include program heads or political appointees located sufficiently high in an organization to ensure that funding priorities and actual awards are consistent with the agency's overall priorities. OMB is willing to work with agencies to identify appropriate officials where there is question.

*Standard Forms for Applying for Federal Assistance (paragraph 6c.)* Several Federal agencies, particularly those with programs which fund both governmental (State and local) and nonprofit grantees, requested *not* to use the standard application facesheet (SF-424) as well as the project approval checklist, budget sheet, and standard assurances in Attachment "M" to Circular A-102. They pointed out that unlike 1971, when Circular A-102 and the forms were originally developed, there is less duplication and overlap in Federal funding for grantees and consequently less need by grantees for uniform application forms. Further, OMB now reviews and approves all forms and application packages under the Paperwork Reduction Act of 1980. In recognition of these changes in the makeup of Federal assistance programs, the types of recipients receiving funding and the paperwork control authorities in OMB's Office of Information and Regulatory Affairs (OIRA), OMB asked for public comment on revised standard application forms in a May 29, 1987 Notice in the Federal Register (52 FR 20178-20179).

The great majority of the over 80 public comments to the May 1987 Notice were concerned about the proposed financial reporting formats for the open ended entitlement programs, rather than either the need for, or design of, the standard application forms. We attribute much of this lack of interest to the fact that, with the approval of OMB's Office of Information and Regulatory Affairs, few programs use the forms display in Circular A-102 "as is". In fact, aside from the SF-424 Facesheet, nearly every program extensively tailors the forms or develops its own instructions and supplemental program-specific requirements.

In recognition of current practice and approved forms, the proposed circular has been revised to require use of either (1) three types of pre-approved standard forms: facesheet, standard budget information (construction or non-construction) and standard assurances (construction or non-construction) or (2) forms approved by OMB under the Paperwork Reduction Act of 1980. Two forms previously displayed in Circular A-102, the Part II, "Project Approval Checklist," and Part IV, "Narrative," are eliminated. The contents of the latter are reflected as guidance to agencies in paragraph 6c. of the circular. Agencies are free to use the standard forms without further OMB clearance. Use of any other forms and application packages requires OMB approval and clearance under the Paperwork Reduction Act of 1980.

*Exception to the common rule (paragraph 6g.)* A number of grantees expressed concern that paragraph 6g, "Special Conditions or Restrictions," coupled with the corresponding "Exceptions" (§—6) and "High-Risk" (§—12) provisions of the common rule are loopholes which permit Federal agencies to circumvent the rule and impose additional or unwarranted requirements. In recognition of this concern and to permit oversight, the circular is revised to make it clear that agencies will document the use of these provisions.

*Financial Status Reports (paragraph 7c.)* A new section was added to require use of the SF-269, Financial Status Report-Long Form, or SF-269a, Financial Status Report-Short Form. These forms are a revision of the SF-269 previously required under Circular A-102, with changes based on a May 29, 1987 Federal Register Notice (discussed above under "Standard Forms for Applying for Federal Assistance"). Both the short and long forms are simplified to require a single column rather than 6-column breakout of the status of funds

The long form responds to recommendations from the GAO for a form which permits reporting matching as well as the various uses of program income. The new paragraph 7c expresses a longstanding, but unstated, prohibition against agencies using the form to collect object class expenditure data (e.g., expenditures broken down by personnel, travel, equipment, etc.). Further, it limits collection of expenditure detail by programs, functions or activities within the program or project, unless required by statute or regulation.

*Contracting with small and minority firms, women's business enterprise and labor surplus area firms (paragraph 7d).* A number of commenters expressed concern that the proposed circular did not contain policy language from the old Circular A-102 which encouraged use of small, minority women's and labor surplus area firms. This was true because all of the substantive requirements from Attachment "O" in the old A-102 for grantees to use such firms when possible were proposed to be codified in the June 9, 1988, 24-agency, common rule. Unfortunately, in the interest of streamlining the rule, the prefatory sentence explaining that this is national policy was dropped. To remove any doubt that grantees are encouraged to contract with such firms, the opening sentence concerning small and minority business, as well as those concerning women's enterprises and labor surplus area firms have been restored to the circular.

*Program Income (paragraph 7e).* A number of State and local grantees were concerned that agencies will only sparingly permit the use of the addition or matching share alternatives for use of program income. On the other hand, others such as the GAO supported the circular, stating that there should be a preference for deducting program income from program costs since this alternative will result in financial savings to the Federal Government and grantees. No change is made to the proposed circular. In the event this provision serves as a disincentive to earning such income, § 25(g) of the common rule permits agencies to specify another alternative (or combination of alternatives) in program regulations or a specific grant agreement.

*Site visits and technical assistance (paragraph 7f).* Federal agencies expressed concern that the proposal would unduly restrict their ability to travel to grantee project sites or offer technical assistance. OMB proposed site visits "only as warranted by program or project needs" and restricted technical

assistance visits "only (1) in response to requests from recipients, or (2) when recipients are designated 'high risk.'" The proposed approach represented a departure from the original Circular A-102 which "encouraged" agencies to travel and offer technical assistance. Frequent travel and gratuitous technical assistance are no longer realistic given the Federal budget deficit and they are inconsistent with Federal deference to States' authority and competence under Federalism. However, to enable Federal agencies to address genuine program needs, an additional justification for technical assistance visits has been added based on "demonstrated program need."

*Property Management (paragraph 8a).* A number of commenters misinterpreted the provisions of the closeout provisions of the circular (as well as the property sections of the common rule) dealing with "federally owned property". They mistakenly concluded these provisions covered all grant-acquired property and equipment, not just that which is Federally owned and provided. This is not so because title to grant-acquired property vests with the grantee, not the Federal Government. The circular and common rule have been changed to make this distinction clear.

Another commenter suggested that closeout review cover all non-expendable personal property purchased with grant funds where title rests with the recipient. We do not believe such a mandatory Federal review of grant-acquired property is warranted. The common rule contains explicit instructions as to the grantee's property records and calls for the grantee to perform a physical inventory at least once every two years.

*Closeout (paragraph 8a.)* One agency expressed the opinion that Section 8a requiring written notification to grantees of required closeout documents may be too staff intensive. The agency recommended that published program regulations detailing this requirement should be sufficient. We agree. Since closeout reports do not generally vary significantly, a published program regulation or standard notice can satisfy the requirement.

**[Circular No. A-102 (Revised)]**

March 3, 1988.

To the Heads of Executive Departments and Establishments

Subject: Grants and Cooperative Agreements with State and Local Governments

1. *Purpose.* This Circular establishes consistency and uniformity among Federal agencies in the management of grants and cooperative agreements with State, local, and federally recognized

Indian tribal governments. This revision supersedes Office of Management and Budget (OMB) Circular No. A-102, dated January 1981.

2. *Authority.* This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; Reorganization Plan No. 2 of 1970; and Executive Order 11541. Also included in the Circular are standards to ensure consistent implementation of sections 202, 203, and 204 of the Intergovernmental Cooperation Act of 1968, the Office of Federal Procurement Policy Act Amendments of 1983, and sections 6301-08, title 31, United States Code.

3. *Background.* On March 12, 1987, the President directed all affected agencies to issue a grants management common rule to adopt government-wide terms and conditions for grants to State and local governments. This revised Circular provides guidance to Federal agencies on business-like management of grant programs and other matters not covered in the common rule. The revision replaces and rescinds Circular A-102, dated January 1981, including Attachments A-P.

4. *Coverage.* Consistent with their legal obligations, all Federal agencies administering programs that involve grants and cooperative agreements with State, local and Indian tribal governments (grantees) shall follow the policies in this Circular and issue a common grants management rule [common rule]. If the enabling legislation for a specific grant program prescribes policies or requirements that differ from those in this Circular, the provisions of the enabling legislation shall govern.

5. *Deviations.* The Office of Management and Budget may grant deviations from the requirements of this Circular when permissible under existing law. However, in the interest of uniformity and consistency, deviations will be permitted only in exceptional circumstances.

6. *Pre-Award Policies.*

a. *Use of grants and cooperative agreements.* Sections 6301-08, title 31, United States Code govern the use of grants, contracts and cooperative agreements. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government. The statutory criterion for

choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement."

**b. Advance Public Notice and Priority Setting.**

(1) Federal agencies shall provide the public with an advance notice in the **Federal Register**, or by other appropriate means, of intended funding priorities for discretionary assistance programs, unless funding priorities are established by Federal statute. These priorities shall be approved by a policy level official.

(2) Whenever time permits, agencies shall provide the public an opportunity to comment on intended funding priorities.

(3) All discretionary grant awards in excess of \$25,000 shall be reviewed for consistency with agency priorities by a policy level official.

**c. Standard Forms for Applying for Grants and Cooperative Agreements.**

(1) Agencies shall use the following standard application forms unless they obtain OMB approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 35) and the 5 CFR Part 1320, "Controlling Paperwork Burdens on the Public":

- SF-424 Facesheet
- SF-424a Budget Information (Non-Construction)
- SF-424b Budget Information (Construction)
- SF-424c Standard Assurances (Non-Construction)
- SF-424d Standard Assurances (Construction)

When different or additional information is needed to comply with legislative requirements or to meet specific program needs, agencies shall also obtain prior OMB approval.

(2) A preapplication shall be used for all construction, land acquisition and land development projects or programs when the need for Federal funding exceeds \$100,000, unless the Federal agency determines that a preapplication is not needed. A preapplication is used to:

- (a) Establish communication between the agency and the applicant,
- (b) Determine the applicant's eligibility,
- (c) Determine how well the project can compete with similar projects from others, and
- (d) Discourage any proposals that have little or no chance for Federal funding before applicants incur significant costs in preparing detailed applications.

(3) Agencies shall use the Budget Information (Construction) and Standard Assurances (Construction) when the major purpose of the project or program is construction, land acquisition or land development.

(4) Agencies may specify how and whether budgets shall be shown by functions or activities within the program or project.

(5) Agencies should generally include a request for a program narrative statement which is based on the following instructions:

(a) Objectives and need for assistance. Pinpoint any relevant physical, economic, social, financial, institutional, or other problems requiring a solution. Demonstrate the need for the assistance and state the principal and subordinate objectives of the project. Supporting documentation or other testimonies from concerned interests other than the applicant may be used. Any relevant data based on planning studies should be included or footnoted.

(b) Results or Benefits Expected. Identify results and benefits to be derived. For example, show how the facility will be used. For land acquisition or development projects, explain how the project will benefit the public.

(c) Approach. Outline a plan of action pertaining to the scope and detail how the proposed work will be accomplished for each assistance program. Cite factors which might accelerate or decelerate the work and your reasons for taking this approach as opposed to others. Describe any unusual features of the project, such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvements. Provide for each assistance program quantitative projections of the accomplishments to be achieved, if possible. When accomplishments cannot be quantified, list the activities in chronological order to show the schedule of accomplishments and their target dates. Identify the kinds of data to be collected and maintained, and discuss the criteria to be used to evaluate the results and success of the project. Explain the methodology that will be used to determine if the needs identified and discussed are being met and if the results and benefits identified are being achieved. List each organization, cooperator, consultant, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

(d) Geographic Location. Give a precise location of the project and area to be served by the proposed project.

Maps or other graphic aids may be attached.

(e) If applicable, provide the following information: for research and demonstration assistance requests, present a biographical sketch of the program director with the following information: name, address, telephone number, background, and other qualifying experience for the project. Also, list the name, training and background for other key personnel engaged in the project. Describe the relationship between this project and other work planned, anticipated, or underway under Federal assistance. Explain the reason for all requests for supplemental assistance and justify the need for additional funding. Discuss accomplishments to date and list in chronological order a schedule of accomplishments, progress or milestones anticipated with the new funding request. If there have been significant changes in the project objectives, location, approach or time delays, explain and justify. For other requests for changes, or amendments, explain the reason for the change(s). If the scope or objectives have changed or an extension of time is necessary, explain the circumstances and justify. If the total budget has been exceeded or if the individual budget items have changes more than the prescribed limits, explain and justify the change and its effect on the project.

(6) Additional assurances shall not be added to those contained on the standard forms, unless specifically required by statute.

**d. Debarment and Suspension.** Federal agencies shall not award assistance to applicants that are debarred or suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549. Agencies shall establish procedures for the effective use of the Consolidated List of Debarred, Suspended, Voluntarily Excluded and Ineligible Assistance Participants to assure that they do not award assistance to listed parties in violation of the Executive Order. Agencies shall also establish procedures to provide for effective use and/or dissemination of the list to assure that their grantees and subgrantees (including contractors) at any tier do not make awards in violation of implementing regulations.

**e. Awards and Adjustments.**

(1) Ordinarily awards shall be made at least ten days prior to the beginning of the grant period.

(2) Agencies shall notify grantees immediately of any anticipated

adjustments in the amount of an award. This notice shall be provided as early as possible in the funding period. Reductions in funding shall apply only to periods after notice is provided.

Whenever an agency adjusts the amount of an award, it shall also make an appropriate adjustment to the amount of any required matching or cost sharing.

**f. Carryover Balances.** Agencies shall be prepared to identify to OMB the amounts of carryover balances (e.g., the amounts of estimated, grantee unobligated balances available for carryover into subsequent grant periods). This presentation shall detail the fiscal and programmatic (level of effort) impact in the following period.

**g. Special Conditions or Restrictions.** Agencies may impose special conditions or restrictions on awards to "high risk" applicants/grantees in accordance with § 12 of the common rule. Agencies shall document use of the "Exception" provisions of § 6 and "High-risk" provisions of § 12 of the common rule.

**h. Waiver of Single State Agency Requirements.**

(1) Requests to agencies from the Governors, or other duly constituted State authorities, for waiver of "single" State agency requirements in accordance with section 6504, title 31, United States Code, shall be given expeditious handling and, whenever possible, an affirmative response.

(2) When it is necessary to refuse a request for waiver of "single" State agency requirements under section 204, the Federal grantor agency shall advise the Office of Management and Budget prior to informing the State that the request cannot be granted. The agency shall indicate to OMB the reasons for the denial of the request.

(3) Legislative proposals embracing grant-in-aid programs shall avoid inclusion of proposals for "single" State agencies in the absence of compelling reasons to do otherwise. In addition, existing requirements in present grant-in-aid programs shall be reviewed and legislative proposals developed for the removal of these restrictive provisions.

**i. Patent Rights.** Agencies shall use the standard patent rights clause specified in "Rights to Inventions made by Nonprofit Organizations and Small Business Firms" (37 CFR Part 401), when providing support for research and development.

**7. Post-award Policies.**

**a. Cash Management.** Agency methods and procedures for transferring

funds shall minimize the time elapsing between the transfer to recipients of grants and cooperative agreements and the recipient's need for the funds.

