U.S. Department of Transportation
Federal Aviation Administration

Memorandum

Subject: ACTION: Program Guidance Letter 93-3 Date: MAR 31 1993

From: Manager, Airports Financial Assistance Division, APP-500 Reply to Attn. of:

To: PGL Distribution List

93-3.1 New Program Control Work Codes (Ken Jacobs (202) 267-8824).

Changes in eligibility and heightened interest in the amount of grant funds issued for various types of projects have necessitated changes in our work codes. Amendments to Section 508(f) of the AAIA have made work under the Military Airport Program eligible which was previously ineligible (See PGL 93-2.3). Airplane deicing facilities are eligible (See PGL 92-5.1) and the AIP funds used for these facilities are likely to generate interest by FAA, DOT and others. Work to mitigate environmental impact of proposed airport development (wetlands mitigation, storm water runoff, etc.) requires an increasing commitment of AIP funds. Relocation of airport traffic control towers and airport surveillance radars have the potential of becoming major cost items in future AIP programs. In order to track these types of projects for the FY-93 program and beyond, the following work codes are to be used effective immediately:

B05 - Runway/taxiway signs (required by FAR Part 139).

B06 - Airplane deicing facilities.

D12 - Mitigation of environmental impact associated with runway development.

E12 - Mitigation of environmental impact associated with taxiway development.

F12 - Mitigation of environmental impact associated with apron development.

G06 - Other airport signs (not required by FAR Part 139).

H04 - Relocation of air traffic control towers and airport surveillance radars (excluding approach NAVAIDS).

J12 - Mitigation of environmental impact associated with terminal development.

P02 - Construction, improvement or repair of fuel farms, airport surface parking lots, and utilities (Military Airport Program only).

P12 - Mitigation of environmental impact not associated with runway, taxiway, apron, or terminal development.

Environmental mitigation for deicing chemicals that is required by the installation of airplane deicing facilities (B06) should be coded as D12, E12, or F12 depending upon the location of the deicing station. These work codes are compatible with the NPIAS-CIP work codes and should simplify the eventual transition to NAGIS.

Order 5100.20B, Program Control and Reporting Procedures, Airport Grant-In-Aid Programs, will be updated to reflect these changes. All programmers are reminded to avoid using the "miscellaneous" designations whenever possible. Please call APP-520 if you have any work code questions.

93.3-2 Terminal Development (Don Samuels (202) 267-8818).

Section ~~513(b)(1)~~ 47110 (d) of the Airport and Airway Improvement Act has been amended with respect to allowable costs of terminal development at commercial service airports which annually enplane 0.05 percent or less of the total U.S. enplanements. (This includes nonhub primary airports and nonprimary commercial service airports.)

By definition, nonhub primary airports enplane less than 0.05 percent of all enplanements and small hubs begin at 0.05 percent. Technically, therefore, a small hub may qualify if its enplanements exactly equal 0.05 percent. Preliminary CY 91 enplanement data used for computing FY 93 entitlements indicate that an airport must have 244,333 or less enplanements to qualify. There are 268 primary airports and 129 commercial service other than primary in the nonhub classification.

Prior language in section 513 (b)(1) limits allowable project costs for terminal development to nonrevenue-producing areas if such project costs are directly related to the movement of

passengers and baggage in air commerce. The new amendment expands the area of allowable costs to include terminal development in revenue-producing areas and construction, reconstruction, repair and improvement of nonrevenue-producing parking lots.

The amendment does not specifically alter the pre-existing requirement that allowable costs be directly related to the movement of passengers and baggage in air commerce. We have determined, however, that costs attributable to other revenue-producing areas in a terminal at an airport in this category are likely to be incidental with respect to the total project cost. Therefore, allowable costs in a project for terminal development may include, in addition to previously allowable costs, incidental costs attributable to revenue-producing areas other than those directly related to the movement of passengers and baggage in air commerce.

Examples of such areas include space for a snack shop or vending machines, an alcove for pay telephones, and wall or floor space to accommodate rental car or lodging reservation facilities. In addition, the costs necessary to provide utilities, heating, ventilating and air conditioning for such space are allowable. Costs related to administrative (nonpublic use) space and any equipment, furnishings or facilities used in revenue production (e.g., snack bar equipment or furniture, vending machines, telephones, reservation lines) are not allowable costs under this provision. We have also determined that a project solely to provide a restaurant, for example, in an existing terminal is not an eligible project.

Newly eligible development described above which was underway in calendar year 1992 or later can be funded retroactively. A new grant may be issued to an airport sponsor or an existing grant may be amended (limited to a 15 percent increase in the maximum grant obligation) to reimburse the sponsor, provided the airport sponsor has complied with all procurement and contracting requirements associated with AIP projects (e.g., 49 CFR Part 18, Davis-Bacon, DBE).

Note also that, for a nonhub primary airport, any such new grant or increase may only be made with sponsor entitlements; nonprimary airports remain subject to the discretionary funding limitation of $200,000 per year. The sponsor must certify that no project for needed airport development affecting safety, security, or capacity will be deferred if the terminal or parking lot work is approved.

For purposes of determining what costs can be considered reimbursable, only costs incurred in calendar year 1992, or

later, for newly eligible work which was underway in calendar year 1992 are retroactively eligible for reimbursement. (Costs attributable to previously eligible work, i.e., nonrevenue-producing public use space, are not eligible for retroactive reimbursement under this provision.) Neither the date of the grant nor the date of the notice to proceed to the contractor are germane to the allowability of these costs.

Section 513(b)(5) has also been amended to increase the Federal share at these same airports to 85 percent. This provision is not retroactive and applies to grants issued in FY 1993 and beyond.

SEE LEGAL DETERMINATION ATTACHED

93-3.3 Water Quality Projects (Mark Beisse (202)267-8826).

47102(3)(F)

Public Law 102-581, section 112(b)(3), amends section 503(a)(2) of the AAIA to make certain sponsor compliance responsibilities under the Federal Water Pollution Control Act of 1972 (FWPCA), as amended, eligible under AIP. While section 509(b)(7) of the AAIA requires a project to comply with applicable water quality standards, this amendment establishes eligibility of water quality projects separately from conventional airport development projects. The provision amends the definition of airport development to include any construction, reconstruction, repair, or improvement (or any purchase of capital equipment for an airport) necessary for compliance with the FWPCA by the Environmental Protection Agency (EPA) or a State water quality agency. Work to benefit nonaeronautical revenue producing airport areas is excluded. The following information replaces previous procedures on airport permit applications for storm water discharges in PGL 91-4.1, which is cancelled.

