



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

Memorandum

Subject: Program Guidance Letter 88-6

Date: JUL 12 1988

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

Reply to
Attn. of:

To: PGL Distribution List

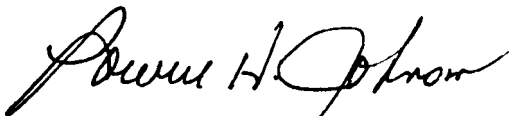
88-6.1 Foreign Trade Restrictions - Ben Castellano (267-8822).

On June 1, DOT published in the Federal Register 49 CFR Part 30, Denial of Public Works Contracts to Suppliers of Goods and Services of Countries That Deny Procurement Market Access to U.S. Contractors. (Attachment 1.) This restriction is found both in the FY88 Continuing Resolution and in Section 533 of the AAIA, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987.

While the restriction in the Continuing Resolution expires September 30, Section 533 continues for the duration of the AAIA. Also, the Continuing Resolution places a restriction only on projects associated with construction, while Section 533 is broader and restricts procurement of products and services on any project funded under the AAIA.

You will note that 30.13 and 30.15 contain standard language that is to be included in all solicitations and contracts. However, with the concurrence of our legal counsel, we are providing a shorter version of standard language. All solicitations now being advertised and contracts not yet signed shall be amended to include the shortened standard language (Attachment 2), regardless of whether the solicitation or contract is the result of a FAAP, an ADAP, or an AIP grant. If any regional office is aware of a contract or subcontract being awarded to a Japanese firm after December 22, 1987, please contact Ben Castellano.

Attached for your information is a copy of the regulation and a copy of the revised standard language.



Lowell H. Johnson

Attachments

§ 73.606 [Amended]

2. § 73.606(b), the Table of Allotments is amended by adding Channel 59 for Lewisburg, West Virginia.

Steve Kaminer,

Deputy Chief, Policy and Rules Division Mass Media Bureau.

[FR Doc. 88-12183 Filed 5-31-88; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 30**

[Docket No. 45632 Notice No. 88-7]

Denial of Public Works Contracts to Suppliers of Goods and Services of Countries That Deny Procurement Market Access to U.S. Contractors

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; Request for comments.

SUMMARY: This rule implements provisions in the Continuing Resolution on the Fiscal Year 1988 Budget, Pub. L. No. 100-202, section 109(a) and the Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, section 115, that prohibit the expenditure of Federal funds for procuring construction services and products for U.S. public works projects from Japanese firms (and, potentially, nationals of other countries).

DATES: This final rule is effective June 1, 1988. Comments should be received by July 18, 1988. Late-filed comments will be considered to the extent practicable.

ADDRESS: Comments should be sent to Docket Clerk, Docket No. 45632, U.S. Department of Transportation, 400 7th Street SW., Room 4107, Washington, DC, 20590. Comments may be reviewed by the public at this location from 9:00 a.m. through 5:30 p.m., Monday through Friday. Commenters wishing the receipt of their comments to be acknowledged should include a stamped, self-addressed postcard with their comments. The Docket Clerk will date stamp the card and return it to the commenter.

FOR FURTHER INFORMATION CONTACT: Roberta Gabel, Deputy Assistant General Counsel for Environmental, Civil Rights, and General Law (202-366-9161), or Michael Jennison, Office of the Assistant General Counsel for International Law (202-366-5621), Office of the Secretary of Transportation, 400 Seventh Street SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: Near the close of its first session, the 100th Congress enacted provisions affecting competition for public works contracts, the Continuing Resolution on the Fiscal Year 1988 Budget, Pub. L. No. 100-202, section 109(a) (signed December 22, 1987) [the Continuing Resolution] and the Airport and Airways Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, section 115 (signed December 30, 1987) [the Airport Safety Act]. In brief, these two statutes prohibit the use of certain Federal funds for procuring construction services and products for U.S. public works projects from Japanese firms (and, potentially, nationals of other countries). The purpose of this final rule is to govern application of the restrictions to procurements made by grantees of DOT modal administrations.

Section 109(a) of the Continuing Resolution provides as follows:

None of the funds appropriated for fiscal year 1988 by this Resolution or any other law may be obligated or expended to enter into any contract for the construction, alteration, or repair of any public building or public work in the United States or any territory or possession of the United States with any contractor or subcontractor of a foreign country, or any supplier of products of a foreign country, during any period in which such foreign country is listed by the United States Trade Representative [as denying fair and equitable market opportunities for products and services of the United States in procurement or bidding].