(1) Such transfers shall be made consistent with program purpose, applicable law and Treasury regulations at 31 CFR Part 205.

(2) Where letters-of-credit are used to provide funds, they shall be in the same amount as the award.

**b. Grantee Financial Management Systems.** In assessing the adequacy of an applicant's financial management system, the awarding agency shall rely on readily available sources of information such as audit reports to the maximum extent possible. If additional information is necessary to assure prudent management of agency funds, it shall be obtained from the applicant or from an on-site review.

**c. Financial Status Reports.**

(1) Federal agencies shall require grantees to use the SF-269, Financial Status Report-Long Form, or SF-269a, Financial Status Report-Short Form, to report the status of funds for all nonconstruction projects or programs. Federal agencies need not require the Financial Status Report when the SF-270, Request for Advance or Reimbursement, or SF-272, Report of Federal Cash Transactions, is determined to provide adequate information.

(2) Federal agencies shall not require grantees to report on the status of funds by object class category or expenditure (e.g., personnel, travel, equipment).

(3) If reporting on the status of funds by programs, functions or activities within the project or program is required by statute or regulation, Federal agencies shall instruct grantees to use block 12, Remarks, on the SF-269 or a supplementary form approved by the OMB under the Paperwork Reduction Act of 1980.

(4) Federal agencies shall prescribe whether the reporting shall be on a cash or an accrual basis. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on an accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through an analysis of the documentation on hand.

**d. Contracting With Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms.** It is national policy to award a fair share of contracts to small and minority business firms. Grantees shall

take similar appropriate affirmative action to support of women's enterprises and are encouraged to procure goods and services from labor surplus areas.

**e. Program Income.**

(1) Agencies shall encourage grantees to generate program income to help defray program costs. However, Federal agencies shall not permit grantees to use grant-acquired equipment to compete unfairly with the private sector.

(2) Federal agencies shall instruct grantees to deduct program income from total program costs as specified in the common rule at § 25(g)(1), unless agency regulations or the terms of the grant award state otherwise. Authorization for recipients to follow the other alternatives in § 25(g)(2) and (3) shall be granted sparingly.

**f. Site Visits and Technical Assistance.** Agencies shall conduct site visits only as warranted by program or project needs. Technical assistance site visits shall be provided only (1) in response to requests from grantees, (2) based on demonstrated program need, or (3) when recipients are designated "high risk" under § 12 of the common rule.

**8. After-the-grant Policies.**

**a. Closeout.** Federal agencies shall notify grantees in writing before the end of the grant period of final reports that shall be due, the dates by which they must be received, and where they must be submitted. Copies of any required forms and instructions for their completion shall be included with this notification. The Federal actions that must precede closeout are:

(1) Receipt of all required reports.

(2) Disposition or recovery of federally-owned assets (as distinct from property acquired under the grant), and

(3) Adjustment of the award amount and the amount of Federal cash paid the recipient.

**(b) Annual Reconciliation of Continuing Assistance Awards.** Federal agencies shall reconcile continuing awards at least annually and evaluate program performance and financial reports.

Items to be reviewed include:

(1) A comparison of the recipient's work plan to its progress reports and project outputs,

(2) the Financial Status Report (SF-269),

(3) Request(s) for payment,

(4) Compliance with any matching, level of effort or maintenance of effort requirement, and

(5) A review of federally-owned property (as distinct from property acquired under the grant).

9. *Entitlements (Reserved)*

10. *Policy Review (Sunset)*. The Circular will have a policy review three years from the date of issuance.

11. *Effective Date*. The Circular is effective on publication.

12. *Inquiries*. Further information concerning this Circular may be obtained from: Financial Management Division, New Executive Office Building, Room 10215, Office of Management and Budget, Washington, DC 20503, (202) 395-3050.

James C. Miller III,

Director.

[FR Doc. 88-5321 Filed 3-10-88; 8:45 am]

BILLING CODE 3110-01-M

Canceled

**DEPARTMENT OF AGRICULTURE**

7 CFR PARTS 3015 AND 3016

**DEPARTMENT OF ENERGY**

10 CFR PART 600

**SMALL BUSINESS ADMINISTRATION**

13 CFR PART 143

**DEPARTMENT OF COMMERCE**

15 CFR PART 24

**DEPARTMENT OF STATE**

22 CFR PART 135

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

24 CFR PARTS 44, 85, 111, 511, 570, 571, 575, 590, 850, 882, 905, 941, 988, 970, AND 990

**DEPARTMENT OF JUSTICE**

28 CFR PART 66

**DEPARTMENT OF LABOR**

29 CFR PART 97

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

29 CFR PART 1470

**DEPARTMENT OF DEFENSE**

32 CFR PART 278

**DEPARTMENT OF EDUCATION**

34 CFR PARTS 74 AND 80

**NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

36 CFR PART 1207

**VETERANS ADMINISTRATION**

38 CFR PART 43

**ENVIRONMENTAL PROTECTION AGENCY**

40 CFR PARTS 30, 31, AND 33

**DEPARTMENT OF THE INTERIOR**

43 CFR PART 12

**FEDERAL EMERGENCY MANAGEMENT AGENCY**

44 CFR PART 13

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

45 CFR PARTS 74 AND 92

**NATIONAL SCIENCE FOUNDATION**

45 CFR PART 602

**NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES**

National Endowment for the Arts

45 CFR PART 1157

National Endowment for the Humanities

45 CFR PART 1174

Institute of Museum Services

45 CFR PART 1183

**ACTION**

45 CFR PART 1234

**COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION**

45 CFR PART 2015

**DEPARTMENT OF TRANSPORTATION**

49 CFR PART 18

Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

**AGENCIES:** Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Health and Human Services; Department of Housing and Urban Development; Department of the Interior; Department of Justice; Department of Labor; Department of State; Department of Transportation; ACTION; Commission on the Bicentennial of the United States Constitution; Environmental Protection Agency; Federal Emergency Management Agency; Federal Mediation and Conciliation Service; Institute of Museum Services; National Archives and Records Administration; National Endowment for the Arts; National Endowment for the Humanities; National Science Foundation; Small Business Administration; Veterans Administration.

**ACTION:** Final rule.

**SUMMARY:** This action finalizes a common rule establishing consistency and uniformity among the Federal agencies shown above in the administration of grants and cooperative agreements to State, local and federally recognized Indian tribal governments.

**EFFECTIVE DATE:** This rule is effective October 1, 1988, except for the Department of Transportation. See the Department of Transportation agency specific preamble below.

**FOR FURTHER INFORMATION CONTACT:** See individual agencies below.**SUPPLEMENTARY INFORMATION:****Background**

In November 1983, a 20-agency task force under the President's Council on Management Improvement (PCMI), chaired by the Office of Management and Budget (OMB), was established to explore streamlining grants management and review OMB Circular A-102, "Uniform Administrative Requirements for Grants to State and Local Governments."

On June 18, 1984, OMB published a Notice in the *Federal Register* (49 FR 24958-24959) seeking comments on over 50 issues and possible options for each. Federal agencies, States, local governments, interest groups, business organizations, and nonprofit organizations, as well as members of Congress, submitted several hundred comments.

Five agency-chaired teams studied the comments, existing Federal agency grants administration regulations, and noncodified manuals and handbooks implementing OMB Circular A-102 to draft a government-wide "common" rule. The proposed common rule contained fiscal and administrative requirements for grants to State and local governments (grantees) and subrecipients which are State and local governments (subgrantees). At the same time, OMB and the agencies prepared a revised Circular A-102—directed solely to Federal agencies—containing guidance to Federal agencies on how they should manage the award and administration of Federal grants.

On March 12, 1987, the President directed all affected agencies to simultaneously propose and subsequently adopt a common rule verbatim, except where inconsistent with statutory requirements. The President explained that at the time it was issued "Circular A-102 was a significant step toward simplification of grants management." He went on to say, however, that "after 16 years, some of the provisions are out of date, there are gaps where the standards do not cover important areas, and agencies have interpreted the circular in numerous different ways in their regulations. It is now time for the circular to be revised to reflect developments consistent with our Federalism policies and State and local regulatory relief objectives and the President's Management Improvement Program." The President directed the affected agencies to propose a common rule within 90 days and adopt a final common rule within one year. To meet

this schedule. 23 agencies proposed a governmentwide "common rule" in the June 9, 1987 Federal Register (52 FR 21820-21862). In the same issue, OMB proposed a revised Circular A-102 (52 FR 21816-21818).

The final common rule will be codified in each agency's portion of the Code of Federal Regulations, as indicated in the information provided for individual agencies below. Several agencies' rules reflect differences required in statute (e.g., the five-year record retention requirement for the Department of Education programs under the General Education Provisions Act (GEPA)). Such differences are indicated in the text.

All grants administration provisions in program regulations which are inconsistent with the common rule are rescinded, except to the extent they are required by legislation or approved as a deviation by OMB. Each agency will specify in the agency-specific preamble and amendments additional to the common rule those agency regulations that are rescinded. Likewise, all grants administration provisions of noncodified program manuals, handbooks, and other materials which are inconsistent with the rule are superseded, except to the extent they are required by legislation or approved by OMB.

This rule is effective for grants and cooperative agreements awarded on or after October 1, 1988, the start of the next Federal fiscal year. As noted in the agency-specific preambles, some Federal agencies may authorize earlier effective dates. For example, some Federal agencies may allow grantees to use the new definition of equipment and the increase in the threshold for small purchase procedures as of the issuance of the final rule.

#### Comments on the Proposed Common Rule

OMB and the Federal agencies received over 85 comments on the proposed common rule from States, local governments, counties, Indian tribes, councils of governments, interest groups, business organizations, universities and nonprofit organizations. All comments received by any agency were reproduced and exchanged among all of the agencies and used to prepare this final rule.

Commenters supported the codification of common governmentwide policies in federal agency regulations. As the General Accounting Office (GAO) explained, this approach "should go a long ways towards providing a more standardized and efficient approach to administering federal assistance" and "create a more

certain environment for State and local governments."

The proposed rule invited comments on three issues in particular: Federalism, "Flow-down," and Open-Ended Entitlements.

#### Federalism

As explained in E.O. 12612, Federalism, States possess unique constitutional authority, resources and competence. Under Federalism, States should be given the maximum administrative discretion possible with respect to national programs they administer. Intrusive Federal oversight is neither necessary nor desirable. Federal agencies should refrain from establishing uniform, national standards, and, where possible, defer to the States to establish them.

Consistent with the President's Federalism Executive Order, the proposed common rule provided that in three important areas (financial management systems, § \_\_\_\_20, equipment, § \_\_\_\_32, and procurement, § \_\_\_\_36), States will expend and account for grant funds according to their own laws and procedures. This flexibility for States in these three areas applies only to funds expended by the State itself.

Most commenters reacted favorably to granting States increased flexibility. A number of States as well as the National Association of State Budget Officers, who were commenting on behalf of the Governors and the National Governors' Association, enthusiastically endorsed these changes. The GAO as well was supportive, pointing out that "This policy would provide greater flexibility to States to standardize the management of related State and Federal programs. The policy also recognizes the improvements made by many States in recent years to upgrade their management systems and personnel."

#### "Flow-down"

In the past, OMB Circular A-102 required that its provisions be applied to State and local governments when they were subgrantees under Federal grants as well as when they were primary grantees. The purpose of this "flow-down" of requirements was to ensure that subgrantees had the same rights and protections as grantees. To maintain this uniformity for subgrantees, the requirements in the proposed rule applied not only to direct Federal grantees, but also when funds "flow-down" to governmental subgrantees. Grantees, in their dealings with subgrantees, were subject to the same rules as Federal awarding agencies in

dealing with them. The proposal did not address the administrative requirements applicable to nongovernmental grantees and subgrantees, because they are covered by Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations." A June 24, 1987 Notice in the Federal Register (52 FR 23729) announced that OMB and the Department of Health and Human Services (HHS) are co-chairing a follow-on effort to similarly review and issue a common rule and revised Circular for nongovernmental grantees covered by Circular A-110. Grants to nongovernmental grantees and subgrantees will be addressed at that time. The proposed rule, however, did address which cost principles apply or "flow-down" to grantees, subgrantees, or contractors. Section \_\_\_\_22, Allowable Costs, stipulated that depending on the organization, Circular A-21 (educational institutions), A-87 (governments), or A-122 (nonprofits), or 48 CFR Part 31 (for-profits) will apply.

From the outset of the review of Circular A-102, OMB and the agencies recognized the importance of the policy requiring the "flow-down" of administrative requirements to subgrantees. The June 18, 1984 Federal Register Notice which announced the review specifically asked for public comment on a number of issues and provided options for each. The "flow-down" issue asked: "To what extent should States or other applicants be required to apply Federal administrative requirements to subrecipients (subgrantees)?" It offered three options which included: (1) Letting States manage and condition subgrants (except for requirements which fulfill a Federal need), (2) letting all grantees (besides States) do so, and (3) maintaining the status quo. The policy issue made reference to a full discussion and illustration of the first or "Federalism" option (giving States flexibility to condition and manage subgrants) in the Department of Health and Human Services (HHS) proposed rule published in the Federal Register, February 24, 1984 on pages 6933-5.

There was considerable public comment on the June 1984 Notice. The several interest groups representing local governments indicated they "do not want major policy modifications to the Circular." Many local governments and nonprofits alleged that States' administration and conditioning of subgrants is uneven at best and typically heavy-handed, i.e., has more "strings." States and the National

Association of State Budget Officers (NASBO), writing in conjunction with the National Governors' Association (NGA), strongly supported the review of the Circular. NASBO further indicated a preference for continued application of the uniform administrative requirements to subgrantees. Thus, continued "flow-down" of the rules to subgrantees appeared to satisfy both the States as well as the local governments.

On March 12, 1987, the President directed all affected grant-making agencies to adopt a government-wide common rule reflecting Federalism and regulatory relief. The resulting June 9, 1987 proposed common rule maintained the "flow-down" policy. The status quo approach for subgrantees was taken in spite of Federalism and regulatory relief because of the comments made earlier by State and local governments.

A number of commenters on the June 1987 proposal were concerned about the clarity of the flow-down policy. Several recommended that rather than incorporating the policy throughout the text (e.g., by repeating the applicability to grantees and subgrantees), that the rule contain a separate section entitled "Subgranting" or "Subgrants" to explain "flow-down" and distinguish such funding from contracting in § \_\_\_\_36, Procurement.

A greater number of commenters addressed the substance of the "flow-down" policy. States in particular pointed out that the proposal constituted undue regulation of State administration of Federal funds and is inconsistent with Federalism. NASBO and several Governors said that the flexibility in the June 1987 proposal was not enough—that States should be able to condition and manage subgrants according to State law and procedures without any required "flow-down" of the Federal administrative standards.