The preparation of the water quality certificate or permit applications required under the FWPCA, including related monitoring programs, is eligible. For airports participating in group storm water permit procedures, the fee for participation is also eligible. Eligible water quality planning projects may include evaluation, hydraulic modeling, pollution prevention plans, or facility planning and design. In addition, the periodic updating of pollution prevention plans, together with water quality studies, testing, and inspection related to the plan updates, is eligible.

CROSSED OUT WRONG SENTENCE

Eligible water quality development projects may include land acquisition for the improvements, airport drainage, waste water treatment facilities, and other capital costs of water pollution control. ~~If eligible work is combined with ineligible activities, areas, or facilities, regions should prorate allowable costs based on paragraph 551f of Order 5100.38A. Planning and development projects eligible under this provision~~

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may not be eligible for funding with PFC revenues. We are consulting with the Office of Chief Counsel on this issue and will provide further guidance as soon as possible.

Several of the National Pollutant Discharge Elimination System (NPDES) permits for airports and construction sites have been issued under recently amended EPA rules. FWPCA compliance projects must be justified by an NPDES permit or a similar certificate or finding for the airport. Water quality projects may not always be included within the approval of an environmental assessment for another airport development project, for instance, where either the development work or the water quality project is categorically excluded. In such cases, a copy of the certificate, permit, or a description certifying as to the location of those documents, should be included in the project file. The requiring agency should also be asked to verify in writing that the project will meet its needs for the foreseeable future. Note that such projects, even though required by a water quality agency, may or may not be categorically excluded.

Examples of ineligible work include airport management, operational, and proprietary responsibilities, such as employee training, housekeeping activities, or cleanup of a fuel leak. Projects which would serve fuel farms, automobile parking and rental areas, aircraft maintenance activities, exclusive use facilities, nonaeronautical uses, or property not owned by the airport are also ineligible. SEE THE LEGAL DETERMINATION ATTACHED

93-3.4 Air Quality Projects (Mark Beisse (202) 267-8826).

Public Law 102-581, section 112(b)(3), amends section 503(a)(2) of the AAIA to make certain sponsor compliance responsibilities under the Clean Air Act of 1970, as amended, eligible under AIP. While section 509(b)(7) of the AAIA requires a project to comply with applicable air quality standards, this amendment establishes eligibility of air quality projects separately from conventional airport development projects. The provision amends the definition of airport development to include any construction, reconstruction, repair, or improvement (or any purchase of capital equipment for an airport) necessary for compliance with the Clean Air Act. Work to benefit nonaeronautical revenue producing airport areas is excluded.

The Clean Air Act amendments of 1990 require greater integration of transportation and air quality planning processes to resolve problems in nonattainment areas defined under Environmental Protection Agency rules. Difficult decisions, tradeoffs, mitigation or compliance actions will be required to reduce impacts resulting from the development and operation of airports and the requirement to improve the nation's air quality.

We have little experience funding air quality compliance projects except those projects required to mitigate impacts associated with a conventional airport development project. Such compliance projects could be varied and include such work as installation of airport fuel storage and transfer vapor recovery systems or the control of exhaust emissions from terminal building heating, air conditioning or power generating facilities. ~~Projects eligible under this provision may not be eligible for funding with PFC revenues. We are consulting with the Office of Chief Counsel on this issue and will provide further guidance as soon as possible.~~

As a preliminary eligibility criterion, we would expect specific compliance requirements to be identified in an adopted state implementation plan (SIP) for the region in which the airport is located.

Please forward requests for air quality compliance projects and the specific program requirements of the air quality regulatory agency to APP-510. We will coordinate with APP-600 until we are able to develop criteria for evaluating projects. In the interim, regions may approve such work where the costs of air quality compliance are incidental.

93-3.5 Projects to comply with the Americans with Disabilities Act (Jim Borsari (202) 267-8822).

P.L. 102-581 amended Section 503(a)(2) of the Airport and Airway Improvement Act of 1982 (AAIA) to make projects to comply with the Americans with Disabilities Act of 1990 (ADA) eligible under the Airport Improvement Program (AIP).

The provision applies for any construction, reconstruction, repair or improvement of an airport (or any purchase of capital equipment) which is necessary for compliance with the responsibilities of the owner or operator of the airport and does not primarily benefit a revenue producing area used by a nonaeronautical business, most often referred to as a concession.

It is important that projects of this nature be scrutinized to determine that they are in fact the responsibility of the airport owner or operator. Many access projects may be required for an airport tenant (air carrier or other aeronautical business) under Title I of the ADA for employment purposes or required under the Air Carrier Access Act. These projects are not the responsibility of the airport and would be ineligible. On the other hand, some projects that had not been considered eligible previously are now eligible under this section of the AAIA. (For example, an elevator to airport offices for public and internal meeting use had not been

considered eligible as terminal development since the elevator was not "directly related to the movement of passengers and baggage in air commerce." Under this provision, the same elevator may now be eligible if it is determined to be necessary to comply with ADA.) Even though Title I requirements for other than airport owners or operators are ineligible, projects to comply with Title I for airport owners or operators would be eligible.

The majority of the items that would be eligible are expected to be those required under Title II and Title III. Synopses, as assembled by the Department of Justice, of requirements for Titles I, II, and III are attached as Attachment A.

The Federal share for these projects is the same as other airport development for the airport. The share is not limited to the 75 percent and 85 percentages under terminal development and can also be funded under discretionary funds at primary airports, even if the development is within the terminal building.

It is important to note that these ADA projects may not be eligible for the PFC program. We are consulting with the Office of Chief Counsel on this issue and will provide further guidance as soon as possible. However, many items that were considered eligible under the AAIA previously (e.g., lift devices, elevators and other public use terminal construction items) are still eligible for both AIP and PFC programs. Eligibility under the prior criteria, however, would appear to exclude such items as the previous example of the elevator to administrative office or nonpublic use items such as employee elevators, etc., since these items are not "directly related to the movement of passengers and baggage in air commerce."

93-3.6 Disadvantaged Business Enterprise (DBE) requirements for Passenger Facility Charge (PFC) Program (Jim Borsari (202) 267-8822).

There have been some questions regarding the application of DBE requirements as they pertain to the PFC program. Even though DBE requirements were not extended to PFC's, there are some DBE requirements on mixed AIP/PFC projects.

As a rule of thumb, it is best to remember that even though PFC's are approved by the FAA, PFC revenue is considered "local money." Therefore, for those "joint projects" the following ground rules would apply:

1. In PFC projects in which there is no AIP involvement, the Federal DBE requirements do not apply;

2. In projects in which PFC's are used to provide the sponsor share of AIP project costs, the PFC amount is not reflected in the overall DBE goal, but is reflected in the DBE contract goal since PFC's are considered local funds (the overall goal is always calculated as a percentage of the Federal share only).