Section 115 of the Airport Safety Act provides as follows:

No funds made available under this Act may be used to fund any project which uses any product or service of a foreign country during any period in which such foreign country is listed by the United States Trade Representative [as denying fair and equitable market opportunities for products and services of the United States in procurement or bidding].

These statutory restrictions are wide-ranging, affecting many millions of dollars of public works projects. This regulation is intended to give the statutes uniform implementation throughout DOT assisted programs. The restrictive provisions in the two statutes differ in only minor respects from each other.

The Continuing Resolution on the FY 1988 budget combined into one package all FY 1988 appropriation bills for the entire Federal government. Section 109(a) prohibits the obligation or expenditure of funds appropriated for FY 1988 by the Continuing Resolution or any other law for any contract for the construction, alteration, or repair of any public building or public work in the

United States with any contractor or subcontractor of a foreign country that is identified by the United States Trade Representative (U.S.T.R.) or by the Continuing Resolution as discriminating against U.S. firms in conducting procurements for public works projects. Similarly, section 115 of the Airport Safety Act prohibits use of any funds made available by it to fund any project, whether in the United States or overseas, that uses any product or service of a foreign country that is identified by the U.S.T.R. as discriminating against U.S. firms in conducting procurements for public works projects.

On December 30, 1987, U.S.T.R. published an initial list that identified one country, Japan, as denying fair and equitable market opportunities to U.S. firms. 52 FR 49,244 (1987). U.S.T.R. has recently conducted an initial survey and determined not to add any other countries to the list, 53 FR 2140 (1988). U.S.T.R. will conduct another survey after 180 days and, if appropriate, add other countries.

The effect of the U.S.T.R. list is that for the rest of FY 1988 contractors or subcontractors of Japan and any other country that may subsequently be listed will be barred from Federal or federally-funded public works procurements, including projects funded by the Airport Safety Act. Countries on the list may be removed from it through procedures specified in the two statutes; if there were no country on the list, these rules would have no effect.

The Department interprets the restriction in the Continuing Resolution as commencing December 22, 1987, and expiring September 30, 1988. In contrast, the restrictions in the Airport Safety Act are tied to the funds made available by that Act. The applicability of the two restrictions, however, is not mutually exclusive, and the restriction in the Continuing Resolution applies by its terms to all Federally funded airport and airway projects and contracts entered into after December 22, 1987.

Both provisions cover not only foreign firms but also foreign-owned U.S. firms and U.S. firms that are directly or indirectly foreign-controlled. They also cover supplies and products produced in foreign countries that are incorporated into public works projects.

This regulation defines the projects to which the restrictions apply and provides guidelines for determining whether ownership or control of a contractor or subcontractor is by citizens of a country subject to the restrictions. Once it has been determined that the restrictions apply to

a particular public works project, the Department, subject to certain exceptions discussed below, will give them the same substantive effect, regardless of whether it is the Continuing Resolution, the Airport Safety Act, or both that triggers them.

On March 17, 1988, the Office of Federal Procurement Policy, in the Office of Management and Budget, issued guidance to all agencies concerning the implementation of section 109 of the Continuing Resolution. This regulation comports to that guidance.

Description of Key Sections

Section 30.3

This section describes the applicability of the two statutes to DOT programs. Section 109(a) of the Continuing Resolution extends to all DOT agencies and all recipients of DOT funds. It applies to all projects for which funds are obligated or contracts are awarded during fiscal year 1988, including projects and contracts under all DOT financial assistance programs. Because the Department is interpreting the restriction to apply to funds appropriated in previous fiscal years but obligated or expended in FY 1988 (see discussion of § 30.7 below), it is also interpreting the restriction as ending at the close of FY 1988. Section 109(a) applies by its terms only to public buildings and public works projects in the United States, its territories and possessions. It also applies to FAA-funded airport and airway construction projects. U.S. overseas bases, installations, and embassies are not subject to the restriction.

Section 115 of the Airport Safety Act, on the other hand, extends to all projects for which funds are made available by that Act, whether or not the contract is awarded during fiscal year 1988 and whether or not the project is located within the United States. It applies to all contracts entered into under grants authorized by the Airport Safety Act. It covers both products and services.

The restrictions cover all architect, engineering, and construction services for public projects and public works, under the terms of the statutes. They also include all products or goods used during the construction, alteration, or repair of public projects and public works. Note, however, that the restrictions do not cover construction equipment or vehicles that are provided to the project but that do not become part of a delivered structure, product, or project. Moreover, the restrictions of the Continuing Resolution (and it differs

in this respect from the Airport Safety Act) do not apply to vehicles to be used in the operation of the finished project. For the purposes of this rule, the Department considers rail rolling stock and buses, for example, to be detachable equipment that can be moved from one project to another, and thus not subject to a restriction aimed at construction contractors.