On the other hand, a number of subgrantees wrote urging maintenance of "flow-down" to ensure that the rules they follow under State subgrants would be the same as those for direct Federal grants. One regional grantee argued that they have "a vital interest in simplicity and consistency in regulations governing the administration of grants which are received both directly from the Federal Government and, indirectly, as passed through various State agencies" and thus "applaud and strongly support the retention and clarification of the flow-down policy requiring grantees to follow A-102 with subrecipients."

In reconsidering this important matter, it is our view that most restrictions and requirements on States in administering subgrants are no longer necessary. As explained in E.O. 12612, Federalism,

States have unique Constitutional authority, resources, and competence. "Flow-down" provisions cannot be reconciled with the goal of this common rule to place maximum reliance on a State's own management systems, including a State's system for administering grants from its non-Federal funds. In response to clear and strong recommendations from NASBO, the NGA and Governors themselves, the rule is modified to permit States to more freely manage subgrants. A new § \_\_\_\_37, Subgrants, has been added to clarify the policy, distinguish subgrants from the award and administration of procurement contracts, and, with regard to States, to rely on a State's own laws and procedures.

This will mean that local governments and Indian tribal governments will administer *direct* Federal grants according to the standards in the common rule and Federal "pass-through" funds *subgranted* from the State according to State laws and procedures. This change represents a shift in the basis upon which uniformity is established. When Circular A-102 was first issued in 1971, uniformity for local governments was based on Federal standards. This made sense because at that time there were many more Federal programs directly funding local governments and State aid to local governments was proportionally lower. Now, according to the Bureau of the Census, this is no longer the case. Local governments receive 5 times as much aid from States as they do from the Federal Government. Further, due to the ten block grants authorized in 1961 and 1982, States occupy a much more pivotal position in the administration of the remaining Federal grant programs. The common rule shifts the basis for uniformity to one which recognizes States' increased role in financing and administering intergovernmental programs.

#### Open-Ended Entitlements

The regulatory requirements in the June 9, 1987 proposal did not apply to open-ended entitlement grants. These are the grants for public assistance programs, such as Medicaid and Aid to Families with Dependent Children, the child nutrition programs and the administrative costs of the Food Stamps program, for which the Federal Government pays a statutorily-required share of costs without dollar limit. Because of this open-ended feature and because of special statutory requirements, these grants are administered differently from other grants in important aspects. Subpart E of the proposed rule was reserved to

subsequently and separately address these programs.

Commenters agreed with the proposal to address entitlement programs separately from the closed-ended grants. The GAO, for example, explained that "Since the Federal role varies among the types of assistance programs, we agree that the accountability rules should also vary to reflect the differential Federal roles."

The Departments of Agriculture (USDA) and Health and Human Services (HHS) which administer these programs will collaborate in the drafting of the common Subpart E for these programs.

#### Other Public Comments

##### Subpart A—General

##### Section \_\_\_\_3 Definitions.

"Subgrant"—There were four comments regarding the definitions of subgrants and contracts between governmental entities. The primary comments came from local governments that were concerned that States would bypass the flow-down requirements of § \_\_\_\_4(a) by using a procurement contract to pass Federal assistance funds to substate units of government. The definition of subgrant is worded to include contracts used to provide financial assistance to an eligible subgrantee; however, a section on subgrants, § \_\_\_\_37, has been added to help clarify when requirements flow through to subgrantees.

"Share"—There was one comment concerning the definition of the term "share." The commenter was concerned that this definition excluded donated equipment and supplies for subrecipients. This definition is used for determining the proportionate share when disposing of property, equipment or supplies acquired with Federal grant funds and has no effect on the eligibility of in-kind contributions.

##### Section \_\_\_\_4 Applicability.

Two commenters recommended that the coverage of the common rule be extended to block grant programs to obtain uniformity. The commenters said that, although block grant programs had been exempt from the requirements of Office of the Management and Budget (OMB) Circular A-102, many States used the procedures of OMB Circular A-102. The common rule does not prohibit States from using these requirements when dealing with subgrantees; however, to subject these programs to the requirements of the common rule would be contrary to the broad discretion granted to States to run block grant programs.

Several comments were received regarding the applicability of other

Federal regulations. Section \_\_\_\_4 implies that Federal regulations that are inconsistent with this common rule, whether or not they had been approved by OMB or required by statute, would apply to grants and subgrants. In § \_\_\_\_5, regulations that are inconsistent with the common rule are superseded except those required by statute or approved by OMB as an exception. Section \_\_\_\_4(a) has been rewritten to match the wording of § \_\_\_\_5.

#### Section \_\_\_\_6 Exceptions.

Three comments were received objecting to the provisions of § \_\_\_\_6(c) that allows Federal agencies to authorize exceptions on a case-by-case basis or for subgrantees. The commenters believed that OMB should be the only organization allowed to grant exceptions. This provision was included to provide Federal agencies the flexibility to respond to individual situations for grantees and to provide Federal agencies the same oversight over subgrantee requirements that OMB has over requirements on grantees. There should be limited use of this provision by Federal agencies just as OMB has authorized few exceptions to the common rule. No substantive change was made to the common rule.

#### Subpart B—Pre-Award Requirements

##### Section \_\_\_\_10 Forms for applying for grants.

The existing application forms are a five-part package including: the SF-424 Facesheet; Part II, Project Approval Information checklist; Part III, Budget Information; Part IV, Narrative; and Part V, Assurances. Unlike 1971 when Circular A-102 was first issued, there is less duplication and overlap in Federal funding for grantees and consequently less need by grantees for uniform application forms. Further, OMB now reviews and approves all forms and application packages under the Paperwork Reduction Act of 1980. In recognition of these changes in the makeup of Federal grant and cooperative agreement programs, the types of recipients receiving funding, and the paperwork control authorities in OMB's Office of Information and Regulatory Affairs (OIRA), OMB asked for public comment on revised standard application forms in a May 29, 1987 Notice in the Federal Register (52 FR 20178-20179). The great majority of the over 80 public comments concerned the proposed financial reporting formats for the open-ended entitlement programs, rather than either the need for, or design of, the standard application forms. We

attribute much of this lack of interest to the fact that, with the approval of OMB's Office of Information and Regulatory Affairs (OIRA), few programs use the forms displayed in Circular A-102 "as is." In fact, aside from the SF-424 Facesheet, every program extensively tailors the forms or develops its own instructions and supplemental program-specific requirements. In recognition of this, § \_\_\_\_10 has been revised to require use of either (1) three types of pre-approved standard forms: Facesheet, standard budget information (construction or non-construction) and standard assurances (construction and non-construction) or (2) forms approved by OMB under the Paperwork Reduction Act of 1980.

##### Section \_\_\_\_11 State Plans.

To further implement E.O. 12372, this section offered States three additional means to simplify, consolidate or substitute State plans for Federally required plans. All three commenters supported the language and intent, particularly in response to some Federal agencies which had indicated in their agency-specific preambles that this section was not applicable to their programs. Since the public comment was supportive, there was no need to make any change.

##### Section \_\_\_\_12 Special grant or subgrant conditions for "high-risk" grantees.

This section clearly identified the controls or conditions which awarding agencies may use when making grants to high risk grantees. These conditions were not mandatory, nor were they exclusive to this section. For example, some conditions such as payment on a reimbursement basis are available in other circumstances, in §§ \_\_\_\_21 and \_\_\_\_43. Further, under § \_\_\_\_6, agencies are permitted to depart from the common rule on a case-by-case basis or with the approval of OMB. Three commenters addressed this section: one supported the section as is; another requested more detailed due process procedures; the third wanted more clearly described controls over Federal agency use of the conditions. No change is made to this section, but the revised OMB Circular A-102 issued elsewhere in this issue has been changed to require Federal agencies to document the use of high risk conditions to permit oversight.

#### Subpart C—Post-Award Requirements

##### Section \_\_\_\_20 Standards for financial management systems.

A number of Inspectors General were concerned that in State-administered

programs the effect of § \_\_\_\_20 is that subgrantees and cost-type contractors are not subject to any requirements to account for funds. This is not the case. Section \_\_\_\_20 requires a State to follow its own laws and procedures regarding financial management systems. Section \_\_\_\_20 does not require States to meet specific Federal financial management standards because such requirements are an unwarranted intrusion into State affairs and could effect a State's ability to administer subgrants effectively. However, the rule has been revised to clarify that States, *as well as* their subgrantees and cost-type contractors, must have sufficient control and accounting procedures to show that Federal funds have not been used for unauthorized purposes.

One comment was received regarding the provision of § \_\_\_\_20(b)(7) that requires grantees to establish procedures with subgrantees to ensure timely receipt of cash management reports. The commenter wanted the rule to include a concept of "reasonableness" for grantee imposed requirements on subgrantees. One purpose of this rule is to provide uniform and "reasonable" requirements on grantees, and we do not expect grantees to impose unreasonable requirements on subgrantees based on the requirements of this common rule. However, the rule has been revised to include the reasonable concept for grantee procedures imposed on subgrantees to prepare cash management reports.

##### Section \_\_\_\_21 Payment.

In anticipation of legislation amending the Intergovernmental Cooperation Act of 1968, the proposed rule merely cross-referenced the Department of the Treasury rules governing payment. Many commenters therefore noted the absence of any provisions addressing the disposition of interest earned on advances or use of receivables from audit disallowances, credits and other adjustments. In order to address these concerns, the section has been expanded to address interest earned on advances, payments to subgrantees and contractors, and use of refunds, credits and other receivables. In addition, provisions for payments to grantees through the method of electronic transfer of funds have been added.

##### Section \_\_\_\_22 Allowable costs.

A comment was received that the complete reference to cost principles for for-profit organizations was too broad and should be 41 CFR Subpart 31.2; however, other portions of Part 31, such

as definitions and applicability, also apply to commercial organizations. Another commenter objected to the provision that allows Federal agencies to prescribe cost principles, such as railroads that use the Uniform System of Accounts established by the Interstate Commerce Commission. To require these organizations to adopt a second set of Federal cost principles would be counterproductive. No changes were made to the common rule.

#### Section \_\_\_\_23 Period of availability of funds.

Several comments were received regarding the requirement in § \_\_\_\_23(b) for grantees to liquidate all obligations within 90 days after the end of the funding period (or as specified in program regulations). Two commenters only wanted exceptions to the 90-day period if specified in law, and one commenter recommended an extension to 9 months. The 90-day period was established as standard for programs that have a funding period, but a provision is contained in the common rule that allows Federal agencies to establish a different time limit in program regulations to provide for different program requirements. Because the common rule contains a provision that permits the flexibility needed to meet differing program needs, the common rule was not changed.

#### Section \_\_\_\_24 Matching or cost sharing.

A comment was received that indicated an inconsistency in the use of Federal cash for satisfying matching requirements in § \_\_\_\_24, and the definition of "cash contributions" in § \_\_\_\_3. The definition allows Federal funds received from other assistance agreements to be considered as a recipient's cash contribution if authorized by Federal statute. The exception in § \_\_\_\_24(b)(1) allows costs borne by another Federal grant if authorized by Federal statute. The term "cost borne by another Federal grant" includes grant funds used to pay the recipient's cash contribution. Therefore, no change was made to the common rule.

Two comments were received regarding the provision of § \_\_\_\_24(e)(2) on the valuation of building and land donated to the grantee. The common rule provides that unless approval is received from the awarding agency, no amount can be allowed for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The commenters recommended that the fair rental rate be used for such property.

The common rule values such property in the same manner as grantee-owned property is valued in OMB Circular A-87, Cost Principles for State and Local Governments, which is the government-wide directive on such matters. Consequently, no change was made to the common rule.

#### Section \_\_\_\_25 Program income.

One commenter did not believe that the definition of program income in § \_\_\_\_25(b) covered the proceeds derived by grantees from the products of the land, such as oil, gas, and other minerals. The definition of program income includes income "earned only as a result of the grant agreement during the grant period." This definition includes items, such as oil and gas revenues, that a grantee would earn from land acquired with Federal grant funds. Earnings on items such as oil or gas revenues are not considered or contemplated when making awards. No change was made to the common rule.

Several commenters objected to what they interpreted were the provisions of § \_\_\_\_25(g). They believed that this paragraph required the use of the deductive method in handling program income. The common rule encourages the use of the deductive method for using program income; however, the common rule does not require Federal agencies to use only this method. The common rule does require specific Federal action before other uses can be made of program income. No change was made to the rule.

Two commenters objected to the provision in § \_\_\_\_25(g) that allows Federal agencies to distinguish between the treatment of grantee and subgrantee program income. This provision is included because different functions are often performed by grantees and subgrantees. In some situations the purpose of the program may be better served if a subgrantee uses the additive method, while the grantee uses the deductive method because there is no need for the grantee to enlarge its efforts. This provision allows for such a situation. Therefore, no change was made to the common rule.

#### Section \_\_\_\_26 Non-Federal Audit.

Since all of the agencies participating in the common rule have regulations implementing the Single Audit Act of 1986, this section merely cross-referenced the Act. Nonetheless, a number of commenters asked for a fuller explanation of grantee audit responsibilities. We agree there should be a fuller explanation. The section has been expanded to address grantee audit responsibilities. However, for a

complete discussion of the Single Audit Act, audit standards, requirements, and reporting, grantees should look to the agency regulations implementing the Act and OMB Circular A-128.

#### Section \_\_\_\_30 Changes.

Three significant revisions have been made to the "Changes" provisions based on the recommendations of Federal agencies. First, the prior approval requirement for budget transfers exceeding 10 percent has been made waivable by Federal agencies. (§ \_\_\_\_30(c)(1)(ii)). Second, the prior approval requirement for changes in key persons has been elaborated to require approval for any change in the project director or principal investigator of a research project, unless this requirement is waived by the Federal grantor agency. In most research programs, the qualifications of this person are a major factor in the approval of the project. Consequently, this requirement is needed for almost all research grants. (§ \_\_\_\_30(d)(3)). Third, the prohibition on approval requirements for grant administration project revisions other than those listed in paragraph (d) has been deleted because it was found to be unnecessary. A number of other changes have been made for editorial or clarifying purposes. Several public commenters suggested allowing even more latitude, in various ways, for changes that do not require approval. Because the proposed regulation represents a significant loosening of prior approval requirements, we have decided not to go further before experience is gained on the effect of these changes.