3. In projects in which PFC's are used for items of work that supplement an AIP project, the PFC amount is not considered in either the overall goal or the contract goal unless a portion of the PFC funds are used as the local matching share for the AIP project. (Example: A runway extension project in which PFC funds will pay for site preparation, land acquisition and design, and AIP will be used for the actual construction. The cost of the PFC funded work is not used in the calculation of either the overall or contract goal. However, if PFC funds are also used as the local share for the AIP project, those PFC funds are considered in the contract goals but not the overall goal.)

93-3.7 Bonus Payments for Pavement Projects under AIP (Jim Borsari (202) 267-8822).

The Director, Office of Airport Safety and Standards, AAS-1, has requested that we review the allowability of bonus payments to contractors for pavement quality which exceeds contract specifications.

There is no prohibition to the inclusion of provisions in paving contracts which would permit an increase in the contract price when testing indicates that the contractor has provided a superior pavement (resulting longer service life) than that which was specified. The following conditions apply:

1. Any increase in grant amount as a result of bonus payments is subject to the availability of AIP funds and is limited to the 15 percent limit on amendments established by the AAIA.

2. An appropriate method of determining the extent to which the finished product exceeds specifications and the method for determining a commensurate increase in contract price ~~is~~ has been ~~being~~ developed by AAS-200 and must be adhered to by the sponsor. Regions should contact AAS-200 regarding sponsors' requests for bonus payment provisions until such provisions are issued by AAS-200. and is included in AC-150/5370-10A

3. Bidders must be clearly advised of the method and mechanism in solicitation documents. These provisions must be approved by a region or ADO/AFO but not through normal sponsor certifications accepted by the FAA.

4. Application of the bonus payment provision by the sponsor must meet the requirements of change order processing and approval by an appropriate Airports official, and

5. All other project test results must meet or exceed requirements in order to make an incentive payment to a contractor for work exceeding specifications. If a grant provides funding from more that one project (e.g., a runway and an apron), each must be treated separately with respect to meeting or exceeding specifications. It is possible, therefore, that a contractor could incur a penalty for substandard construction on one project and be awarded a bonus for superior work on another.

Other types of bonus payments listed in paragraph 821 of FAA Order 5100.38A, such as early completion of the project, are still considered ineligible.

93-3.8 External Civil Rights Program (Jim Borsari (202) 267-8822).

Attached (Attachment B) for your information and guidance is a compilation of DBE and other civil rights statutes with which sponsors must comply. The compilation was developed by Irene Mields, AGC-100, and presented to an AACI-NA annual conference.

93-3.9 Revocation of Certain Executive Orders Concerning Federal Contracting (Jim Borsari (202) 267-8822).

On February 1, 1993, the President issued Executive Order 12836, Revocation of Certain Executive Orders Concerning Federal Contracting (Attachment C). PGL 93-2.5, which was issued to implement the now revoked Executive Order 12818, is hereby cancelled, as is the requirement for the inclusion of the "Open Bidding" special condition included in construction grants issued after November 23, 1992. For grants issued between November 23, 1992, and February 1, 1993, the special condition remains in effect. Please contact the Program Guidance Branch if you receive inquiries about the status of this special condition in connection with specific projects.

As Executive Order 12800, which was also revoked, dealt with Government contracts only, no AIP guidance was necessary and therefore not issued.

A copy of revoked Executive Order 12818 is Attachment D.

Lowell H. Johnson

Attachments

RETURN TO
BINDER BEHIND
PGL 93-3.4

APR 5 1993

ACTION: Eligibility of Federal Mandates under the Passenger Facility Charge (PFC) Program

Assistant Chief Counsel for
Airports & Environmental Law, AGC-600

Manager, Airports Financial
Assistance Division, APP-500

We have reviewed section 112(b)(3) of Public Law 102-581 to consider the eligibility for funding with passenger facility charge (PFC) revenue of projects listed in that statute. We have concluded that those projects eligible for AIP funding exclusively under section 112(b)(3) are eligible for PFC funding only to the extent that PFC revenue finances the non-Federal share of allowable project costs under an Airport Improvement Program (AIP) grant.

However, your office has considered many of these projects as AIP, and hence, PFC-eligible under preexisting law. There is no indication that section 112(b)(3) was intended to narrow the standards for AIP and PFC eligibility. Therefore, to the extent that projects were AIP-eligible under existing law, those projects remain PFC-eligible regardless of whether the projects have received AIP funding.

STATUTORY BACKGROUND:

Section 112(b)(3)(F) amends section 503(a)(2) of the Airport and Airways Improvement Act of 1982 (AAIAct). Section 503(a)(2) in turn defines "airport development." Section 112(b)(3)(F) added to this definition projects undertaken to comply with the Americans with Disabilities Act of 1990, the Clean Air Act and the Federal Water Pollution Control Act (FWPCAct), "if funded by a grant under this title."

This provision, including the limiting phrase, appeared in S.2642, the Aviation Noise Improvement And Capacity Act of 1992, as reported in S. Rep. 102-424 (September 23, 1992). The Committee report is silent on the purpose of the limiting phrase.

A similar provision appeared in House Bill 4691, as reported in H.R. Rep. 102-503 (April 28, 1992). The House provision did not include the limiting phrase.

Pub. L. 102-581 was not submitted to a conference committee. Therefore there is no written record of the reasons that the Senate version of the provision was enacted in preference of the House version.

With respect to PFC eligibility, section 1113(e) of the Federal Aviation Act defines as PFC-eligible "project[s] for airport development under the Airport and Airway Improvement Act of 1982" and "projects for terminal development described in section 513(b) of [the AAIAct.]"

PREEXISTING POLICY:

We understand that, under FAA policy that predated enactment of section 112(b)(3), projects to comply with the ADA, Clean Air Act and FWPCAct were considered AIP-eligible under certain circumstances. Federal Water Pollution Control Act

As to the ADA, section 513(b) of the AAIAct authorizes the use of entitlement funds for terminal development in certain circumstances. Section 1113(e) in turn defines terminal development projects under section 513(b) as PFC-eligible. The FAA's policy before enactment of section 112(b)(3) was to treat projects for compliance with ADA within the terminal, e.g., elevators or wheelchair lifts for jetways, as eligible terminal development.

The situation for projects to comply with the Clean Air Act and FWPCAct is more complicated. As we understand it, many airport development projects that might adversely affect air or water quality require permits from state or federal agencies. Those agencies may require the sponsor to include mitigation measures in the project as a condition for granting the necessary permits. For example, a sponsor may need a storm water runoff permit to construct the storm water drainage system for a new runway. The permitting agency may require construction of an oil/water separation system before issuing the permit.

Alternatively, to comply with its obligations under the National Environmental Policy Act (NEPA) or other environmental statutes, the FAA might require such mitigation measures as a condition to Federal approval.

In either case, the FAA has considered the cost of these mitigation devices as a component of the overall allowable cost of the airport development project that the device supports. As such, the devices have been AIP-eligible and hence PFC-eligible.