Section 30.5

The provisions contained in the Continuing Resolution prohibit the Department from obligating or expending funds for entering into contracts or subcontracts after December 22, 1987, and before October 1, 1988, with contractors or subcontractors of Japan and any other country that may be subsequently listed by the U.S.T.R. The Department is only authorized to waive this restriction when the President or the Secretary, on a case-by-case basis, determines a waiver to be in the public interest. Notice of waivers granted will be published in the Federal Register. To the extent prohibited contracts were entered into after December 22, 1987, and prior to the promulgation of these regulations, the Department is statutorily prohibited from utilizing its appropriations to pay contractors or to reimburse its grantees for their payments under such contracts.

In implementing this restriction, the Department sees only the following alternatives to be available to a grantee who has entered into a contract that is prohibited by section 109(a): 1) the prohibited contract may be canceled at no cost to the Government; 2) a Secretarial waiver may be requested; or 3) the grantee may choose to forego Federal reimbursement for costs associated with the particular contract, subcontract, or product.

Section 30.7

The Continuing Resolution applies to funds "appropriated for fiscal year 1988 by [that] Resolution or any other law." In paragraph (a) of this section, the Department interprets the word "appropriation" to include trust fund moneys for which Congress sets obligation ceilings. This is consistent with general principles of fiscal law. The Comptroller General has held that a statute that authorizes the collection and credit of money to a particular fund for specified purposes, and that makes the fund available for obligation and expenditure as authorized, constitutes an appropriation. In addition, the legislative history of section 109(a) clearly demonstrates that Congress intended the provision to apply to Federally funded transit and airport

projects. Many of these projects can be funded through the use of either general fund or trust fund moneys. It would be inconsistent with Congressional intent and arbitrary to apply this provision only to projects that happen to be funded out of the General funds of the Treasury and not apply it to similar projects that happen to be trust funded.

The Department also considered whether the term "appropriated for fiscal year 1988" should apply only to funds that were specifically appropriated for FY 1988 or should also apply to funds appropriated in earlier years and still available for obligation or expenditure. The Department has decided that the latter interpretation is appropriate. The limitation applies to funds appropriated by "any other law" as well as to funds appropriated in the Continuing Resolution for FY 1988. Prior years' appropriations appear to be such "other laws." The legislative history of section 109(a) also makes clear that Congress intended that immediate action be taken in order to encourage the Japanese government to open up its public works construction projects to U.S. construction firms. As most of the Department's funds that are used for public works construction are multi-year, many contracts will be entered into during FY 1988 utilizing funds that were appropriated in prior years but that are still available for obligation or expenditure. It would frustrate Congressional intent to interpret the language as only applying to funds specifically appropriated in FY 1988. Finally, while the Department interprets the Continuing Resolution as allowing the unrestricted expenditure of funds that were appropriated in prior years and obligated under contracts entered into prior to December 22, 1987, the Department interprets the restriction as nonetheless applying to any new subcontracts entered into under those contracts during the effective period of the restrictions, that is, after December 22, 1987, and before October 1, 1988.

In paragraph (f) of this section the Department used 50 percent of the value of total cost of the product as the level at or above which a product is considered to have its origin in a foreign country because the 50 percent figure is mentioned in the legislative history of section 109(a). In executing their certification clauses, the Department expects contractors and suppliers of goods and services to exercise due diligence and good faith in determining the origin of products subject to this rule.

Section 30.9

The key provision of section 30.9 is that a firm 50 percent or more of which is owned by a firm from Japan or another country designated by U.S.T.R. is considered to be foreign-owned for the purpose of the contracting restrictions of this part. The Department has chosen 50 percent as the cutoff for ownership by citizens of countries on the U.S.T.R. list, in order to provide some predictability and certainty of application.

In addition to the 50 percent ownership requirement, the Department has decided to deem a partnership to be controlled, directly or indirectly, by a citizen of a foreign country if any general partner is a citizen of that country, because a partnership can be bound, under fundamental principles of agency, by any general partner.

A corporation will be regarded as being of a foreign country if it is organized under the laws of the foreign country or if the number of its directors necessary to constitute a quorum are citizens of the foreign country. Corporate control can be considered to reside in differing blocks of stock for differing purposes. We have chosen to define corporate control as residing in a foreign national or citizen if one or more foreign nationals or citizens control 50 percent or more of the outstanding stock or voting power. This standard is consistent with the definition of control under the Small Business Act.