#### Section \_\_\_\_32 Equipment.

Several comments were received related to the increase in the accountability thresholds to \$5,000. Most commenters applauded the Federal Government's move to relieve the administrative burden placed on State and local governments by current requirements. One commenter expressed concern that raising the thresholds would virtually eliminate inventory records maintained by grantees of general office furniture and equipment. The commenter went on to say, however, that without doubt all grantees would follow their own definition of equipment and continue to maintain records regardless of Federal agency guidelines. The very purpose of raising the thresholds was to alleviate the recordkeeping burden placed on State and local government's assistance recipients. Consequently, no change was made to the proposed common rule.

Two commenters expressed concern over § \_\_\_\_32(c)(3), which prohibits grantees or subgrantees from using equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute. The commenters believed that the provision is vague and could lead to inconsistent implementation by the various Federal agencies. One commenter also expressed concern that this provision will prohibit use of equipment acquired with a Federal grant for legitimate charitable purposes. However, several business organizations strongly endorsed the provision. They applauded the restriction, saying it would be extremely helpful in controlling abuses in use of grant-acquired equipment. No change was made to the rule.

One commenter stated that the provision of § \_\_\_\_32(e)(3) that allows an awarding agency to make a unilateral excess property and disposition decision, is unduly vague and may invite arbitrary implementation. This provision has been revised to state that in cases where a grantee or subgrantee fails to take appropriate disposition action, the awarding agency may direct the grantee to take appropriate excess and disposition actions.

Finally, paragraph 6(g) of Attachment N, Property Management Standards, in Circular A-102 reserves to the Federal Government the right to direct the transfer of equipment acquired with grant funds to the Federal Government or a third party. This provision was rarely, if ever, used in the case of grants to State and local governments and consequently not included in the June 9 proposal. One Federal agency expressed concern about the deletion of this provision, citing instances where a principal investigator under a research grant leaves one entity and continues the research at a successor entity. That agency believed it was in the best interest of the Government to maintain the right to direct the transfer of title to equipment in these instances. The common rule has been revised to add such a provision based on the language in the current Circular A-102.

#### Section \_\_\_\_33 Supplies.

Two commenters recommended that the provision of § \_\_\_\_33(b) on disposition of supplies should be deleted because grantees should not be required to calculate the cumulative Federal share of their supplies to compensate the grantor. During the development stages of the proposed regulation, this

provision was considered necessary to protect the Federal interest and requesting grantees to keep records of their supplies (which the majority do anyway) did not seem reasonable. This provision merely continues existing policy (Attachment N to OMB Circular A-102) except for raising the threshold from \$1,000 to \$5,000 to be consistent with the revised threshold established throughout the proposed common regulation.

#### Section \_\_\_\_35 Subawards to debarred and suspended parties.

One commenter opposed the Federal Government's system of nonprocurement suspension and debarment with government-wide effect. This system, which is in the final stages of development, was directed by the President in E.O. 12549. Because Federal agencies' regulations implementing the Executive Order will be issued later this year, the rule was revised to delete detailed procedural requirements.

#### Section \_\_\_\_36 Procurement.

Section \_\_\_\_36(b)(12). One commenter suggested that grantee protest procedures should be modified to set up a Federal agency review process to provide a forum for appeal to the grantor agency of any adverse grantee protest determination. Under § \_\_\_\_36(b)(12) (i) and (ii), the Federal agencies are involved in the review of protests where there have been violations of Federal law or regulations and standards of § \_\_\_\_36, or violations of the grantee's protest procedures. This provides Federal agencies the avenue to review and rectify adverse grantee actions. The same provisions are contained in the current procurement standards of Attachment O to A-102. Several Federal agencies have instituted review procedures of complaints against the award of contracts under grants. However, other agencies have determined a formal review process or board of appeals is unnecessary due to the low incidence of appeals. On January 23, 1985, the General Accounting Office decided to discontinue reviewing protests against grantee contracting activities largely because of the diminishing number of complaints filed by disappointed contractors over the nine years that protests were reviewed. We know of no major problems that grantees or Federal agencies are experiencing under the current procedures. Further, Federal agencies are permitted to set up a formal agency review when they deem it necessary. Therefore, we do not believe the provisions should be changed to

require Federal agencies to set up formal agency review process.

Section \_\_\_\_36(c)(1)(vi). Two commenters suggested a modification to the provision specifying a "brand name" product as being restrictive of competition. They believed that there are special instances, such as nonavailability of a product, quality needs or unique requirements, where only a "brand name" product should be purchased. Section \_\_\_\_36(c) Competition requires all procurement transactions to be conducted in a manner providing full and open competition. Section \_\_\_\_36(c)(1)(iv) identifies as being restrictive to competition the situation of specifying only a "brand name" product instead of allowing "an equal" product in the specifications. It does not prohibit the award to the "brand name" manufacturer when an award is justified on a basis such as nonavailability of a product. Therefore, to promote competition to its fullest as required by § \_\_\_\_36(c), the suggestion was not adopted.

Section \_\_\_\_36(c)(2). Several comments were made regarding the prohibition against using statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals. The provision was strongly supported by several commenters, although one commenter believed it should not be imposed without a study detailing the results of the prohibition. One commenter was concerned that the section would preempt State licensing laws. Also, one commenter had concern because in contracting for architectural and engineering (A/E) services geographic location is used as a selection criterion provided its application leaves an appropriate number of qualified firms to compete for a given project. The application of unreasonably restrictive qualifications and any percentage factors that give bidding advantages to in-State or local firms are barriers to open and free competition which are not in the public interest. Section \_\_\_\_36(c)(2) was included in the proposed regulation to foster competition, fairness, and economy in the award of contracts. The provision is viewed as being federally appropriate for a regulation covering a wide range of procurement actions, and consequently the prohibition was retained. However, two provisions have been added to handle the special situations that the commenters noted which make it clear that State licensing laws are not preempted and that geographic location may be used when

appropriate as a selection factor when contracting for A/E services.

Section \_\_\_\_36(d)(1). Procurement by small purchase procedures. Several commenters were complimentary of the increase in the dollar threshold for use of small purchase procedures from \$10,000 to \$25,000. However, there was an equal number of commenters that suggested raising the threshold even higher because of the cost of work in today's dollars. We believe that \$25,000 is the proper level of threshold at this time, and it is consistent with the policy that is followed for Government direct procurements.

Section \_\_\_\_36(d)(2) Procurement by sealed bids (formal advertising). Two comments were received suggesting that a statement be included emphasizing that the use of competitive sealed bidding is the preferred procurement method of construction. Federal procurement policy for direct procurement is to acquire construction using sealed bid procedures if certain conditions exist. Those conditions are essentially the same as described under § \_\_\_\_36(d)(2)(i) (A), (B), and (C) of the proposed rules concerning procurement by sealed bids. We believe this to be sound procurement policy when acquiring construction for direct Federal and for assistance programs. In view of this, we have adopted the suggestion by adding a provision to the subsection which expresses a preference for the sealed bid method when purchasing construction.

Section \_\_\_\_36(d)(3). Several comments were submitted concerning procurement by competitive proposals. A few commenters believed the proposed regulation should more clearly identify the qualifications-based selection process for the procurement of A/E services. One commenter believed that the qualifications-based selection process for A/E services should be required. The proposed regulation more clearly identifies and describes the requirements for procuring A/E services than was done under the procurement standards of Attachment O to A-102. In the proposed regulation, a separate paragraph to the provisions on competitive procurements clearly identifies at § \_\_\_\_36(d)(3)(v) a distinctive qualifications-based selection process that may be used for A/E services. However, this process is not mandated because to do so would override many State and local procurement rules which provide for the consideration of price in the selection of firms for certain A/E services. Consequently, no change was made to the proposed common regulation.

Section \_\_\_\_36(e). Contracting with small and minority firms, women's business enterprises, and labor surplus area firms. One commenter recommended that this section should be amended to include the preamble that is in Section 9 of Attachment O to A-102. The current statement is: "It is national policy to award a fair share of contracts to small and minority business firms." The commenter believed that the elimination of this statement would stop all Federal agencies from complying with Executive Order 12432, Minority Business Enterprise Development. Two commenters supported the proposed rule which requires grantees to take all necessary affirmative steps (six steps are detailed) to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible. They believe the requirements are appropriate to ensure that grantees and contractors extend best faith efforts to use these firms while still allowing the open competitive bidding system to operate. While the proposed regulation is more concise, the total requirements that were in Section 9 of Attachment O remain intact. Also, the mere elimination of the preamble in the standards on grantee procurements does not in any way reduce or change the requirements listed in the Executive Order on Minority Business Enterprise Development. Consequently, the proposed common rule was not modified.

Section \_\_\_\_36(f). Contract cost and price. One commenter requested that legal services be singled out as being subject only to price analysis, but not to cost analysis because legal firms do not maintain their financial systems in a manner to permit cost analysis. The cost and price provision as circulated is intended to provide general guidance, and to set forth the requirement for cost or price analysis. Under a certain type of procurement, such as legal services, where there are an adequate number of sources available and the price or unit price can be determined as being reasonable through price analysis, a cost analysis would not be required. The standard appears to adequately provide for situations where price analysis would be used and, therefore, the commenter's request was not adopted.

Section \_\_\_\_36(g)(3)(ii). One comment was received supporting the provision which allows grantees to self-certify their procurement systems as complying with the regulation's requirements. However, another commenter objected to the provision because it does not allow sufficient time to take corrective action when a bidder protests. In cases

of a protest, whether or not a grantee's procurement system has been self-certified should not affect the time required for any needed corrective action. A protest is lodged against a single procurement action and only one action needs to be addressed. System deficiencies do not need to be corrected to respond to a protest. Consequently, no change was made in the common rule.

Section \_\_\_\_36(h) Bonding requirements. One commenter requested that this section be modified to apply only to construction projects as is currently the case under the provisions of Attachment B to OMB Circular A-102. The bonding provisions are applicable to construction and the section has been modified to make this clear.

Section \_\_\_\_36(i). Contract provisions. One commenter recommended that Federal agencies be permitted to require standard contract clauses in grantee contracts. Two other commenters believed that standard or "model" clauses would be beneficial and should be allowed. Such clauses make it easier for grantees to manage their projects, and for contractors to understand the contractual requirements that will consistently be applied on federally assisted contracts. The proposed regulation and the current procurement standards in Attachment O require a grantee's contracts to contain certain provisions. In addition, Attachment O permits grantor agencies to require clauses approved by the Office of Federal Procurement Policy. Pursuant to the authority provided in Attachment O, Federal agencies have promulgated model clauses to be used by grantees. Clauses for changes, differing site conditions, suspension of work, termination, and remedies have been issued using the same type of language that has been recommended by the American Bar Association's Model Procurement Code and is required in direct Federal acquisition by virtue of FAR 43.205, FAR 36.502, FAR 12.505, and FAR 49.504. Under many of the Federal assistance programs the use of model clauses appears to be appropriate. Consequently, the authority that is included under current Attachment O was added to the common rule.

Section \_\_\_\_40 Monitoring and reporting program performance.

One commenter questioned whether the language in § \_\_\_\_40(a) requires the grantee to monitor its own activities as it administers the subgranting of funds or instead to monitor the activities of its subgrantees. The commenter believed there was an overlap between

§ \_\_\_\_40(a) and OMB Circular A-128. OMB Circular A-128, which implements the Single Audit Act of 1984, concerns auditing of State and local governments. There is no overlap between the requirements of that Circular and this § \_\_\_\_40, which concerns monitoring, not auditing. In response to the commenter's specific concern, the grantee is responsible for monitoring both its own activities and the activities of its subgrantees.

Another commenter recommended the regulation clarify the explicit responsibility of a grantee to monitor contract performance. The proposed common regulation only imposes minimal requirements regarding contracts entered into by grantees under § \_\_\_\_38. The grantee is ultimately responsible for administering the grant and for monitoring the contractor's activities to ensure compliance with applicable Federal requirements and achievement of performance goals. Because the factors involved in the monitoring will vary depending upon the nature of the work being performed under the contract, we do not believe specific detailed monitoring requirements should be imposed at the Federal level.

#### Section \_\_\_\_41 Financial reporting.

One commenter noted a conflict between the proposed common regulation at § \_\_\_\_41(b)(2) and the Circular at 7(b)(2), setting forth procedures for financial reporting on either a cash or accrual basis. The Circular requires Federal agencies to prescribe whether reporting shall be on a cash or accrual basis and the proposed common regulation requires grantees to report on the same accounting basis it uses in its own accounting system. In addition, several commenters objected to the option of allowing financial reporting on either a cash or accrual basis and thought a standard format should be established. The conflict noted between the proposed common regulation and the Circular has been corrected. The proposed common regulation has been changed to authorize each Federal agency to determine whether financial reporting shall be required on a cash or accrual basis. It is essential for Federal agencies to be given discretion to determine the appropriate type of information necessary to administer the programs for which they are responsible. The option of allowing financial reporting on a cash or accrual basis was determined to be the most feasible and the least burdensome to accommodate the accounting systems in place at Federal and grantee levels. The

proposed common regulation has been modified at § \_\_\_\_41(b)(2) to authorize Federal agencies to determine whether financial reporting shall be required on a cash or accrual basis.

One commenter requested that the language permitting OMB to authorize supplementary financial reporting forms "from time-to-time" be deleted. In the alternative, if this could not be done, the commenter requested that respondents be given an opportunity to review the forms prior to OMB approval. If after original clearance, forms could not be supplemented to meet the needs of particular Federal agencies, the basic form would have to contain all financial reporting requirements for every agency of the Federal Government. Such a requirement is not feasible given the complexities of the various programs administered by the Federal Government. Therefore, the language permitting agencies to request supplementation of forms has not been deleted. The requirements for OMB clearance of forms is contained in the Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520. OMB implements the Act in regulations appearing at 5 CFR Part 1320. These regulations require an agency that wishes to collect information to submit a request for approval to OMB. The agency must also publish a notice in the Federal Register informing the public of the request. If anyone wishes to comment on agency-specific financial reporting forms prior to OMB approval, the forms clearance regulations contained in 5 CFR Part 1320 offer the appropriate vehicle.

Several commenters were very supportive of requiring, at the maximum, quarterly Financial Status Reports (SF-269). However, one commenter was concerned that quarterly financial reporting is not adequate to monitor large awards. This commenter suggested awarding agencies be given the option to require more frequent reporting for large awards. A significant emphasis of the proposed common regulation and Circular is to reduce unnecessary paperwork and reporting burdens at both the Federal Government and grantee levels. We believe that financial reporting on a quarterly basis, regardless of the size of the award, is adequate to monitor grantees. If reporting is insufficient, Federal agencies may impose additional financial reporting requirements through the "high-risk" provisions of § \_\_\_\_12.