ANALYSIS:

As a first step in analysis, it is necessary to separate projects for compliance with the ADA, Clean Air Act and Federal Water Pollution Control Act that were AIP and PFC-eligible before enactment of section 112(b)(3) from those made eligible by section 112(b)(3).

The former projects include those described above under preexisting policy. Such projects were, before enactment of section 112(b)(3), PFC-eligible regardless of AIP funding.

The latter projects include projects to comply with the ADA outside the terminal and stand-alone projects to comply with the Clean Air Act and FWPCAct. A project to install oil/water separators to serve an existing runway storm water drainage system is an example of such projects.

This analysis focuses first on the projects made PFC-eligible for the first time by section 112(b)(3).

Statutes should ordinarily be read to avoid making any provisions meaningless. The legislative history indicates that there was a conscious decision to include the limiting language as part of the new definition of AIP-eligible projects in section 112(b)(3). None of the other descriptions of AIP-eligible projects in section 503 of the AAIAct include such a limitation. Further section 112 added another new category of AIP-eligible projects (in section 503(a)(2)(E)) without the limiting language. In these circumstances principles of sound statutory construction require the FAA to find a way to give effect to the limiting language.

It is difficult to give effect to the limiting language in the context of the AAIAct itself. An attempt to apply the language to AIP eligibility leads to a circular or nonsensical result. If a project receives a grant it is AIP-eligible, which it must be to receive a grant. But if a project is ineligible because it has not received a grant, the project's ineligibility is a moot point; no Federal funds have been pledged.

The limiting language can be given effect if it is interpreted as an indirect limit on PFC eligibility. As noted, PFC eligibility for most projects depends on AIP eligibility. If a project is AIP-eligible only when it is funded with a grant, its PFC eligibility would be similarly limited. Thus, the projects listed in section 503(a)(2)(F) would be PFC-eligible only to the extent that they are funded by a grant. PFC eligibility would then be limited to the non-Federal share of allowable project costs.

The legislative history of the provision does not show a legislative intent for the statute to have a different meaning. In these circumstances, this office supports the interpretation of the limiting language outlined above.

We reach a different conclusion for projects that were PFC-eligible under preexisting law The legislative history also shows that Congress enacted section 112(b)(3) to respond to concerns of airport operators that additional funds should be available to airports to comply with Federal requirement. The purpose of the statute was to expand AIP eligibility, not to restrict it. In these circumstances, this office interprets section 112(b)(3) as having no effect on the AIP eligibility of projects that were already eligible under preexisting law. Therefore, section 112(b)(3) has no effect on the PFC eligibility of these projects either.

CONCLUSIONS:

Based on the foregoing, our conclusions can be summarized as follows. Projects for compliance with the ADA that qualify as terminal development, or as portions of a larger project for terminal development, are PFC-eligible without regard to whether the projects are included in an AIP grant. Projects for compliance with the Clean Air Act and FWPCAct that are components of larger airport development projects (under preexisting law) are also PFC-eligible without regard to whether the projects are included in an AIP grant.

In contrast, projects for compliance with the ADA that are not terminal development and stand-alone projects for compliance with the Clean Air Act and FWPCAct are PFC-eligible only by virtue of section 112(b)(3). Therefore, only the non-Federal share of allowable costs of such projects that are funded by an AIP grant may be funded with PFC revenue.

If you have further questions on this issue please contact Barry Molar, manager of the Airports Law Branch in my office.

David L. Bennett

AGC-610:MOLAR:egr:8173b(1-4):4/2/93
cc: AGC-610/600/601
600-930063

U.S. Department of Justice
Civil Rights Division
Coordination and Review Section

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) gives civil rights protections to individuals with disabilities that are like those provided to individuals on the basis of race, sex, national origin, and religion. It guarantees equal opportunity for individuals with disabilities in employment, public accommodations, transportation, State and local government services, and telecommunications.

I. Employment

➤ Employers with 15 or more employees may not discriminate against qualified individuals with disabilities. For the first two years after July 26, 1992, the date when the employment provisions of the ADA go into effect, only employers with 25 or more employees are covered.

➤ Employers must reasonably accommodate the disabilities of qualified applicants or employees, unless an undue hardship would result.

➤ Employers may reject applicants or fire employees who pose a direct threat to the health or safety of other individuals in the workplace.

➤ Applicants and employees are not protected from personnel actions based on their current illegal use of drugs. Drug testing is not affected.

➤ Employers may not discriminate against a qualified applicant or employee because of the known disability of an individual with whom the applicant or employee is known to have a relationship or association.

➤ Religious organizations may give preference in employment to their own members and may require applicants and employees to conform to their religious tenets.

➤ Complaints may be filed with the Equal Employment Opportunity Commission. Available remedies include back pay and court orders to stop discrimination.

III. Transportation

Public bus systems

➤ New buses ordered on or after August 26, 1990, must be accessible to individuals with disabilities.

➤ Transit authorities must provide comparable paratransit or other special transportation services to individuals with disabilities who cannot use fixed route bus services, unless an undue burden would result.

➤ New bus stations must be accessible. Alterations to existing stations must be accessible. When alterations to primary function areas are made, an accessible path of travel to the altered area (and the bathrooms, telephones, and drinking fountains serving that area) must be provided to the extent that the added accessibility costs are not disproportionate to the overall cost of the alterations.

➤ Individuals may file complaints with the Department of Transportation or bring private lawsuits.

Public rail systems

➤ New rail vehicles ordered on or after August 26, 1990, must be accessible.

➤ Existing rail systems must have one accessible car per train by July 26, 1995.

➤ New rail stations must be accessible. As with new bus stations, alterations to existing rail stations must be made in an accessible manner.

➤ Existing "key stations" in rapid rail, commuter rail, and light rail systems must be made accessible by July 26, 1993, unless an extension of up to 20 years is granted (30 years, in some cases, for rapid and light rail).

➤ Existing intercity rail stations (Amtrak) must be made accessible by July 26, 2010.

➤ Individuals may file complaints with the Department of Transportation or bring private lawsuits.

Privately operated bus and van companies

➤ New over-the-road buses ordered on or after July 26, 1996 (July 26, 1997, for small companies), must be accessible. After completion of a study, the President may extend the deadline by one year, if appropriate.