Although the law of business associations does not generally recognize the joint venture as a separate, distinct category of business entity, many bidders for public works construction contracts are joint ventures, whether partnerships, unincorporated associations, or nonpublicly-traded corporations. Treating a joint venture in the same way as a publicly traded corporation could result in anomalous situations; for example, a foreign-owned corporation might qualify as a joint venturer because it had less than 50 percent of the total project, but could not do the same work as a subcontractor. To avoid that result, the Department will treat all such forms of business essentially as partnerships.

Sections 30.11-15

Section 30.15 provides a model implementing clause, the substance of which is to be inserted in public works contracts. Section 30.13 provides a comparable model provision to be placed in solicitations. Section 30.11 specifies when the two model provisions are to be used.

Section 30.19

In accordance with Congressional intent expressed in the legislative history of the Continuing Resolution, the rule specifies that the restrictions imposed by it are in addition to any other restrictions contained in Federal law, such as the Buy America Act, 41 U.S.C. §§ 10a-10d.

Regulatory Process Matters

This rule is not a major rule under Executive Order 12291, since we do not anticipate that its cost (*i.e.*, the differential in project expenditures using non-Japanese goods and services where Japanese goods and services would otherwise have been used) would exceed \$100 million per year. While the rule may increase costs in project expenditures somewhat in the short term, it establishes a framework for retaliating against countries that close their markets to foreign competition. Its objective, therefore, is to provide an incentive for other countries to eliminate their trade barriers, so that they may be removed from the list of countries whose firms will be barred from public works procurements. Ultimately, increased competition among contractors in worldwide markets will increase the productivity and efficiency of contractors doing business in the United States, and create benefits for the economy as a whole.

The rule is a significant rule under the Department's Regulatory Policies and Procedures. Since there is no notice of proposed rulemaking for this rule, the Regulatory Flexibility Act does not apply.

This regulation is likely to have a Federalism impact, under the terms of Executive Order No. 12612, because it will restrict the normal discretion of states and localities to award Federally-assisted contracts in accordance with state and local contracting laws and regulations. For example, a state that normally awards highway contracts to the lowest responsive and responsible bidder will be precluded from awarding the contract to such a bidder if it is Japanese-owned or controlled. This prohibition can increase costs for states, since they would then have to award the contract to a higher bidder. This impact on Federalism is mandated by statute, however, and the Department lacks discretion to avoid it. Consequently, the Department certifies that this regulation has been assessed in light of the principles, criteria, and requirements of Executive Order No. 12612.

The statutes requiring this regulation were enacted and became effective in December 1987. Since that time, it has

been contrary to statute for the Department's funds to be used to contract with Japanese-owned or controlled firms. It is essential that the Department publish these regulations quickly, in order to avoid or dispel confusion over the applicability of the statutory requirement to particular contracts and particular firms. A number of contracting actions are currently being delayed because of this problem, and it is necessary in the public interest to end these delays. In addition, this rule concerns public grants and contracts. For these reasons, the Department has determined under 5 U.S.C. 553(a)(2) and 553(b)(B) that notice and a prior opportunity for public comment are not needed for this rule and under 5 U.S.C. 553(d)(3) that the rule may be made effective immediately.

Nevertheless, the Department is requesting comment on the final rule. The Department will consider the comments received and will subsequently publish, as appropriate, amendments to these rules and/or a notice responding to the comments.

List of Subjects in 49 CFR Part 30 Government Contracts.

Issued in Washington, DC, on May 23, 1988.

Jim Burnley,

Secretary of Transportation.

Accordingly, Subtitle A of Title 49, Code of Federal Regulations, is amended by adding to it new Part 30 as follows:

PART 30—DENIAL OF PUBLIC WORKS CONTRACTS TO SUPPLIERS OF GOODS AND SERVICES OF COUNTRIES THAT DENY PROCUREMENT MARKET ACCESS TO U.S. CONTRACTORS

Sec.

- 30.1 Purpose.
- 30.3 Applicability.
- 30.5 Effective Dates.
- 30.7 Definitions.
- 30.9 Citizenship—Direct or Indirect Control.
- 30.11 Use of Solicitation Provisions and Contract Clauses.
- 30.13 Restrictions on Federal Public Works Projects—Certification.
- 30.15 Restrictions on Federal Public Works Projects.
- 30.17 Waivers.
- 30.19 Buy American Act.

Authority: 49 U.S.C. 322(a); Containing Resolution on the Fiscal Year 1988 Budget 109(a), Pub. L. No. 100-202; Airport and Airways Safety and Capacity Expansion Act of 1987, 115, Pub. L. No. 100-223.