A commenter believed the authority to allow awarding agencies to require financial reports more frequently or in more detail if a grantee's accounting system does not meet the standards for

financial management systems may invite arbitrary implementation and should require due process procedures. The authority to review the adequacy of the financial management system of grantee is established in the proposed common regulation at § \_\_\_\_20(b)(7). The standards for financial management systems established in the proposed common regulation in § \_\_\_\_20(a)-(c) are such basic fiscal management principles that failure to meet these standards would have to involve egregious errors. Therefore, we do not believe this requirement to be arbitrary. In addition, a grantee has no due process rights to report information a certain number of times or a specific level of detail. This requirement, when imposed, would only require more detailed or frequent financial reporting. We believe that these requirements are essential to ensure the proper stewardship of Federal funds.

One commenter suggested that unliquidated obligations reported on an interim or final Financial Status Report (SF-269) be required to be liquidated within a reasonable time after the required 90-day reporting period. The proposed common regulation, at § \_\_\_\_23(b), requires that obligations incurred under an award be liquidated within 90 days after the end of the funding period, unless an extension has been granted by the awarding agency. We believe that the authorization to extend the liquidation date offers sufficient flexibility to handle any unique liquidation problems.

Another commenter suggested that the requirement to file Federal Cash Transactions Reports (SF-272) 15 days following the end of a quarter or month be increased to 30 days. The 15-day requirement is necessary for Federal Cash Transactions Reports (SF-272) in order for awarding agencies to complete cash requirement forecasts for the Treasury Department on a timely basis. Since grantees are required to establish methods and procedures for minimizing the time between transfer of funds and disbursement in accordance with Treasury regulations at 31 CFR 205, this timely reporting should not be burdensome.

A commenter believed the authority to allow awarding agencies to require reporting on the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors, when considered necessary and feasible, may invite arbitrary implementation. Another commenter was concerned because many subgrantees get funds from the State on a monthly basis and therefore, the three

days needs test would be impossible to meet, except at the very end of the month. In addition, other commenters believed a dollar threshold for requiring such reporting by subgrantees or contractors should be established. As required by Treasury regulation at 31 CFR Part 205, grantees must establish methods and procedures for payment that minimize the time elapsing between the transfer of funds from the U.S. Treasury and disbursements by grantees and subgrantees. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees. Therefore, grantees should readily have information available related to subgrantee cash advances and be prepared to report on such advances if requested. Also, payment systems that meet the requirement to minimize time elapsed between transfer of funds and subgrantee disbursements will provide funds at a rate sufficient to meet the three-days needs test. To ensure prudent management of Federal funds, awarding agencies need to know whether grantees have excess cash regardless of the amount of the award. Therefore, establishing a dollar threshold is inappropriate.

#### Section \_\_\_\_43 Enforcement.

One commenter requested clarification on whether grantees can use the enforcement process described in § \_\_\_\_43 to require subgrantees to resolve any audit findings, recommendations or exceptions cited in a previous year's audit. Yes, a grantee, as an awarding agency, is authorized under this section to resolve audits through the audit process.

#### Section \_\_\_\_44 Termination for convenience.

One commenter was concerned that termination for convenience may only be carried out with the consent of the grantee and that the awarding agency may wish to terminate an award unilaterally without involving remedies for noncompliance. The commenter misunderstands the nature of a termination action. A termination involves a Federal grantor agency terminating a grantee's authority to obligate funds before the authority would otherwise expire. Incidental to that function, a grantee may be required, as the result of an audit, to return funds that were improperly expended. A grantee has a constitutionally protected property right to obligate funds until the end of its normal grant period. Therefore, a grantor agency, before it may cut short that period of obligation

through a termination action, must either offer the grantee due process of law or obtain the grantee's consent to the termination. As a result, it is impossible to terminate a grant unilaterally even though a Federal agency may be willing to forego recovery of improperly expended funds.

#### Subpart D—After-the-Grant Requirements

Four comments were received on After-the-Grant requirements. Two State agencies commented that the 90-day timeframe in § \_\_\_\_50(b) for grantees to submit all reports associated with the grant was not sufficient. One of the commenters suggested that 120 days or longer would be more appropriate, since they experienced difficulty with some grants in meeting the 90-day deadline. We agree that in some rare cases, 90 days may not be sufficient time for grantees to submit all required reports, particularly when there are unliquidated obligations or delays in receiving reports from subgrantees. In recognition of this, the section has been amended to provide the opportunity for the Federal agency to grant an extension upon the request of the grantee.

One Federal agency commented that the 60-day deadline for cost adjustments in § \_\_\_\_50(c) was unrealistic, given large formula grants and the administrative burden of closing them out. Recognizing the problems such a short deadline will cause, the rule has been changed to a 90-day deadline. We believe all agencies should be able to make a cost adjustment based on the reports on hand within that timeframe. Section \_\_\_\_51, Later disallowances and Adjustments provides the opportunity to make further adjustments if Single Audit reports or other findings question costs.

Another commenter stated that use of § \_\_\_\_52(a)(2) authorizing withholding advance payments to a grantee to satisfy a debt owed to the Government could impede program implementation and not necessarily result in the actual collection of the amounts due. While we agree that use of this provision to satisfy delinquent debts to the Government may at times raise difficult issues, it is nevertheless necessary to insure that the Government has the tools to collect funds that are due. We are certain Federal agencies will continue, as in the past, to use good judgment in the exercise of this authority.

#### Subpart E—Entitlements [Reserved]

#### Impact Analyses

#### Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis be prepared

for "major" rules which are defined in the Order as any rule that has an annual effect on the economy of \$100 million or more, or certain other specified effects. We intend the rule to result in savings to State and local governments in the costs of administering grants. However, we do not believe that the rule will have an annual economic effect of \$100 million or more or the other effects listed in the order. For this reason, we have determined that this rule is not a major rule within the meaning of the Order.

#### Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires that, for each rule with "significant economic impact on a substantial number of small entities," an analysis be prepared describing the rule's impact on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities. We certify that this rule will not have a significant economic impact on a substantial number of small entities because they do not affect the amount of funds provided in the covered programs, but rather modify and update administrative and procedural requirements.

#### Paperwork Reduction Act

Sections \_\_\_\_10(c); \_\_\_\_20(b)(2); \_\_\_\_24(b)(6); \_\_\_\_30 (f)(1) and (f)(3); \_\_\_\_32 (d)(1) and (f)(2); \_\_\_\_36 (b)(9), (c)(3), and (i); \_\_\_\_40 (b)(2), (c) and (d); \_\_\_\_41 (b), (c), (d) and (e); \_\_\_\_42(b); and, \_\_\_\_50(b) of this rule contain collection-of-information requirements. As required by the Paperwork Reduction Act of 1980, each agency will submit a copy of this rule to the Office of Management and Budget (OIRA) for its review of these reporting and recordkeeping requirements. No recipient may be subject to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number.

BILLING CODES 3410-KS-M, 6450-01-M, 8025-01-M, 3510-FE-M, 4710-24-M, 4210-32-M, 4410-18-M, 4510-23-M, 6732-01-M, 3810-01-M, 4000-01-M, 7515-01-M, 8320-01-M, 6560-50-M, 4310-RF-M, 6718-21-M, 4150-04-M, 7555-01-M, 7537-01-M, 7536-01-M, 7036-01-M, 8050-28-M, 6340-01-M, 4910-62-M

#### DEPARTMENT OF AGRICULTURE

#### Office of the Secretary

#### 7 CFR Parts 3015 and 3016

FOR FURTHER INFORMATION CONTACT:  
Gerald Miske (Branch Chief), (202)382-1553.

1234 as set forth at the end of this document.

Donna M. Alvarado,  
Director.

**PART 1234—UNIFORM  
ADMINISTRATIVE REQUIREMENTS  
FOR GRANTS AND COOPERATIVE  
AGREEMENTS TO STATE AND LOCAL  
GOVERNMENTS**

**Subpart A—General**

Sec.

- 1234.1 Purpose and scope of this part.
- 1234.2 Scope of subpart.
- 1234.3 Definitions.
- 1234.4 Applicability.
- 1234.5 Effect on other issuances.
- 1234.6 Additions and exceptions.

**Subpart B—Pre-Award Requirements**

- 1234.10 Forms for applying for grants.
- 1234.11 State plans.
- 1234.12 Special grant or subgrant conditions for "high-risk" grantees.

**Subpart C—Post-Award Requirements**

**Financial Administration**

- 1234.20 Standards for financial management systems.
- 1234.21 Payment.
- 1234.22 Allowable costs.
- 1234.23 Period of availability of funds.
- 1234.24 Matching or cost sharing.
- 1234.25 Program income.
- 1234.26 Non-Federal audit.

**Changes, Property, and Subawards**

- 1234.30 Changes.
- 1234.31 Real property.
- 1234.32 Equipment.
- 1234.33 Supplies.
- 1234.34 Copyrights.
- 1234.35 Subawards to debarred and suspended parties.
- 1234.36 Procurement.
- 1234.37 Subgrants.

**Reports, Records Retention, and Enforcement**

- 1234.40 Monitoring and reporting program performance.
- 1234.41 Financial reporting.
- 1234.42 Retention and access requirements for records.
- 1234.43 Enforcement.
- 1234.44 Termination for convenience.

**Subpart D—After-the-Grant Requirements**

- 1234.50 Closeout.
- 1234.51 Later disallowances and adjustments.
- 1234.52 Collections of amounts due.

**Subpart E—Entitlements (Reserved)**

Authority: Pub. L. 93-113; 42 U.S.C. 4951, et seq.; 42 U.S.C. 5060.

BILLING CODE 6050-28-M

**COMMISSION ON THE BICENTENNIAL  
OF THE UNITED STATES  
CONSTITUTION**

**45 CFR Part 2015**

**FOR FURTHER INFORMATION CONTACT:**

Kemp Harshman, Associate General Counsel, Commission on the Bicentennial of the United States Constitution, 736 Jackson Place NW., Washington, DC 20503, (202) 653-7451.

**List of Subjects in 45 CFR Part 2015**

Accounting, Administrative practice and procedure, Grant programs, Grants administration, Reporting and recordkeeping requirements.

Title 45 of the Code of Federal Regulations is amended by adding a new Part 2015 as set forth at the end of this document.

Mark W. Cannon,  
Staff Director.

**PART 2015—UNIFORM  
ADMINISTRATIVE REQUIREMENTS  
FOR GRANTS AND COOPERATIVE  
AGREEMENTS TO STATE AND LOCAL  
GOVERNMENTS**

**Subpart A—General**

Sec.

- 2015.1 Purpose and scope of this part.
- 2015.2 Scope of subpart.
- 2015.3 Definitions.
- 2015.4 Applicability.
- 2015.5 Effect on other issuances.
- 2015.6 Additions and exceptions.

**Subpart B—Pre-Award Requirements**

- 2015.10 Forms for applying for grants.
- 2015.11 State plans.
- 2015.12 Special grant or subgrant conditions for "high-risk" grantees.

**Subpart C—Post-Award Requirements**

**Financial Administration**

- 2015.20 Standards for financial management systems.
- 2015.21 Payment.
- 2015.22 Allowable costs.
- 2015.23 Period of availability of funds.
- 2015.24 Matching or cost sharing.
- 2015.25 Program income.
- 2015.26 Non-Federal audit.

**Changes, Property, and Subawards**

- 2015.30 Changes.
- 2015.31 Real property.
- 2015.32 Equipment.
- 2015.33 Supplies.
- 2015.34 Copyrights.
- 2015.35 Subawards to debarred and suspended parties.
- 2015.36 Procurement.
- 2015.37 Subgrants.

**Reports, Records Retention, and Enforcement**

- 2015.40 Monitoring and reporting program performance.
- 2015.41 Financial reporting.

- 2015.42 Retention and access requirements for records.
- 2015.43 Enforcement.
- 2015.44 Termination for convenience.

**Subpart D—After-the-Grant Requirements**

- 2015.50 Closeout.
- 2015.51 Later disallowances and adjustments.
- 2015.52 Collections of amounts due.

**Subpart E—Entitlements (Reserved)**

Authority: Pub. L. 98-101 as amended and Pub. L. 99-194 as amended.

BILLING CODE 6340-01-M

**DEPARTMENT OF TRANSPORTATION**

**Office of The Secretary**

**49 CFR Part 18**

[Docket 44910]

**EFFECTIVE DATE:** This rule is effective October 1, 1988, except for the \$5,000 threshold for the definition of "equipment" in § 18.3, the \$5,000 threshold for disposition of equipment in § 18.32(e), and the \$25,000 threshold for the use of small purchase procedures in § 18.36(d)(1), which are effective March 12, 1988. For a discussion of implementation, see the additional supplementary information below.

**FOR FURTHER INFORMATION CONTACT:** Charles E. Ventura, Department of Transportation, Office of Acquisition and Grant Management—M-63, 400 Seventh Street SW., Room 9100, Washington, DC 20590, (202) 366-4286.

**ADDITIONAL SUPPLEMENTARY  
INFORMATION:**

**Background**

Most significant changes are noted in the common preamble. The Department of Transportation has chosen to implement the higher thresholds for the definition and disposition of equipment, and for the use of small purchase procedures, on the date the regulation is issued. The revised threshold for equipment also applies to equipment owned by grantees that had been acquired with grants that are currently active or have been closed. The Department views these changes as beneficial to the efficient operation of our grant programs and a significant step in reducing the red tape associated with grant administrative requirements.

The "Federalism" provisions of §§ 18.20(a), 18.32(b), 18.36(a), and 18.37(a) that allow States to use their own procedures for financial management, equipment, procurement management, and managing subgrants are extended to all grants active on

October 1, 1988. Because many of our programs fund projects that will cross over the October 1, 1988 implementation date, the Department has chosen to extend the Federalism provisions to grants active as of October 1, 1988. This will allow our State grantees to use the same provisions for current grants as they will use for new grants. This authority does not apply if the awarding agency specifically withholds the authority from a grantee.

The payment requirements of § 18.21(g)(3) do not allow payments to grantees for amounts withheld from payments to contractors to assure satisfactory completion of work. We define payments to contractors to include amounts paid to escrow accounts which can be withdrawn by the contractor upon satisfactory completion of work. The rule has been changed to note that payments to escrow accounts are allowable costs.

The disposition requirements for equipment in § 18.32(e)(3) allow the awarding agency to direct a grantee or subgrantee to take appropriate excess and disposition actions if the grantee or subgrantee fails to take such actions. Section 18.31(c) does not contain an identical provision for real property; however, the policy of the Department of Transportation is that grantees or subgrantees who do not take appropriate disposition actions for real property can be directed by the awarding agency to take such actions.

Section 18.36(b)(7) encourages grantees to use value engineering clauses in contracts for construction projects. The intent of this subsection is to ensure that the essential function is provided at the lowest life-cycle cost. In this regard, design contracts, as well as, construction contracts are possible candidates for value engineering clauses.