ATTACHMENT B

AACI-NA ANNUAL CONFERENCE

"EXTERNAL CIVIL RIGHTS PROGRAM"

DISADVANTAGED BUSINESS ENTERPRISE
and
OTHER CIVIL RIGHTS STATUTES AND REGULATIONS

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DISADVANTAGED BUSINESS ENTERPRISE, DISABILITY, AND CIVIL RIGHTS STATUTES AND REGULATIONS

I. INTRODUCTION - CIVIL RIGHTS PROGRAMS AFFECTING, IN GENERAL, RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE AND ENTITIES RELATED TO SAME)

A. Eleven major authorities in "nutshell" form

B. General Problems

1. Overlap in major authorities, complicated further by enactment of civil rights sections in the enabling or appropriations legislation of individual Federal agencies. (At last count - 57, only 12 of which apply to all bases of discrimination. Of the 57, 37 apply to race, 35 to color, 34 to national origin, 48 to sex, 34 to religion or creed, and 20 to physical or mental disabilities.) Further, there are variations in the types of discrimination covered (employment, benefits and services, business opportunities, accessibility, etc.)

2. Dual or multi-jurisdictional authority. (Not unusual to find Department of Transportation (DOT), Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), and others all have jurisdiction relating to implementation of a statute.)

3. Surface resemblances in authorities, but variations in judicial, administrative interpretations. (Compare, e.g., the employment requirements of Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, and Title I of the Americans with Disabilities Act (ADA)).

4. Requirements not interchangeable or usable as substitutes in most cases. (Compliance with the Architectural Barriers Act (ABA) does not mean, necessarily, that you have complied with the Rehabilitation Act.)

C. General Advice

1. Read Department of Transportation (OST) and Federal Aviation Administration (FAA) Advisory Circulars, Handbooks, Guidance. (See, especially, "Civil Rights Requirements for the Airport Improvement Program" (AIP), 3/31/89, AC No. 150/5100-15A. This AC does not include, however, information on Air Carrier Access Act or the ADA. Office of Airports may do AC on the ADA.)

2. Read Notices of Proposed Rulemaking and Final Rules in the Federal Register, including Preambles, as well as Code of Federal Regulations. Notices and Preambles have valuable interpretive clues.

3. Work closely with Regional Civil Rights, Airports, and Legal Staff. Headquarters assistance available in cases of first impression, conflicting advice at regional level.

4. Knowledge of case law essential, but ordinarily, this will be reflected in the regulations or guidance provided by the FAA or OST.

5. Make sure you have all published guidance, including memoranda issued by lead offices.

II. GOVERNING AUTHORITIES

A. Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)

1. Implementing Regulations - 49 CFR Part 21.

2. Coverage - Nondiscrimination on the basis of race, color, and national origin in:

a. provision of benefits and services to the public;

b. employment programs designed to provide employment and in employment practices that impact on the public.

3. Applicability - Recipients and all permanent or transient entities on the airport facility receiving or benefiting from Federal assistance, i. e., lessees, sublessees, contractors, subcontractors, successors in interest (as long as facility is used for purpose for which Federal assistance initially was provided, or as long as the life of the equipment, etc., purchased with the Federal financial assistance).

4. Recent legal questions

a. What constitutes Federal financial assistance? See U. S. Department of Transportation (DOT) v. Paralyzed Veterans of America (PVA), 477 U.S. 597 (S. Ct. June 27, 1986)

b. What is the definition of a "program receiving Federal financial assistance"? See Grove City College v. Bell, 465 U.S. 555 (1984), 104 S.Ct. 1211 (1984); Civil Rights Restoration Act of 1988 , Pub. L. 100-289, 102 Stat. 28 (1988), Congressional Record, January 28, 1988, p. S205 et seq..

B. Section 520 of the Airport and Airway Improvement Act (AAIA) of 1982, as amended in 1987 (49 U.S.C.S. app. Section 2219 (1991)

1. Implementing regulations - None. Forerunner, Section 30 of Airport and Airway Development Act, was implemented through 14 CFR Part 152, Subpart E.

2. Coverage - Nondiscrimimation on bases of race, creed, color, national origin, sex in:

a. provision of benefits and services to the public (similar to Title VI).

b. opportunities for disadvantaged business enterprises.

c. employment opportunities - organizations of any size.

3. Applicability

a. Recipients

b. Aviation-Related Activities (commercial enterprises) that:

1. are operated on the airport:

2. employ persons on the airport, and which:

(i) are related primarily to the aeronautical activities on the airport;

(ii) provide goods or services to the public attracted to the airport by the aeronautical activities;

(iii) provide services or supplies to other aeronautical-related or public service airport businesses or to the airport; or

(iv) perform construction work on the airport.

5. Transition of Section 30 to Section 520.

a. Originally conceived of as an affirmative action statute; now considered a nondiscrimination statute. Resulted, in part, from designation of affirmative action plans as "reports" by the Office of Management and Budget and refusal to approve same.

b. Compliance with employment requirements handled generally by EEOC, following agreement between Federal agencies, DOJ, and EEOC. See: "Procedures for Complaints of Employment Discrimination Filed against Recipients of Federal Financial Assistance," 28 CFR Part 42 (DOJ) and 29 CFR Part 1691 (EEOC), 48 FR 3569, January 25, 1983.

c. Supplements Title VI on airports through addition of sex and creed as bases for nondiscrimination in provision of benefits and services of Federally-assisted programs. Similar in that respect to Title IX of the Education Amendments Act (20 U.S.C.S. Section 1681 et seq.) which prohibits discrimination on the basis of sex in Federally-assisted education programs.

d. Served as the basis for the Minority and Women's Business Enterprise (MBE/WBE) Program until amendment to AAIA established new statutory basis for a Disadvantaged Business Enterprise (DBE) Program.

6. Recent Legal Question

Does Section 520 provide legal authority for race conscious program such as MBE/WBE? See: S. J. Groves & Sons Company and Jasper Construction Company v. Fulton County, Georgia, U. S. Department of Transportation and Secretary of Transportation, 920 F.2d 752 (11th Cir. 1991), cert. denied, 111 S.Ct. (1991). This was an expansion of the Supreme Court's decision in Metro Broadcasting, Inc. v. Federal Communications Commission (FCC), _____U.S._____, 110 S. Ct. 2997, 111 L.Ed. 2d 445 (1990), which upheld the right of a Federal agency to set goals in its own programs, in accordance with a Congressional mandate. In denying certiorari in Fulton County, the Supreme Court upheld a Federal agency's (USDOT) right to set goals in a grant-related MBE/DBE program.

C. Executive Order 11246, Equal Employment Opportunity (3 CFR 339 (1964-1965 Compilation), reprinted in 42 U.S.C. 2000e note, issued Sept. 24, 1965, as amended by E.O. 11375, 32 FR 14303 (Oct. 13, 1967).)

1. Implementing Regulations - Department of Labor, Office of Federal Contract Compliance Programs, 41 CFR Part 60.

2. Coverage - Affirmative action in providing opportunities for:

a. employment in Federally-assisted construction contracts;

b. non-segregation in facilities for such employees

3. Applicability - All contractors and subcontractors receiving Federal or Federally-assisted construction contracts in excess of $10,000 (amount of contract governs, rather than percentage of Federal share); all contractors and subcontractors with contracts of $50,000 or more and 50 or more employees. See: 41 CFR 60-1.40 and 60-4.1.