§ 30.1 Purpose.

The rules in this part implement section 109(a) of the Continuing Resolution on the Fiscal Year 1988 Budget, Pub. L. No. 100-202 (signed December 22, 1987) [the Continuing Resolution], and section 115 of the Airport and Airways Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223 (signed December 30, 1987) [the Airport Safety Act]. These rules are intended to give uniform implementation to these statutes throughout DOT procurement and grant programs.

§ 30.3 Applicability.

(a) The restrictions imposed by section 109(a) of the Continuing Resolution extend to all DOT agencies as well as all recipients of DOT funds. The restrictions apply to all projects for which funds are obligated or contracts or subcontracts are awarded during fiscal year 1988, including projects and contracts under all DOT financial assistance programs. The prohibition applies to public buildings and public works projects everywhere in the United States or any territory or possession of the United States. U.S. overseas bases, installations, and embassies are not subject to this part.

(b) The restrictions imposed by section 115 of the Airport Safety Act extend to all projects for which funds are made available by that Act, whether or not the contracts are awarded during fiscal year 1988. The restrictions apply to all contracts entered into under grants authorized by the Airport Safety Act.

(c) This part applies to projects covered by section 109(a) of the Continuing Resolution, section 115 of the Airport Safety Act, or both. Whether one or the other statute or both apply, the effect on the project shall be the same, subject to paragraph (e) of this section.

(d) In addition to construction, alteration, and repair contracts, the restrictions of this part cover all architect, engineering, and other services related to the preparation and performance of construction, alteration, and repair of public projects and public works.

(e) The restrictions of this part also apply to all products used in the construction, alteration, or repair of public projects and public works; *provided, however, That*

(1) The restrictions of this part do not apply to construction equipment or vehicles that do not become part of a delivered structure, product, or project and

(2) Notwithstanding paragraph (c) of this section, the restrictions of section 109(a) of the Continuing Resolution do

not apply to vehicles to be used by the project, including, but not limited to, buses, trucks, automobiles, rail rolling stock, and aircraft.

§ 30.5 Effective dates.

The provisions of section 109(a) of the Continuing Resolution apply to contracts (or new subcontracts under existing contracts, whether or not subject to the restriction) entered into after December 22, 1987, its date of enactment, and before October 1, 1988. The provisions of section 115 of the Airport Safety Act apply to contracts funded by the Act and entered into after December 30, 1987, its date of enactment; the restrictions remain effective so long as money provided by the Airport Safety Act is used. Accordingly, any contracts or subcontracts subject to the restrictions of this part entered into with contractors or subcontractors owned or controlled by citizens of subject countries, as defined by §§ 30.7 and 30.9 of this part, since December 22, 1987 shall be canceled at no cost to the Government, subject to the waiver provisions of § 30.17 of this part. All public works or public buildings contracts entered into after December 22, 1987, shall include, or be modified to include, a provision prohibiting subcontracting with citizens of subject countries, as defined by §§ 30.7 and 30.9 of this part.

§ 30.7 Definitions.

(a) "Funds appropriated for FY 1988 by this resolution or any other law," as used in this part with reference to section 109(a) of the Continuing Resolution, means all appropriated and trust funds available to DOT, its modal administration, or their grantees for expenditure or obligation in fiscal year 1988, regardless of the fiscal year in which the funds were appropriated.

(b) "Funds made available by this Act," as used in this part with reference to section 115(a) of the Airport Safety Act, means all funds, including trust funds, made available to DOT, its modal administrations, or their grantees by that Act, whether or not the contracts to be funded are awarded during fiscal year 1988.

(c) "Contractor and subcontractor" means any person, other than a supplier of products, performing any architectural, engineering, or other service directly related to the preparation for or performance of the construction, alteration, or repair of any public building or public work in the United States or any territory or possession of the United States.

(d) "Contractor or subcontractor of a foreign country" means any contractor

or subcontractor that is a citizen or national of a foreign country, or is controlled directly or indirectly by one or more citizens or nationals of a foreign country.

(e) "Service of a foreign country" means any service provided by a person that is a citizen or national of a foreign country, or is controlled by one or more citizens or nationals of a foreign country.

(f) "Product of a foreign country" means construction materials, i.e., articles, materials, and supplies brought to the construction site for incorporation into the public works project. A product is considered to have been produced in a foreign country if more than fifty percent of the total cost of the product is allocable to production or manufacture in the foreign country.