The Federal Highway Administration (FHWA) had proposed requiring its own application forms and procedures. The FHWA had been exempted from the application requirements of OMB Circular A-102, and FHWA application forms and procedures have been approved by OMB. The common rule has been revised to allow Federal agencies to use their own forms and procedures provided they have been approved by OMB. This change eliminates the need for a deviation. However, the rule has been amended to highlight the payment procedures that are used for FHWA programs.

#### Deviations

Because of existing statutory requirements which do not conform with the provisions of the common regulation,

or due to special efforts to reduce Federal red tape, the Department will not comply with some of the sections of the common rule. The deviations not required by statute received no negative comments, and these deviations have been approved by the Office of Management and Budget (OMB). A new airport State Block Grant Pilot Program was authorized in section 534 of the Airport and Airway Improvement Act of 1982, as amended. The Federal Aviation Administration has requested an exemption from the requirements of this rule for this program, although no specific program regulations have been developed. A formal request for exemption will be made when regulations for the program are developed.

Additional statutory deviations, such as one required by the recently passed aviation legislation, and the non-statutory deviations approved by OMB are listed below.

Section 21, Payment. Section 404 of the Surface Transportation Assistance Act of 1982 directs the Secretary to reimburse States for the Federal share of costs incurred.

Section 36, Procurement. 23 U.S.C. 112(a) directs the Secretary to require recipients of highway construction grants to use bidding methods that are "effective in securing competition." Detailed construction contracting procedures are contained in 23 CFR Part 635, Subpart A.

Section 36, Procurement. 23 U.S.C. 112(d) requires concurrence by the Secretary before highway construction contracts can be awarded. One comment was received that this provision does not apply for projects approved under certification acceptance or the Secondary Road Plan. Subsection 18.36(q) has been revised to note this exception.

Section 36, Procurement. The requirement for the use of qualifications-based (e.g., architectural and engineering services) contract selection procedures in § 18.36(t) has been revised to highlight that subgrantees as well as grantees are covered by this requirement. Grantees or subgrantees must either use qualifications-based procedures, use equivalent State procedures, or choose to establish a formal procurement procedure by State statute. A similar provision has also been added for the Airport Improvement Program in section 511 of the Airport and Airway Improvement Act of 1982, as amended. The Subsection has also been revised to note that this procedure can only be used in certain areas, specific areas will be noted in highway,

mass transportation, and airport directives.

Section 41, Financial Reporting. FHWA will require State recipients to use FHWA or State financial reports as opposed to the standard forms referenced in the common rule.

Section 41, Financial Reporting. The National Highway Traffic Safety Administration (NHTSA) will use existing State forms for financial reporting.

#### Impact Analyses

##### *Executive Order 12291 and DOT Regulatory Policies and Procedures*

Executive Order 12291 requires that a regulatory impact analysis be prepared for "major" rules which are defined in the Order as any rule that has an annual effect on the national economy of \$100 million or more, or certain other specified effects.

We intend the regulations to result in savings to State and local governments in the costs of administering grants. However, we do not believe that the regulations will have an annual economic effect of \$100 million or more or the other effects listed in the Order. For this reason, we have determined that these regulations are not a major rule within the meaning of the Order.

This common rule restates, in regulatory form, most of the provisions of OMB Circular A-102 that had been implemented in our program regulations and directives. In addition, some of provisions of the regulation that were not in Circular A-102, or are different from Circular A-102, will reduce the red tape burden on our grantees. Because of this, we certify that this regulation is insignificant under the Department of Transportation's Regulatory Policies and Procedures.

##### *Regulatory Flexibility Act of 1980*

The Regulatory Flexibility Act [5 U.S.C. 605(b)] requires that, for each rule with a "significant economic impact on a substantial number of small entities," an analysis be prepared describing the rule's impact on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities.

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they do not affect the amount of funds provided in the covered programs, but rather modify and update administrative and procedural requirements.

**Paperwork Reduction Act**

The recordkeeping and information collection requirements included in these regulations were submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1960 (44 U.S.C. 3504(h)), and were approved August 11, 1987. The OMB approval number is 2105-0520.

**List of Subjects in 49 CFR Part 18**

Accounting, Administrative practice and procedure, Grant programs, Grants Administration, Insurance, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Title 49 of the Code of Federal Regulations, is amended as set forth below:

Issued this 3rd day of March, 1988 at Washington, D.C.

Jim Burnley,

Secretary of Transportation.

1. Part 18 is added as set forth at the end of this document.

**PART 18—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS**

**Subpart A—General**

Sec.

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- 18.2 Scope of subpart.
- 18.3 Definitions.
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- 18.21 Payment.
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- 18.24 Matching or cost sharing.
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**Changes, Property, and Subawards**

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- 18.31 Real property.
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**Reports, Records Retention, and Enforcement**

- 18.40 Monitoring and reporting program performance.

Sec.

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- 18.44 Termination of convenience.

**Subpart D—After-the-Grant Requirements**

- 18.50 Closeout.
- 18.51 Later disallowances and adjustments.
- 18.52 Collection of amounts due.

**Subpart E—Entitlements [Reserved]**

Authority: 49 U.S.C. 322(a).

2. New Part 18 is further amended as follows:

a. Section 18.10 is amended by adding paragraph (a)(3) to read as follows:

**§ 18.10 Forms for applying for grants.**

(a) \* \* \*

(3) Forms and procedures for Federal Highway Administration (FHWA) projects are contained in 23 CFR Part 630, Subpart B, 23 CFR Part 420, Subpart A, and 49 CFR Part 450.

\* \* \* \* \*

b. Section 18.20 is amended by adding paragraph (d) to read as follows:

**§ 18.20 Standards for financial management systems.**

(d) Certain Urban Mass Transportation Administration (UMTA) grantees shall comply with the requirements of section 15 of the Urban Mass Transportation (UMT) Act of 1964, as amended, as implemented by 49 CFR Part 630, regarding a uniform system of accounts and records and a uniform reporting system for certain grantees.

c. Section 18.21 is amended by adding paragraphs (j) and (k) to read as follows:

**§ 18.21 Payment.**

(j) 23 U.S.C. 121 limits payments to States for highway construction projects to the Federal share of the costs of construction incurred to date, plus the Federal share of the value of stockpiled materials.

(k) Section 404 of the Surface Transportation Assistance Act of 1982 directs the Secretary to reimburse States for the Federal share of costs incurred.

d. Section 18.22 is amended by adding paragraphs (c), (d), and (e) to read as follows:

**§ 18.22 Allowable costs.**

(c) The overhead cost principles of OMB Circular A-87 shall not apply to State highway agencies for FHWA funded grants.

(d) Sections 3(1) and 9(p) of the UMT Act of 1964, as amended, authorize the Secretary to include in the net project cost eligible for Federal assistance, the amount of interest earned and payable

on bonds issued by the State or local public body to the extent that the proceeds of such bonds have actually been expended in carrying out such project or portion thereof. Limitations are established in Sections 3 and 9 of the UMT Act of 1964, as amended.

(e) Section 9 of the UMT Act of 1964, as amended, authorizes grants to finance the leasing of facilities and equipment for use in mass transportation services provided leasing is more cost effective than acquisition or construction.

e. Section 18.24 is amended by adding paragraphs (b)(8), (9), and (10) and (c)(3) to read as follows:

**§ 18.24 Matching or cost sharing.**

\* \* \* \* \*

(b) \* \* \*

(8) 23 U.S.C. 121(a) permits reimbursement for actual construction cost incurred by States for highway construction projects. Except for private donations of right-of-way, contributions and donations shall not be considered State costs, and shall not be allowable for matching purposes for highway construction contracts. 23 U.S.C. 323 permits private donations of right-of-way to be used for a State's matching share, and establishes procedures for determining the fair market value of such donated right-of-way.

(9) Section 4(a) of the UMT Act of 1964, as amended, provides that the Federal grant for any project to be assisted under section 3 of the UMT Act of 1964, as amended, shall be in an amount equal to 75 percent of the net project costs. Net project cost is defined as that portion of the cost of the project which cannot be reasonably financed from revenues.

(10) Section 18(e) of the UMT Act of 1964, as amended, limits the Federal share to 80 percent of the net cost of construction, as determined by the Secretary of Transportation. The Federal share for the payment of subsidies for operating expenses, as defined by the Secretary, shall not exceed 50 percent of the net cost of such operating expense projects.

(c) \* \* \*

(3) Section 5(g) of the Department of Transportation Act (49 U.S.C. 1654(g)) limits in-kind service contributions under the local Rail Service Assistance Program to "the cash equivalent of State salaries for State public employees working in the State rail assistance program, but not including overhead and general administrative costs."

\* \* \* \* \*

f. Section 18.25 is amended by adding paragraphs (g)(4), (5), (6), and (7) to read as follows:

**§ 18.25 Program income.**

(g) \* \* \*

(4) Section 3(a)(1)(D) of the UMT Act of 1964, as amended, provides that the Secretary shall establish requirements for the use of income derived from appreciated land values for certain UMTA grants. Specific requirements shall be contained in grant agreements.

(5) UMTA grantees may retain program income for allowable capital or operating expenses.

(6) For grants awarded under Section 9 of the UMT Act of 1964, as amended, any revenues received from the sale of advertising and concessions in excess of fiscal year 1985 levels shall be excluded from program income.

(7) 23 U.S.C. 156 requires that States shall charge fair market value for the sale, lease, or use of right-of-way airspace for non-transportation purposes and that such income shall be used for projects eligible under 23 U.S.C.

g. Section 18.31 is amended by adding paragraph (d) to read as follows:

**§ 18.31 Real property.**

(d) If the conditions in 23 U.S.C. 103(e) (5), (6), or (7), as appropriate, are met and approval is given by the Secretary, States shall not be required to repay the Highway Trust Fund for the cost of right-of-way and other items when certain segments of the Interstate System are withdrawn.

h. Section 18.36 is amended by adding paragraphs (j) through (t) to read as follows:

**§ 18.36 Procurement.**

(j) 23 U.S.C. 112(a) directs the Secretary to require recipients of highway construction grants to use bidding methods that are "effective in securing competition." Detailed construction contracting procedures are contained in 23 CFR Part 635, Subpart A.

(k) Section 3(a)(2)(C) of the UMT Act of 1964, as amended, prohibits the use of grant or loan funds to support procurements utilizing exclusionary or discriminatory specifications.

(l) 46 U.S.C. 1241(b)(1) and 46 CFR Part 381 impose cargo preference requirements on the shipment of foreign made goods.

(m) Section 165 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 1601, Section 337 of the Surface Transportation and Uniform

Relocation Assistance Act of 1987, and 49 CFR Parts 660 and 661 impose Buy America provisions on the procurement of foreign products and materials.

(n) Section 105(f) of the Surface Transportation Assistance Act of 1982, section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, and 49 CFR Part 23 impose requirements for the participation of disadvantaged business enterprises.

(o) Section 308 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 1068(b)(2), authorizes the use of competitive negotiation for the purchase of rolling stock as appropriate.

(p) 23 U.S.C. 112(b) provides for an exemption to competitive bidding requirements for highway construction contracts in emergency situations.

(q) 23 U.S.C. 112 requires concurrence by the Secretary before highway construction contracts can be awarded, except for projects authorized under the provisions of 23 U.S.C. 171.

(r) 23 U.S.C. 112(e) requires standardized contract clauses concerning site conditions, suspension or work, and material changes in the scope of the work for highway construction contracts.

(s) 23 U.S.C. 140(b) authorizes the preferential employment of Indians on Indian Reservation road projects and contracts.

(t) FHWA, UMTA, and Federal Aviation Administration (FAA) grantees and subgrantees shall extend the use of qualifications-based (e.g., architectural and engineering services) contract selection procedures to certain other related areas and shall award such contracts in the same manner as Federal contracts for architectural and engineering services are negotiated under Title IX of the Federal Property and Administrative Services Act of 1949, or equivalent State (or airport sponsor for FAA) qualifications-based requirements. For FHWA and UMTA programs, this provision applies except to the extent that a State adopts or has adopted by statute a formal procedure for the procurement of such services.

i. Section 18.40 is amended by adding paragraph (c)(1) to read as follows:

**§ 18.40 Monitoring and reporting program performance.**

(c) \* \* \*

(1) Section 12(h) of the UMT Act of 1964, as amended, requires pre-award testing of new buses models.

j. Section 18.41 is amended by adding paragraph (f) to read as follows:

**§ 18.41 Financial reporting.**

(f) Notwithstanding the provisions of paragraphs (a)(1) of this section, recipients of FHWA and National Highway Traffic Safety Administration (NHTSA) grants shall use FHWA, NHTSA or State financial reports.

BILLING CODE 4910-62-M

**Text of the Common Rule**

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

**PART \_\_\_\_—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS**

**Subpart A—General**

- Sec.
- \_\_\_\_.1 Purpose and scope of this part.
  - \_\_\_\_.2 Scope of subpart.
  - \_\_\_\_.3 Definitions.
  - \_\_\_\_.4 Applicability.
  - \_\_\_\_.5 Effect on other issuances.
  - \_\_\_\_.6 Additions and exceptions.

**Subpart B—Pre-Award Requirements**

- \_\_\_\_.10 Forms for applying for grants.
- \_\_\_\_.11 State plans.
- \_\_\_\_.12 Special grant or subgrant conditions for "high-risk" grantees.

**Subpart C—Post-Award Requirements**

**Financial Administration**

- \_\_\_\_.20 Standards for financial management systems.
- \_\_\_\_.21 Payment.
- \_\_\_\_.22 Allowable costs.
- \_\_\_\_.23 Period of availability of funds.
- \_\_\_\_.24 Matching or cost sharing.
- \_\_\_\_.25 Program income.
- \_\_\_\_.26 Non-Federal audit.

**Changes, Property, and Subawards**

- \_\_\_\_.30 Changes.
- \_\_\_\_.31 Real property.
- \_\_\_\_.32 Equipment.
- \_\_\_\_.33 Supplies.
- \_\_\_\_.34 Copyrights.
- \_\_\_\_.35 Subawards to debarred and suspended parties.
- \_\_\_\_.36 Procurement.
- \_\_\_\_.37 Subgrants.

**Reports, Records, Retention, and Enforcement**

- \_\_\_\_.40 Monitoring and reporting program performance.
- \_\_\_\_.41 Financial reporting.
- \_\_\_\_.42 Retention and access requirements for records.
- \_\_\_\_.43 Enforcement.
- \_\_\_\_.44 Termination for convenience.