4. Compliance - To prevent overlap under Section 520, compliance with E. O. 11246 is considered compliance with Section 520, as well.

D. Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)

1. Implementing Regulations - Health and Human Services, 45 CFR Part 90.

2. DOT Implementing Regulations - None issued. Disability regulations generally encompass problems encountered by elderly.

3. Coverage - Does not include employment (see Age Discrimination in Employment Act, as amended (29 U.S.C. 621 et seq.)).

E. Section 105(f) of Airport and Airway Safety and Capacity Expansion Act of 1987, amending Section 505 of the AAIA, through the addition of paragraph (d) (1) through (4) (Federally-assisted contracting) and Section 109, amending Section 511(a) (concessions) of the AAIA - Disadvantaged Business Enterprise Program.

1. Implementing Regulations for contracting program - 49 CFR Part 23, Subpart D.

2. Proposed Implementing Regulations for Concession Program - 55 FR 11964, March 20, 1990, and Erratta, 55 FR 17465. Final Rule published 57 FR 18400, April 30, 1992. See Appendix A, attached hereto, for highlights.

3. Coverage - Affirmative action in:

a. achieving goals (not less than 10% of funds made available by FAA, as specified in Section 505(d)(1) for participation of DBE's in Federally-assisted contracting and subcontracting);

b. achieving goals of at least 10% of all businesses at the airport (methodology for setting goals and business size established in final rule).

4. Applicability - Airports receiving funds under Subsection (a) of Section 505, Title V, of the AAIA.

5. Recurring Legal Issues

a. May set-asides be used, even when ordinary bid procedures result in achievement of goals? Yes. See: Milwaukee County Pavers Assn. v. Wisconsin Department of Transportation, 710 F.Supp. 1532 (W.D. Wis. 1989).

b. If Congress has found that recipients should achieve "at least" 10 percent goals in contracting and concession leasing, must the recipient make additional findings to exceed those goals? No. "Findings" must be made by the recipient only in the case of local or State programs for which the Congress has not made findings. In DBE case, the Congress found that goals of "at least 10 percent" could be set. See: City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). See also: Fullilove v. Klutznick, 448 U.S. 448 (1980).

c. When does a goal become a "quota"? Waiver rights are "key." Goals are really quotas if there is no flexibility, such as a waiver process, in the goal-setting approach. See waiver procedures in 49 CFR Sections 23.64(e), 23.65, and 49 CFR Part 23, Subpart D, Appendix D. Note: A recipient is not required to seek a waiver simply because the population of its location may make it difficult or necessary to use a set-aside program to meet the 10 percent floor. See: Ellis v. Skinner, et al., No.. 91-4013 (10th Cir., April 10, 1992). Also, a recipient is not forced to choose between meeting the 10 percent goal and obtaining a waiver from the entire DBE program. It may obtain a waiver from the 10 percent floor by showing that it has not been able to meet the goal, despite good faith efforts, but can meet the goal it has established. See: Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 975 (6th Cir. 1991)

6. Recurring Implementation Questions

a. May recipients combine local MBE/WBE goals with DBE goals in Federally-assisted contracting and concession leasing? No, but they may have MBE/WBE goals in addition to the Federal goals, if they have made findings of discrimination in accordance with Croson.

b. What should be the obligations of owners of privately-financed terminals on airports and terminals built entirely with local/state funds? 49 CFR Part 23, Subpart F applies to all terminals on airports receiving Federal financial assistance from the DOT/FAA; private owners of terminals stand in the shoes of the recipient and are subject to all DBE requirements. See: Sections 23.91 and 23.105.

c. How "small" must DBE concessions be to remain eligible for the program? Should the DOT adopt the Small Business Regulations, regarding "affiliation" in their entirety? 49 CFR Part 23, Subpart F, Appendix A, provides new size standards, with significant increases.

d. What types of business structures best lend themselves to DBE participation in nonminority prime leases? Subpart F now specifies the business structures. See: Section 23.95(g)(2).

e. In Federally-assisted contracting, how do you determine whether a low bidder, who has not succeeded in obtaining DBE participation, has exerted "best efforts" to do so? Subpart F now specifies the steps to take. See: Section 23.95(i).

f. How do small airports with limited staffing comply with the Congressional requirement for on-site visits during the certification process? Commercial service airports (except primary ones), general aviation and reliever airports no longer are required to implement a DBE concession plan but must take appropriate outreach steps to encourage available DBE's to participate whenever there is a concession opportunity. See:

Subpart F, Section 23.91 (c). Also, even for primary airports, the burden has been eased. On-site visits are required only if necessary to validate the certification information provided by the DBE firm. See: Section 23.95(f)(4).

F. through I. Rehabilitation Act, Architectural Barriers Act, Air Carrier Access Act, Americans with Disabilities Act (statutes overlap and intertwine in attempt to cover structural/physical accessibility, program accessibility, access to both public and private services and benefits, and employment).

1. Section 504 of the Rehabilitation Act of 1972, as amended in 1978 (29 U.S.C. Section 794)

a. Implementing Regulations - 49 CFR Part 27

b. Lead agency - Department of Justice, 28 CFR Part 41 (redesignated and amended at 46 FR 40686, August 11, 1981).

c. Coverage - Nondiscrimination in:

i. provision of access to programs operated with or benefiting from Federal financial assistance;

ii. employment of persons with disabilities.

c. Applicability

i. Recipients of Federal financial assistance.

ii. Lessees, contractors, and other organizations on the facility have a general non-discrimination obligation, but no specific requirements regarding employment, accessibility, or accommodation. Air carriers that own and operate terminals are an exception, since Section 382.23 of 14 CFR Part 382, implementing the Air Carrier Access Act (ACAA), imposes accessibility requirements upon these air carriers, similar to those imposed by 49 CFR Part 27, implementing Section 504 of the Rehabilitation Act, upon recipients of Federal financial assistance. Sections 27.71(e) of Part 27 and Section 382.23(e) of Part 382 both require that leases and contracts between the recipients and air carriers set forth the respective obligations of the parties under Part 27 and Part 382.

d. Current Legal Questions

i. What constitutes "reasonable accommodation?"

ii. What constitutes "undue burden"?

See: Southeastern Community College v. Davis, 442 U.S. 397 (1979); American Public Transit Association v. Lewis, 665 F.2d 1272 (D.C. Cir. 1981). Generally, financial and/or administrative burdens out of proportion to the overall resources of the business or organization.