(g) "Foreign country" means a country included in the list of countries that discriminate against U.S. firms published by the U.S.T.R.

§ 30.9 Citizenship—direct or indirect control.

A contractor, subcontractor, or person providing a service shall be considered to be a citizen or national of a foreign country, or controlled directly or indirectly by citizens or nationals of a foreign country, within the meaning of this part.

(a) If 50 percent or more of the contractor or subcontractor is owned by one or more citizens or nationals of the foreign country;

(b) If the title to 50 percent or more of the stock of the contractor or subcontractor is held subject to trust or fiduciary obligation in favor of one or more citizens or nationals of the foreign country;

(c) If 50 percent or more of the voting power in the contractor or subcontractor is vested in or exercisable on behalf of one or more citizens or nationals of the foreign country;

(d) In the case of a partnership, if any general partner is a citizen or national of the foreign country;

(e) In the case of a corporation, if the number of its directors necessary to constitute a quorum are citizens of the foreign country or the corporation is organized under the laws of the foreign country or any subdivision, territory, or possession thereof; or

(f) In the case of a contractor or subcontractor that is a joint venture, if any participant meets any of the criteria in paragraphs (a) through (e) of this section.

§ 30.11 Use of solicitation provisions and contract clauses.

(a) Unless the President or the Secretary waives the restrictions imposed by section 109(a) of the Continuing Resolution in accordance with § 30.17 of this part, the contracting officer shall insert a clause similar to the clause at § 30.15, Restrictions on Federal Public Works Projects, in contractions and solicitations, if—

(1) The contract is awarded on or after December 22, 1987, and before October 1, 1988; and

(2) The contract obligates funds appropriated for use in FY 1988 by the Continuing Resolution or any other law; and

(3) The contract is for the acquisition of construction, alteration and repair, architectural, engineering, or other services directly related to the preparation for, or performance of, construction, alteration, and repair for Federal public works projects inside the United States, U.S. territories, or U.S. possessions.

(b) Unless the Secretary waives the restrictions imposed by section 115 of the Airport Safety Act in accordance with § 30.17 of this part, the contracting officer shall insert a clause similar to the clause at § 30.15, Restrictions on Federal Public Works Projects, in contracts and solicitations relating to any project for which funds, including grant funds, are made available by that Act, whether or not the contract is awarded during fiscal year 1988.

(c) Any contract already awarded that should have contained the clause prescribed in paragraph (a) or (b) of this section, but did not, shall be modified to include the clause. In the event that the contracting officer is unable to modify such contract, the contract shall be canceled at no cost to the Government, unless a waiver is granted in accordance with § 30.17 of this part.

(d) Contracting officers shall insert a provision similar to the solicitation provision at § 30.13 of this part, Restrictions on Public Works Projects—Certification, in solicitations containing the clause at § 30.15 of this part, Restrictions on Federal Public Works Projects.

(e) Any solicitation issued before December 22, 1987, that will result in the award of a contract covered by paragraph (a) of this section after December 22, 1987, and before October 1, 1988, and that should have contained a provision similar to that § 30.13 of this part, but did not, shall be amended to include the provision if the contract has not yet been awarded.

§ 30.13 Restriction on Federal public works projects—certification.

As prescribed in § 30.11(c) of this part, the contracting officer shall insert the following provision in solicitations containing the clause at § 30.15, *Restrictions on Federal Public Works Projects*:

Restrictions on Federal Public Works Projects—Certification

(a) *Definitions.* The definitions pertaining to this provision are those that are set forth in 49 CFR 30.7–30.9.

(b) *Certification.* By signing this solicitation, the Offeror certifies that with respect to this solicitation, and any resultant contract, the Offeror—

(1) Is [] is not [] a contractor of a foreign country included on the list of countries that discriminated against U.S. firms published by the Office of the United States Trade Representative (U.S.T.R.);

(2) Has [] has not [] entered into any contract or subcontract with a subcontractor of a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R.; and

(3) Has [] has not [] entered into any subcontract for any product to be used on the Federal public works project that is produced in a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R.

(c) *Applicability of 18 U.S.C. 1001.* This certification in this solicitation provision concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18, United States Code, Section 1001.

(d) *Notice.* The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(e) *Restrictions on contract award.* No contract will be awarded to an offeror (1) who is owned or controlled by one or more citizens or nationals of a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R. or (2) whose subcontractors are owned or controlled by one or more citizens or nationals of a foreign country on such U.S.T.R. list or (3) who incorporates in the public works project any product of a foreign country on such U.S.T.R. list: unless a waiver to these restrictions is granted by the President of the United States or the Secretary of Transportation. (Notice of the granting of a waiver will be published in the Federal Register.)