**Subpart D—After-the-Grant Requirements**

- \_\_\_\_.50 Closeout.
- \_\_\_\_.51 Later disallowances and adjustments.
- \_\_\_\_.52 Collection of amounts due.

**Subpart E—Entitlements (Reserved)****Subpart A—General****§ 1.1 Purpose and scope of this part.**

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

**§ 1.2 Scope of subpart.**

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

**§ 1.3 Definitions.**

As used in this part:

"Accrued expenditures" mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

"Accrued income" means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

"Acquisition cost" of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

"Administrative" requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from "programmatic" requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

"Awarding agency" means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

"Cash contributions" means the grantee's cash outlay, including the

outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

"Contract" means (except as used in the definitions for "grant" and "subgrant" in this section and except where qualified by "Federal") a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

"Cost sharing or matching" means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

"Cost-type contract" means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

"Equipment" means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

"Expenditure report" means: (1) For nonconstruction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

"Federally recognized Indian tribal government" means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

"Government" means a State or local government or a federally recognized Indian tribal government.

"Grant" means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include

assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

"Grantee" means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

"Local government" means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

"Obligations" means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

"OMB" means the United States Office of Management and Budget.

"Outlays" (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

"Percentage of completion method" refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

"Prior approval" means documentation evidencing consent prior to incurring specific cost.

"Real property" means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

"Share", when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

"State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

"Subgrant" means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of "grant" in this part.

"Subgrantee" means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

"Supplies" means all tangible personal property other than "equipment" as defined in this part.

"Suspension" means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

"Termination" means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. "Termination" does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance

as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

"Terms of a grant or subgrant" mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

"Third party in-kind contributions" mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

"Unliquidated obligations" for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

"Unobligated balance" means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

#### § 4 Applicability.

(a) *General.* Subparts A-D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 8, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental

Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)(19)(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § \_\_\_\_4(a) (3)-(8) are subject to Subpart E.

§ \_\_\_\_5 *Effect on other issuances.*

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § \_\_\_\_6.

§ \_\_\_\_6 *Additions and exceptions*

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the Federal Register.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

**Subpart B—Pre-Award Requirements**

§ \_\_\_\_10 *Forms for applying for grants.*

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used

to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ \_\_\_\_11 *State plans.*

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive Order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions.

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ \_\_\_\_12 *Special grant or subgrant conditions for "high-risk" grantees.*

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

**Subpart C—Post-Award Requirements**

**Financial Administration**

§ \_\_\_\_20 *Standards for financial management systems.*

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making

disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

#### § 21. Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash

disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the

Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

#### § 22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OBM Circular A-122.
Educational institutions.....	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

#### § 23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than

90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

#### § 24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions—(1) Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party

awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions. (iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services—(1) Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee

or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2)(i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated

land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

#### § 25 Program Income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 31 and 32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

#### § 26 Non-Federal audit.

(a) *Basic Rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide \$25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations" have met the audit requirement. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 36 shall be followed.

#### Changes, Property, and Subawards

##### § 30 Changes

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes.* (1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget form the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

##### § 31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that

purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

#### § \_\_\_\_32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § \_\_\_\_25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third party named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow \_\_\_\_32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

#### § 33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

#### § 34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

#### § 35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

#### § 36 Procurement

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing

new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency.

Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which

unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed.* (1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than \$25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) *Procurement by sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) *Procurement by competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E

professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.*

(1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § \_\_\_\_\_.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review

generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review [delete ";"] procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed \$25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed \$25,000, specifies a "brand name" product; or

(iv) The proposed award over \$25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than \$25,000.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding \$100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this Section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) *Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.* (Contracts other than small purchases)

(2) *Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement.* (All contracts in excess of \$10,000)

(3) *Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Part 60).* (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)

(4) *Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3).* (All contracts and subgrants for construction or repair)

(5) *Compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5).* (Construction contracts in excess of \$2,000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) *Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5).* (Construction contracts awarded by grantees and subgrantees in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers)

(7) *Notice of awarding agency requirements and regulations pertaining to reporting.*

(8) *Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.*

(9) *Awarding agency requirements and regulations pertaining to copyrights and rights in data.*

(10) *Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.*

(11) *Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.*

(12) *Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15).* (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)

(13) *Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).*

#### § \_\_\_\_37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) *Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;*

(2) *Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;*

(3) *Ensure that a provision for compliance with Section \_\_\_\_42 is placed in every cost reimbursement subgrant; and*

(4) *Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.*

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) *Ensure that every subgrant includes a provision for compliance with this part;*

(2) *Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and*

(3) *Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.*

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section \_\_\_\_10;

(2) Section \_\_\_\_11;

(3) *The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in § \_\_\_\_21; and*

(4) Section \_\_\_\_50.

#### Reports, Records, Retention, and Enforcement

#### § \_\_\_\_40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being

achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

- (i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.
- (ii) The reasons for slippage if established objectives were not met.
- (iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled

performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

#### § 41 Financial Reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

- (i) Submitting financial reports to Federal agencies, or
- (ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report.*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with paragraph § 41(e)(2)(iii) of this section.

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report.*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as

appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement.*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § \_\_\_\_41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § \_\_\_\_41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § \_\_\_\_41(b)(3).

(2) Grants that support construction activities paid by letter of credit,

electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § \_\_\_\_41(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § \_\_\_\_41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § \_\_\_\_41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § \_\_\_\_41(b)(2).

#### § \_\_\_\_42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this Part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § \_\_\_\_36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use.

The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period.*—

(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or

computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records—(1) Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

#### § \_\_\_\_ 43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency.

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to Debarment and Suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § \_\_\_\_ 35).

#### § \_\_\_\_ 44 Termination for convenience.

Except as provided in § \_\_\_\_ 43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § \_\_\_\_ 43 or paragraph (a) of this section.

#### Subpart D—After-The-Grant Requirements

##### § \_\_\_\_ 50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative

actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable.)*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:* In accordance with § \_\_\_\_ 32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

##### § \_\_\_\_ 51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § \_\_\_\_ 42;

(d) Property management requirements in §§ \_\_\_\_ 31 and § \_\_\_\_ 32; and

(e) Audit requirements in § \_\_\_\_ 26.

##### § \_\_\_\_ 52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal

Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

#### Subpart E—Entitlement [Reserved]

[FR Doc. 88-5251 Filed 3-10-88; 8:45 am]

BILLING CODES 3410-KS-M, 6450-0-M, 8025-01-M, 3510-FE-M, 4710-2Y-M, 4210-32-M, 4410-18-M, 4510-23-M, 8732-01-M, 3810-01-M, 4000-01-M, 7515-01-IA, 8320-01-M, 6560-50-M, 4310-RF-M, 6718-21-M, 4150-04-M, 7555-01-M, 7537-01-M, 7536-01-M, 7036-01-IA, 8050-28-M, 6340-01-M, 4910-82-M

Canceled



**UNITED STATES DEPARTMENT OF COMMERCE**  
**The Assistant Secretary for Administration**  
Washington, D.C. 20230

1 APR 1988

Mr. Edgar M. Williams  
Grants-In-Aid Division  
APP-500  
Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, DC 20591

Dear Ed,

I am enclosing the final Procedures for Initiating Leasing Actions for NEXRAD Airport Sites Under the AAIA. The package has been revised in accordance with comments received from your Office and the National Oceanic and Atmospheric Administration (NOAA).

It is my understanding that you will distribute copies of the Procedures to all of the field offices with instructions to proceed according to its terms. We have distributed copies to our Administrative Support Center leasing offices.

If you have any questions or concerns, please contact me. Thank you again for your cooperation in this matter.

Sincerely,

Mary DiGiulian, Director  
Office of Administrative  
Services Management

Enclosure

## PROCEDURES FOR INITIATING LEASING ACTIONS FOR NEXRAD AIRPORT SITES UNDER THE AAIA

### Purpose

To familiarize all appropriate Department of Commerce (DOC) and Federal Aviation Administration (FAA) personnel with the process to be followed for initiating leasing actions for Next Generation Weather Radar (NEXRAD) sites at airports under the Airport and Airways Improvement Act of 1982 (AAIA).

### Background

DOC is involved in a joint project with FAA and the Air Force to upgrade the national weather forecasting system. The project is called NEXRAD.

The NEXRAD project requires the acquisition of unimproved land at various locations across the United States as sites for the installation of radar towers and support facilities. DOC has primary responsibility for acquiring and developing about 114 of the planned NEXRAD sites. Of this total, approximately 61 sites are scheduled to be located at airports.

To assist DOC in the airport site acquisition effort, FAA has agreed to use its authority under the AAIA to request that airport sponsors make no-cost land available to DOC for NEXRAD sites. This agreement was formalized on August 28, 1987 in a Letter of Agreement signed by the FAA Administrator and the DOC Assistant Secretary for Administration. Copies of the Agreement have been distributed to both agencies' field staffs.

### Initiating Airport Leases

To ensure coordination between FAA and DOC for NEXRAD site acquisitions at airports, step-by-step procedures for initiating individual leasing actions have been developed. The required steps are as follows:

1. When a DOC leasing officer is ready to begin leasing a particular NEXRAD airport site, the first action shall be to contact the appropriate FAA regional representative. The FAA regional representative will then inform the DOC leasing officer of the name, location and phone number of the FAA field contact for that airport. (To assist DOC leasing officers, a complete list of FAA regional representatives is included as Attachment A. Also, a map showing the geographic bounds of FAA's regions is included as Attachment B.)

2. The DOC leasing officer should next call the designated FAA field contact. Once contacted, the FAA field contact and DOC leasing officer should agree upon who is responsible for setting up an initial meeting between the airport sponsor and the DOC leasing officer.
3. At the initial meeting, the airport sponsor, the DOC leasing officer and the FAA field contact (if present) should discuss the NEXRAD project as it pertains to the airport in question and should review the pertinent terms of the FAA-DOC Letter of Agreement. Once these preliminary matters have been discussed, the DOC leasing officer and the airport sponsor should begin negotiating on site selection.
4. Once site selection has been agreed upon between DOC and the airport, the airport sponsor should amend the Airport Layout Plan to include the proposed NEXRAD site, and then submit the Plan to the appropriate FAA field office for approval. Any proposed critical area needed for the NEXRAD site itself should be included on the Airport Layout Plan.
5. Once FAA approves of the revised Airport Layout Plan, the DOC leasing officer and the airport sponsor can begin the process of executing a lease for the selected sites. Throughout this process, the DOC leasing officer should keep the FAA field contact apprised of any significant developments.
6. The executed lease document should include that the lease is a no-cost lease entered into in accordance with Section 511, paragraph 7 of the AAIA (49 U.S.C. 2201 et. seq.).
7. In the event that DOC decides to make additions or deletions to the established list of NEXRAD sites at airports, DOC's Office of Administrative Services Management will promptly forward a revised list to all appropriate DOC units as well as the FAA Airport Grants-In-Aid Division with copies to all FAA regional representatives.
8. To assist FAA's field personnel, a list of DOC's leasing officers listed by the regional Administrative Support Center to which they are assigned is included as Attachment C. Also, a map showing the geographic bounds covered by each ASC is included as Attachment D.

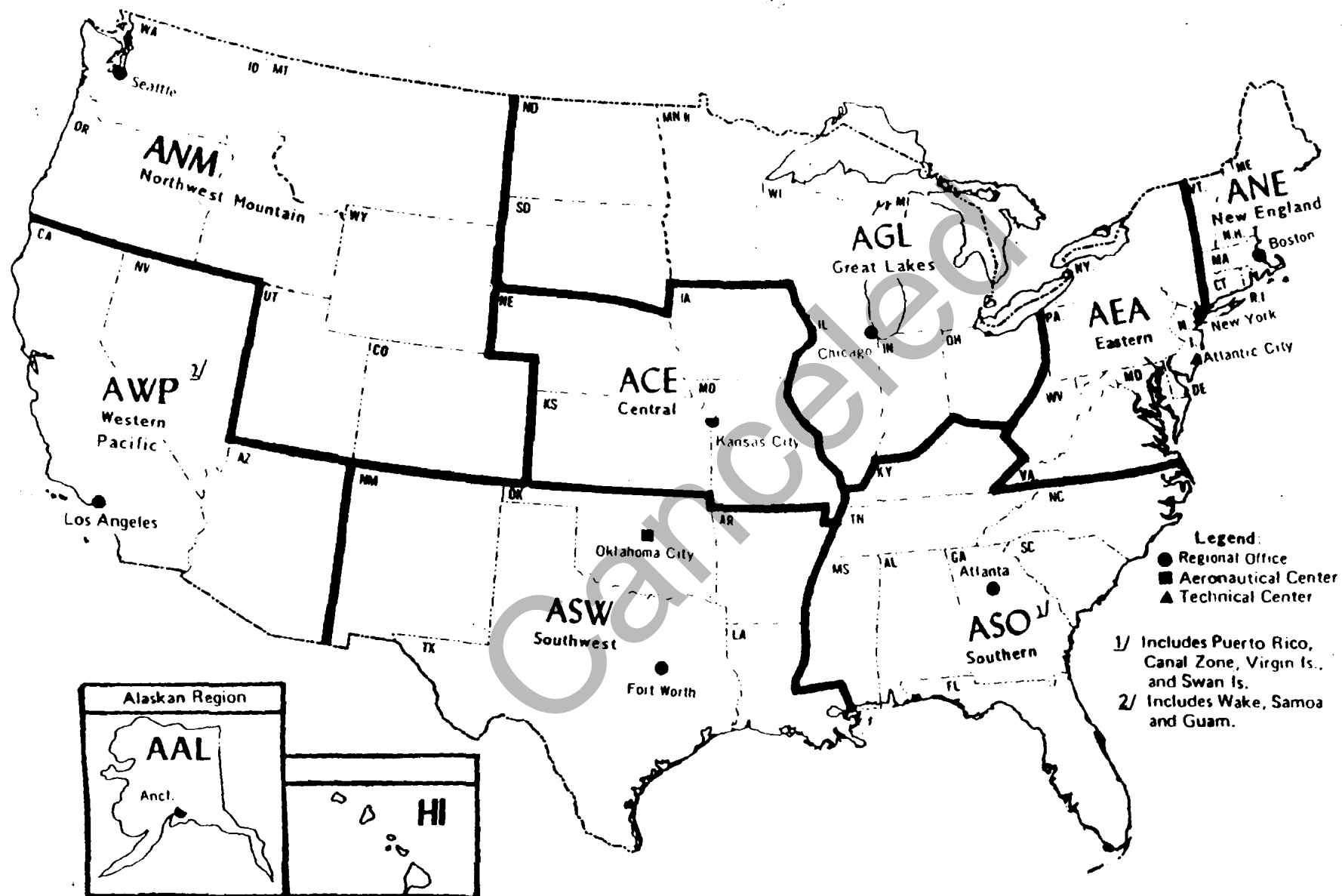
Attachments

## ATTACHMENT A

## FAA Regional Representatives

<u>Region</u>	<u>Name</u>	<u>FTS/Commercial Phone</u>
New England (ANE)	Bill Cronin	836-7061/ (617) 273-7061
Eastern (AEA)	Lou DeRose	667-1245/ (718) 917-1245
Southern (ASO)	Art Weathers	246-7756/ (404) 763-7756
Great Lakes (AGL)	Hank Lamberts	384-7387/ (312) 694-7387
Central (ACE)	Duane Bush	867-6873/ (816) 426-6873
Southwest (ASW)	Gary Ewing	734-5615/ (817) 624-5615
Western Pacific (AWP)	Joe Rodriguez	984-1523/ (213) 277-1523
Northwest Mountain (ANM)	Carol New	446-2639/ (206) 431-2639