2. Architectural Barriers Act of 1968 (42 U.S.C. Sections 4151 et seq.)

a. Implementing Regulations - 36 CFR Parts 1120, 1150-1153, and 1190.

b. Compliance Agency - Architectural and Transportation Barriers Compliance Board (ATBCB), established under 29 U.S.C. Section 792 (Section 502 of the Rehabilitation Act).

c. Coverage - Structural accessibility for persons with disabilities in buildings or facilities:

i. to be constructed or altered by or on behalf of the United States;

ii. to be leased in whole or in part by the United States after August 12, 1968;

iii. to be financed in whole or in part by a grant or a loan made by the United States after August 12, 1968, if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan; or

iv. to be constructed under authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or Title III of the Washington Metropolitan Area Transit Regulation Compact.

d. Lead Agency - Department of Justice (Executive Order 12250, Nov. 12, 1980, 45 FR 72995).

e. Standard Setters

i. For buildings under their jurisdiction:

a. General Services Administration

b. Department of Defense

c. Department of Housing and Urban Development

d. United States Postal Service

ii. Uniform Federal Standards - Working Group developed and issued same on August 7, 1984, 49 FR 31528. Department of Justice plus standards setters above, plus the public and private members of the ATBCB constitute the Working Group. Finished product met or exceeded ATBCB's Minimum Guidelines and Requirements for Accessible Design, 36 CFR Part 1190. GSA intends to adopt new ADA Accessibility Standards (ADAAG) issued by Architectural and Transportation Barriers Compliance Board. See page 15 of this outline.

3. Air Carrier Access Act of 1986 (49 U.S.C.S. app. Section 1301 (1991)

a. Implementing Regulations - 14 CFR Part 382, 55 FR 8008, March 6, 1990.

b. Compliance Agency - Department of Transportation (Office of Consumer Affairs, 400 7th Street, SW, Washington, D. C. 20590, 202/ 366-2220).

c. Coverage - prohibits discrimination on the basis of disability by air carriers against any otherwise qualified individual in the provision of air transportation.

d. Applicability - applies to all air carriers and their contractors providing air transportation or services related thereto such as travel agents, porters, etc., except as stated in Section 382.3 (indirect air carriers only have a general prohibition of discrimination; foreign air carriers or airport facilities outside the United States, its territories, possessions, and commonwealths are not covered; and requirements do not supersede any applicable FAA safety regulations).

e. Scope

i. Physical accessibility to and within air carriers

ii. Physical accessibility and program accessibility in terminals owned by air carriers

iii. Nondiscrimination in the provision of services within the aircraft or terminal, including the stowage of personal equipment, treatment of mobility aids and assistive devices, the imparting of information, the security screening of passengers, the seating assignments, the purchase of tickets, the check-in, and baggage handling, etc.

iv. Training of all personnel that have contact with the public.

f. Current legal question: In view of air carrier facilities that constitute public accommodations in airports, what are responsibilities of air carriers vis a vis airports to provide accessibility (waiting rooms, ticket counters, baggage areas, etc.) under the ACAA and the ADA? DOT hoping to resolve through negotiations and encouragement to cooperate.

4. Americans with Disabilities Act of 1990 (ADA) (42 U.S.C.S. Section 12101 et seq. (1990)

a. Five Titles in the ADA

i. Title I - Employment

ii. Title II - Services, Programs, and Activities

1. Subtitle A - Public Entities - All programs (includes transportation, except by aircraft, to the extent not covered by Subtitle B).

2. Subtitle B - Public Entities - Transportation, except by aircraft.

iii. Title III - Public Accommodations - Provided by private entities.

iv. Title IV - Telecommunications

v. Title V - Implementing Provisions

b. Summaries of Individual Titles

i. Title I - Employment: Covers virtually all private and public employers who affect commerce and who have 25 employees on July 26, 1992, and after July 26, 1994, those who have 15 employees. Final Rule, Equal Employment Opportunity Commission, "Equal Employment Opportunity for Individuals with Disabilities," 29 CFR Part 1630, 56 FR 35725, effective July 26, 1992, and "Recordkeeping and Reporting under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, 29 CFR Parts 1602 and 1627, 56 FR 35725 at 35753, July 26, 1991, effective on that same date. Appendix to Part 1630 has extensive EEOC interpretive guidance on Title I of ADA.

ii. Title II - Services, Programs, and Activities

a. Subpart A - Covers all services, programs, and activities of State and Local Governments, including those that do not receive Federal Financial Assistance. Includes contractors of same. Also includes airports operated by public entities, even though these are not subject to Department of Transportation's regulations implementing Subpart B of Title II. Final Rule, Department of Justice, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 CFR Part 35, 56 FR 35693, Part IV, July 26, 1991, effective January 26, 1992. Compliance Agency: Department of Transportation is "Designated Agency."

b. Subpart B - Covers designated public transportation, except by aircraft, or innercity or commuter rail transport provided by public entities and their contractors. Also covers any private entity (such as a contractor or independent organization operating charter buses, for example) that provides specified public transportation. Also covers any private entity that is not in the business of transporting people but operates a demand responsive or fixed route system or otherwise transports individuals (rental cars, hotels, motels, shopping malls, concessions, etc.)

Taxis are covered as private entities engaged in the business of transporting people in demand responsive service, but automobiles need not be accessible. Any covered vehicles owned or operated by a taxi company must be accessible, however, or the company must demonstrate the equivalency of accessibility.

Vanpool systems operated by public entities, or in which they own or purchase or lease the vehicles, are subject to the requirements of Part 37 for demand responsive service for the general public operated by public entities. Equivalent accessibility can be achieved by providing a van that a person with disabilities can use in the vanpool in which he or she chooses to participate.

Airport transportation systems are covered as follows: fixed route or demand responsive systems between parking lots, terminals, parking lots and terminals, etc.. In this instance, however, the "fixed route" service system is subject to the commuter service bus requirements, which does not require a supplemental paratransit service.

Shuttles and other services, operated by privately-owned hotels, car rental agencies, airlines, theme parks, and other public accommodations, are subject to requirements for private entities not primarily engaged in the business of transporting people. The requirements for demand responsive or fixed route service will apply, depending on the character of the service.

Transportation for employees only is subject to Title I of the ADA and not the DOT regulations. Transportation provided by private clubs and religious organizations is exempt.

The parent company, which is not primarily in the business of providing transportation, is exempt, although its subsidiary, if primarily in the business of providing transportation, is subject to the regulation.

c. Subpart C - Transportation Facilities (Except airports. See Department of Justice (DOJ) regulation instead. Similarly, private entities constructing or altering facilities are subject to DOJ regulation.)

d. Subpart D - Acquisition of Accessible Vehicles by Public Entities. Generally, after August 25, 1990, new, used, or remanufactured vehicles with a useful life of 5 years or more must be accessible.

e. Subpart E - Acquisition of Accessible Vehicles by Private Entities not primarily engaged in the business of transporting people. Vehicles that seat in excess of 16 persons in fixed route systems must be accessible after August 25, 1990. Systems using vehicles with less than 16 passengers may demonstrate equivalent accessibility. Vehicles that seat in excess of 16 persons in demand responsive systems must be

accessible unless the system, when viewed in its entirety, is accessible.