(f) *System.* Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (b) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(g) *Subcontracts.* The Offeror agrees that, if awarded a contract resulting from this solicitation, it will incorporate this solicitation provision, including this paragraph (g), in each solicitation issued under such contract.

[end of provision]

§ 30.15 Restrictions on Federal public works projects

The contracting officer shall insert the following clause in solicitations and contracts as prescribed at § 30.11(a) through (b) of this part:

Restrictions on Federal Public Works Projects

(a) *Definitions.* The definitions pertaining to this clause are those that are set forth in 49 CFR 30.7–30.9.

(b) *General.* This clause implements the procurement provisions contained in the Continuing Resolution on the Fiscal Year 1988 Budget, Pub. L. No. 100–202, and the Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100–223.

(c) *Restrictions.* The Contractor shall not knowingly enter into any subcontract under this contract: (1) with a subcontractor of a foreign country included on the list of countries that discriminate against U.S. firms published by the United States Trade Representative (U.S.T.R.); or (2) for the supply of any product for use on the Federal Public works project under this contract that is produced or manufactured in a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R.

(d) *Certification.* The Contractor may rely upon the certification of a prospective subcontractor that it is not a subcontractor of a foreign country included on the list of countries that discriminates against U.S. firms published by the U.S.T.R. and that products supplied by such subcontractor for use on the Federal public works project under this contract are not products of a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R., unless the contractor has knowledge that the certification is erroneous.

(e) *Erroneous certification.* The certification in paragraph (b) of the provision entitled "Restriction on Federal Public Works Projects—Certification," is a material representation of fact upon which reliance was placed when making the award. If it is later determined that the Contractor knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may cancel this contract for default at no cost to the Government.

(f) *Cancellation.* Unless the restrictions of this clause are waived as provided in paragraph (e) of the provision entitled "Restriction on Federal Public Works Projects—Certification," if the Contractor knowingly enters into a subcontract with a subcontractor that is a subcontractor of a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R. or that supplies any

product for use on the Federal public works project under this contract of a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R., the Contracting Officer may cancel this contract for default, at no cost to the Government.

(g) Subcontracts. The Contractor shall incorporate this clause, without modification, including this paragraph (g) in all solicitations and subcontracts under this contract:

Certification Regarding Restrictions on Federal Public Works Projects—Subcontractors

(1) The Offeror/Contractor, by submission of an offer and/or execution of a contract certifies that the Offeror/Contractor is (i) not an Offeror/Contractor owned or controlled by one or more citizens or nationals of a foreign country included on the list of countries that discriminate against U.S. firms published by the United States Trade Representative (U.S.T.R.) or (2) not supplying any product for use on the Federal public works project that is produced or manufactured in a foreign country included on the list of foreign countries that discriminate against U.S. firms published by the U.S.T.R.

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001.

(2) The Offeror shall provide immediate written notice to the Contractor if, at any time, the Offeror learns that its certification was erroneous by reason of changed circumstances.

(3) The Contractor shall not knowingly enter into any subcontract under this contract: (i) with a subcontractor of a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R.; or (ii) for the supply of any product for use on the Federal public works project under this contract that is produced or manufactured in a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R. The contractor may rely upon the certification in paragraph (g)(1) of this clause unless it has knowledge that the certification is erroneous.

(4) Unless the restrictions of this clause have been waived under the contract for the Federal public works project, if a contractor knowingly enters into a subcontract with a subcontractor that is a subcontractor of a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R., or that supplies any product for use on the Federal public works project under this contract that is produced or manufactured in a foreign country included on the list of countries that discriminate against U.S. firms published by the U.S.T.R., the Government Contracting Officer may direct, through higher-tier contractors,

cancellation of this contract at no cost to the Government.

(5) Definitions. The definitions pertaining to this clause are those that are set forth in 49 CFR 30.7-30.9.

(6) The certification in paragraph (g)(1) of this clause is a material representation of fact upon which reliance was placed when making the award. If it is later determined that the Contractor knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Government Contracting Officer may direct, through higher-tier Contractors, cancellation of this subcontract at no cost to the Government.

(7) The Contractor agrees to insert this clause, without modification, including this paragraph, in all solicitations and subcontracts under this clause.

[end of clause]

§ 30.17 Waivers.