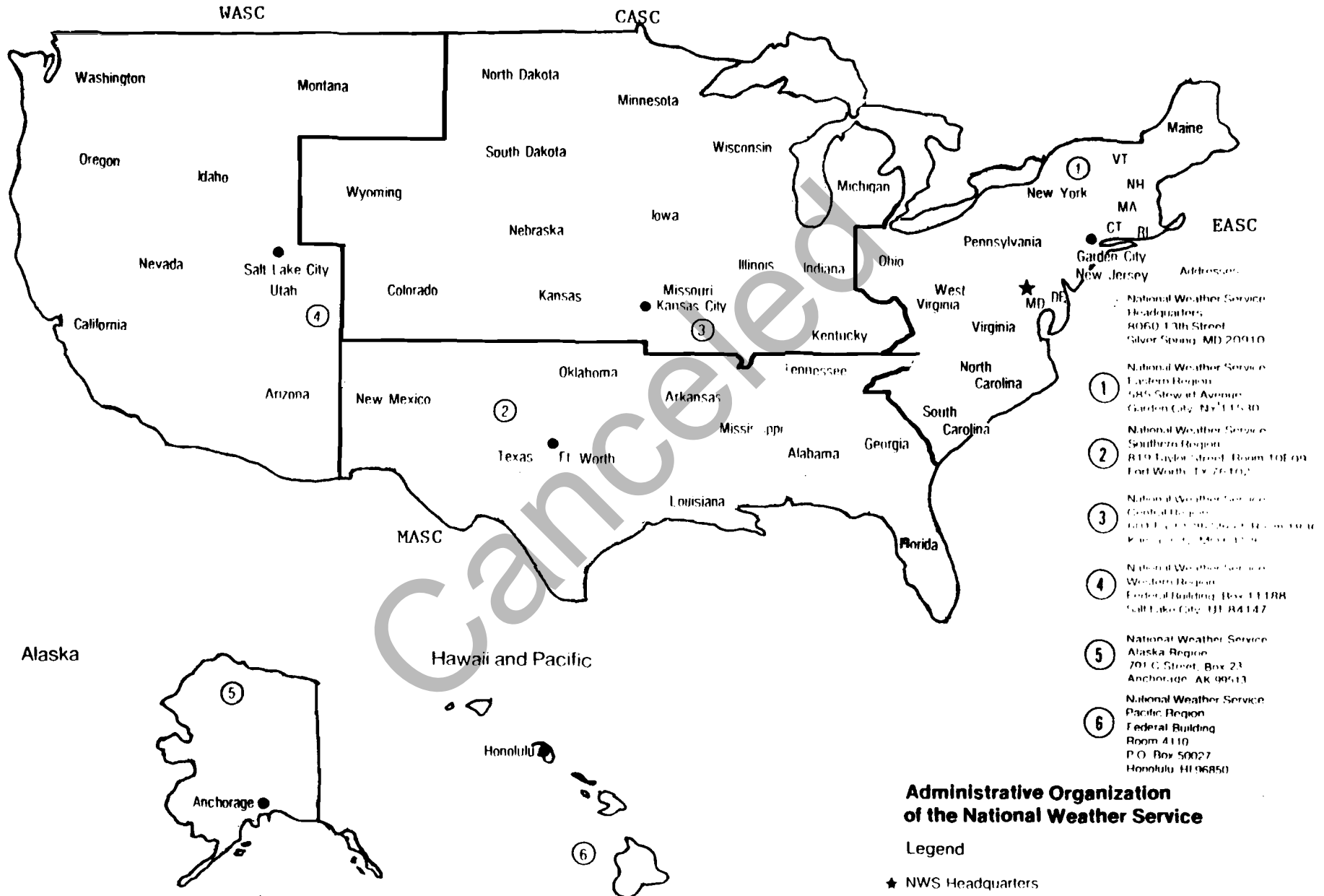
# FEDERAL AVIATION ADMINISTRATION REGIONS AND REGIONAL OFFICES



## ATTACHMENT C

## DOC Leasing Officers

<u>Region</u>	<u>Name</u>	<u>FTS/Commercial</u> <u>Phone</u>
Eastern Admin. Support Center (EASC)	George Watkins Sally Slaughter Brenda Easter	827-6575/ (804) 441-6575
Central Admin. Support Center (CASC)	Margaret Caswell Ken Leonard Jane LaPointe	758-7456/ (816) 374-7456
Mountain Admin. Support Center (MASC)	Jerry Soukup Carol Ciufolo Kathy Erdman	320-5769/ (303) 497-5769
Western Admin. Support Center (WASC)	Dian Stewart Don Miller Dave Petrie	392-6017/ (206) 526-6017



CASC - Central Administrative Support Center  
 EASC - Eastern Administrative Support Center  
 MASC - Mountain Administrative Support Center  
 WASC - Western Administrative Support Center

06 MAY 1987

ACTION: Eligibility of Airport Liability  
Insurance Premium for Periods of  
Construction under AIP

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

Manager, Safety and Standards Branch, ASW-650

We have given substantial study to the question you raised in earlier correspondence regarding liability insurance policies for airport construction projects. In addition to reviewing the background material which you provided, we have contacted other regions and several airport management officials. We have concluded that several basic principles are at issue and need to be clarified.

First, we need to distinguish between various types of insurance that a contractor carries in the normal course of business. Coverages such as workman's compensation, loss of property, and casualty insurance are rightly assumed to be included as relatively fixed overhead costs for the contractor. Other job-specific protection may also be appropriate, such as liability insurance to protect the company from damage claims arising from mishaps which may occur during a construction project, or after completion as a result of some alleged defect in the completed project. All of these costs, insofar as they are reasonable components of overhead, are included in a contractor's competitive bid and are thus eligible for reimbursement under AIP.

Second, most airports carry general liability insurance to protect against claims and suits brought by users of the airport, or by others who may be injured as a result of operations at the airport. The level of protection, and other details of the policy are determined by the airport proprietor and the insurer based on the type of aircraft, the level of activity, and the operational characteristics at the airport. Air carrier airports generally carry substantially higher levels of protection than general aviation facilities.

The contractor coverages listed above are to protect the contractor and are normally not intended to provide third party coverage for the owner, i.e., the airport sponsor, in the event that the airport is named as a co-defendant in a claim for damages related to the construction project. However, a common provision in liability insurance policies at air carrier airports requires that contractors working on the airport to obtain third party liability coverage to indemnify the owner against construction related claims while a project is underway. The amount of required coverage usually varies according to the location on the airport of the project site. In other cases, the airport owner's insurer may, on short notice, demand an additional premium to cover the added risk (of

AC 150/5220-10  
70-11  
P. 84

construction) to airport operations. Under either condition, the cost of the needed insurance is properly a cost associated with continued operation of the airport. Because of the high dollar amounts associated with the loss of lives and property in aviation mishaps, such liability insurance may be written for well over \$100 million and the premium may range from a few thousand dollars to a half million dollars or more. The requirement that the airport be indemnified by the contractor against potential damages is not established by the FAA or the AIP, nor is it an essential element in completing the project. Rather, this third party coverage would simply protect the airport and its insurer against the presumed added risk of airport operations during periods of construction and add the cost of that protection to the construction costs.

Third, airport liability insurance should not be confused with the performance bond required by OMB Circular A-102 and the AIP program procedures. The latter provides protection of the investment in the project of both the FAA and the airport sponsor in the case of default by the contractor. This cost is allowable and is routinely included in project grants.

Finally, the AIP and its predecessor grant programs have been directed squarely at airport capital development. With constant adherence to that principle over the years, project eligibility and cost allowability determinations have been based on whether the questioned cost or project is primarily in direct support of, or necessary to airport capital development. In addition, costs must be not only necessary to the project, but reasonable as well.

In conclusion, we have determined that the cost of liability insurance covering an airport sponsor (whether paid for by the sponsor or the contractor) is considered an operating cost of the airport and is not an eligible cost under the Airport Improvement Program. This determination applies both to cases in which the requirement is listed as a separate cost item in an invitation for bid and in which the sponsor requires such coverage as a factor in bidder qualification. In either case, the inclusion in an invitation for bid of the requirement for liability insurance coverage of a sponsor by a contractor is considered a shift of an airport operating expense into a grant project and must be either removed from the IFB or be bid as a separate cost item and disallowed.

Further, a requirement for a contractor to carry liability insurance well beyond that normally carried by the contractor for his own protection shall be disallowed. In addition to increasing the cost of the project, such a requirement could also create an unacceptable condition which discriminates against smaller contractors who did not normally carry huge liability coverage. They could thus be excluded from competition.

Original Signed by  
Lowell H. Johnson

Lowell H. Johnson

APP-510:Eohnstad:slg:78823:5/2/87  
APP-510/500:ARP-11B  
Disk 510C Memo.Ellis & Mem.Ellis1

NOV 20 1987

Eligibility of Title Insurance Cost  
(Your Memo of 5/21/87)

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

Manager, Airport Plans and Programs Branch, ASW-610

Your memo has highlighted several thought-provoking points. In preparing this response, we have reviewed earlier agency correspondence as well as Office of Management and Budget (OMB) guidance related to this issue.

We agree with the way you bifurcated the subject of eligibility into those associated with obtaining "good title" in real property acquisition projects and those associated with subsequent title insurance. In the former, the costs are generated by attorneys or title companies who provide evidence that all interests, easements, defects and the owner of record are identified prior to the sales transaction. Consequently, the sponsor and the FAA are able to determine whether the purchase will provide the sponsor with adequate interest in the land for the purpose intended. Costs in the latter category are paid to ensure that the sponsor will be protected from defects in the title which may or may not be of record and which are not specifically excluded in the insurance policy.

Clearly a title search, title opinion or abstract of title must be completed to the satisfaction of the purchaser prior to executing the transaction. Costs associated with developing such records have, since at least 1954, been considered as legitimate project formulation costs eligible for Federal participation (General Counsel opinion, May 17, 1954).

Although an attorney or title company customarily assumes some liability for the completeness and accuracy of the title opinion, a purchaser frequently seeks title insurance to protect against defects or interests not discovered during the title search. The idea that the sponsor's interest and the Federal investment in airport land are better protected with title insurance is highly appealing and supports the concept of eligibility for such coverage. We reject that concept, however, for the following reasons.

The primary basis for our position is an opinion by Central Region Counsel (April 24, 1968) which states that the agency should not bear any cost for title insurance which is for the protection and benefit of the sponsor. Although there have been changes in eligibility of land projects since that opinion, there have been no substantial changes in real estate law or the considerations governing such transactions since that date. Nor do we see any legislative language aimed at liberalizing the eligibility costs associated with such projects.

Another major factor in our determination on this issue is our recent response to ASW-650 (May 6, 1987) on the question of eligibility of airport liability insurance premiums during construction. We feel that it is important to treat these items consistently, that is, to consider all insurance premiums as airport operational costs and thus ineligible for grant reimbursement.

We also note that OMB Circular A-87, Attachment B, permits grantor agencies the discretion to make certain insurance costs eligible for reimbursement. That guidance provides no specific examples, however, and merely provides an option to the Federal government. We have not elected to exercise that option.

If a sponsor intends to obtain title insurance, even though aware that the premium is not an eligible cost, you should ask the sponsor to obtain a cost breakdown giving separate costs for title search and title opinion. (It is assumed that title insurance would be offered only after the insuring company has conducted or reviewed a proper title search.) In such cases, the costs attributable to title search can be allowed while those for the insurance will be disallowed. Without a cost breakdown, the entire amount for title insurance must be disallowed.

Original Signed By  
Edgar Williams

for Lowell H. Johnson

cc: APP-510/500/ARP/11B  
APP-510:Eohnstad:pt:267-8824:6/18/87  
No control  
Disk 510-Title1



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

# Memorandum

Subject: ACTION: Title Insurance

Date: APR 11 1988

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

Reply to  
Attn. of:

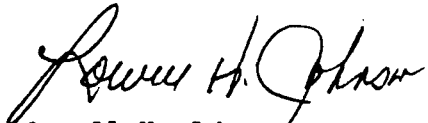
To: Manager, Airports Division, AGL-600

Your inquiries (memos of December 14 and 23, 1987) regarding the eligibility of title insurance costs in conjunction with land acquisition projects raised additional points to consider in deciding to confirm or modify our previous guidance on this matter. After due consideration, however, we have concluded that the previous guidance should remain in force. Most of the basis for that position is included in the attached memorandum to ASW-610 in response to a similar inquiry. We have also included a copy of an earlier memo on the eligibility of airport liability insurance premiums during construction of an AIP project. We believe that our guidance on both is consistent and should remain so.

Two points which you and the State of Illinois raised warrant additional comment, however. The first concerns the concept of equal or less cost for equal or greater protection. We believe that this point ignores one of the primary bases for determining eligibility of costs, i.e., necessity. The sponsor must, according to statute, hold good title, satisfactory to the Secretary, to the land in question. The conventional means by which good title is documented is by the preparation of a title opinion. Title insurance protects against undiscovered title defects and reduces the risk of future claims against the sponsor. So, while often desirable, title insurance is not a necessary cost of the project. If, in the course of obtaining title insurance, a title opinion or equivalent evidence of good title is prepared, the costs of producing that evidence would be eligible project costs.

The other point raised is that a title opinion could be based on a "title commitment," prepared as a step in the process of issuing a title insurance policy. We are unclear as to the exact meaning of that term. The State of Illinois letter implies that a title commitment may be an unsatisfactory basis for a written title opinion. If that is true, it would follow that a title commitment would not provide evidence of title satisfactory to the Secretary as required by statute.

We intend to incorporate this guidance in a forthcoming program guidance letter.



Lowell H. Johnson

Attachments

Canceled