(a) The Secretary may waive the restrictions imposed by section 115 of the Airport Safety Act on the use of a product or service in a project if the Secretary determines that:

(1) Application of the restriction to such product, service, or project would not be in the public interest;

(2) Products or services of the same class or kind are not produced or offered in the United States, or in any foreign country that is not listed by the U.S.T.R. in sufficient and reasonable available quantities and of a satisfactory quality; or

(3) Exclusion of such product or service from the project would increase the cost of the overall project contract by more than 20 percent.

(b) The President or the Secretary may waive the restrictions imposed by section 109(a) of the Continuing Resolution with respect to an individual contract if the President or the Secretary determines that such action is necessary in the public interest, on a contract-by-contract basis. The Secretary may apply the factors listed in paragraphs (a)(2) and (a)(3) of this section in determining whether a waiver is in the public interest.

(c) The authority of the President or the Secretary to issue waivers may not be delegated. The Department shall publish notice of any waiver granted pursuant to this part by the President or the Secretary in the Federal Register within ten days. The notice shall describe in detail the contract involved, the specific reasons for granting the waiver, and how the waiver meets the criteria of this section.

§ 30.19 Buy American Act.

The restrictions of this part are in addition to any other restrictions contained in Federal law, including the

Buy American Act, 41 U.S.C. 10a-10d, and Buy American provisions in legislation governing DOT provisions. Normal evaluation methods for implementing the provisions of the Buy American Act in contracts for the construction, alteration, or repair of public buildings or public works will be applied after determining the offeror's eligible for award on the basis of application of the provisions in this part.

[FR Doc. 88-12118 Filed 5-31-88; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 23

Addition of Species by the Governments of Thailand and Honduras to Appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service adds 24 species of wildlife to 50 CFR 23.23, pursuant to their addition to Appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. These additions were initiated at the requests of Honduras and Thailand. Appendix III comprises species subject to regulation in particular party nations that have requested the cooperation of other Parties in controlling trade in such species.

DATES: These additions to Appendix III became effective on April 13, 1987 (Honduras), as previously announced, and December 7, 1987 (Thailand). Therefore, this rule is effective June 1, 1988.

ADDRESSES: Send correspondence concerning this document to the Office of Scientific Authority; Mail Stop: 527, Matomic Building; U.S. Fish and Wildlife Service; Department of the Interior; Washington, DC 20240. Background materials will be available for public inspection from 8:00 a.m. to 4:00 p.m., Monday through Friday, in Room 537, 1717 H Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dr. Charles W. Dane at the above address, or telephone 202-653-5948.

SUPPLEMENTARY INFORMATION:

Background

The Convention on International Trade in Endangered Species of Wild

CLAUSE TO BE INCLUDED IN ALL SOLICITATIONS, CONTRACTS, AND SUBCONTRACTS
RESULTING FROM PROJECTS FUNDED UNDER THE AIP

The contractor or subcontractor, by submission of an offer and/or execution of a contract, certifies that it:

a. is not owned or controlled by one or more citizens or nationals of a foreign country included in the list of countries that discriminate against U.S. firms published by the Office of the United States Trade Representative (USTR);

b. has not knowingly entered into any contract or subcontract for this project with a contractor that is a citizen or national of a foreign country on said list, or is owned or controlled directly or indirectly by one or more citizens or nationals of a foreign country on said list.

c. has not procured any product nor subcontracted for the supply of any product for use on the project that is produced in a foreign country on said list.

Unless the restrictions of this clause are waived by the Secretary of Transportation in accordance with 49 CFR 30.17, no contract shall be awarded to a contractor or subcontractor who is unable to certify to the above. If the contractor knowingly procures or subcontracts for the supply of any product or service of a foreign country on the said list for use on the project, the Federal Aviation Administration may direct, through the sponsor, cancellation of the contract at no cost to the Government.

Further, the contractor agrees that, if awarded a contract resulting from this solicitation, it will incorporate this provision for certification without modification in each contract and in all lower tier subcontracts. The contractor may rely upon the certification of a prospective subcontractor unless it has knowledge that the certification is erroneous.

The contractor shall provide immediate written notice to the sponsor if the contractor learns that its certification or that of a subcontractor was erroneous when submitted or has become erroneous by reason of changed circumstances. The subcontractor agrees to provide immediate written notice to the contractor, if at any time it learns that its certification was erroneous by reason of changed circumstances.

This certification is a material representation of fact upon which reliance was placed when making the award. If it is later determined that the contractor or subcontractor knowingly rendered an erroneous certification, the Federal Aviation Administration may direct, through the sponsor, cancellation of the contract or subcontract for default at no cost to the Government.

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

This certification concerns a matter within the jurisdiction of an agency of the United States of America and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18, United States Code, Section 1001.