Acquisition of Vehicles by Private Entities Primarily Engaged in the Business of Transporting People. Except for automobiles and vans that carry less than 8 persons, generally must be accessible in fixed route systems. Same applies in demand responsive systems, unless equivalent accessibility, when viewed in entirety, can be demonstrated. Vans with seating capacity of fewer than 8 persons must be accessibile after February 25, 1992, unless there is equivalent accessibility, when viewed in entirety.

f. Subpart F - Comparable Complementary Paratransit (This applies only to entities running fixed route systems. Fixed route systems operated by airports or their contractors are subject to "commuter" requirements and do not have to provide a paratransit system.)

iii. Title III - Places of Public Accommodation by Private Entities. Requires that all new places of public accommodation and commercial facilities be designed and constructed so as to be readily accessible and requires that examinations or courses related to licensing or certification for professional and trade purposes be accessible to persons with disabilities. Final Rule, Department of Justice, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 CFR Part 36, 56 FR 35543, July 26, 1991, effective July 26, 1992.

a. Six subparts

1. Subparts B and C cover transportation provided by public accommodations.

2. Subpart D covers new construction and alterations in commercial facilities.

b. Summary of Requirements

1. Existing facilities of public accommodations (private entities) - must remove barriers in existing facilities where "readily achievable, easily accomplishable, and able to be carried out without much difficulty or expense."

2. Transportation provided by public accommodations (private entities).

a. If not primarily in business of providing transportation, then subject to Subparts B, C, and D, except as in Section 36.310.

b. Barriers within vehicles shall be removed where readily achievable.

c. Private entities shall comply with requirements pertaining to vehicles and transportation systems in the DOT regulations.

c. Subparts B - General Requirements and C - Specific Requirements similar in approach to employment requirements in regard to standards, modifications, accommodation, removal of barriers, etc., for the provision of the goods, services, privileges, advantages, accommodations, or facilities being offered and will not be covered in detail here. Regulation self-explanatory.

d. Subpart D - New Construction and Alterations

1. First Occupancy - Facilities slated for first occupancy after January 26, 1993 must be accessible. First occupancy applies only if -

a. the last application for a building permit or permit extension for the facility is certified to be complete by a State, County, or local government after January 26, 1992 (or, in those jurisdictions where the government does not certify completion of applications, if the last application for a building permit or permit extension for the facility is received by the State, County, or lolcal government after January 26, 1992; and

b. the first certificate of occupancy for the facility is issued after January 26, 1992.

2. Alterations

a. Physical alterations which begin after January 26, 1992, must be accessible to maximum extent feasible.

b. Alterations that affect areas of primary function must ensure a path of travel to the altered area, the restrooms, telephones, and drinking fountains in that area.

c. Elevator exemption available for facilities that have less than 3 stories or less than 3,000 square feet per story, except with respect to shopping center or malls and the professional office of a health care provider, a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal.

e. Subpart E -Enforcement

1. Private Suits for preventive relief. Court may permit Attorney General to intervene.

2. Investigations and compliance reviews. Attorney General and Department of Justice have authority.

3. Suit by Attorney general - civil action if there is pattern or practice of discrimination or violation raises issue of general public importance.

4. Relief: Equitable, such as temporary, preliminary, or permanent injunctions; auxiliary aids or services; modification of policy, practice, or procedure, or use of alternative method; making facilities readily accessible. Civil Penalties ($50,000 top for first violation, $100,000 top for each succeeding one); Litigation Expenses - attorneys' fees, litigation expenses, and costs. Compensatory Damages (monetary) and other relief. No punitive damages.

5. Effective Dates Relating to Litigation - Except for civil action brought for violation of Section 303 of Act, no civil action shall be brought for violation of Section 302 of the Act that occurs before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1,000,000 or less and before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less.

III. Guidelines Issued by the Architectural and Transportation Barriers Compliance Board

A. Final Guidelines, "Americans with Disabilities Act Accessibility Guidelines (ADAAG) for Buildings and Facilities," 36 CFR Part 1191, 56 FR 35408, Part II, July 26, 1991, effective, July 26, 1991.

B. Final Guidelines, "Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles, 36 CFR Part 1192, 56 FR 45529, Part III, September 6, 1991, effective, September 6, 1991.

C. Amendment to Final Guidelines, "Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; Transportation Facilities, 36 CFR Part 1191, Part II, September 6, 1991, effective September 6, 1991.

D. Appendix A to 28 CFR Part 36, "ADA Accessibility Guidelines for Buildings and Facilities," 56 FR at 35605.

IV. Sex Discrimination

A. Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.)

1. Unlawful employment practices (Note: Apply to both women and men and to applicants as well as employees.)

a. Failure or refusal to hire or discharge, or discriminating in regard to compensation, terms, conditions, or privileges of employment on the basis of sex (in the case of women, discrimination on the basis of pregnancy, childbirth, or parenting also constitutes discrimination on the basis of sex, under the Pregnancy Discrimination Act of 1978, enacted as Section 701(k) of Title VII of the Civil Rights Act).

b. Limiting, segregating, or classifying employees in ways that deprive or tend to deprive them of employment opportunities or adversely affect his or her status.

c. Note: In the case of employment agencies, failure to refer or to classify on the basis of sex is prohibited. In the case of unions, exclusion from membership or expulsion; limitation, segregation, or classification of membership in any way that would adversely affect the person; or attempts to cause an employer to unlawfully discriminate on the basis of sex are unlawful practices.

2. Exemptions or exceptions

a. Sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the enterprise. (Note: Ultra-hazardous work environment no longer appears to be a defense. See International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Control, Inc., 59 USLW 4209 (1991).

b. A government security program applies to the employer, and the person does not have or is not eligible for a security clearance.

c. A business operating on or near an Indian Reservation gives preferential treatment to Indians. A white woman, for example, could not bring an action based on sex in a situation where only Indian men were selected for available positions or promoted.

d. Different compensation or conditions apply due to a bona fide seniority system, a merit system, a system of compensation in accordance with production, or different locations.

e. The differences stem from the results of a validated, job-related test.

3. Applicability

a. State and local governments

b. Federal government

c. Private enterprises

d. Unions, hiring halls, employment agencies, training programs

e. Note: Applies to all of the above that have 15 or more employees.

4. Relationship to State EEO Laws

a. Federal law does not preempt State law or local ordinances.

b. Federal law, however, provides enforcement procedures (1) where there is no State or local law and (2) where there is a State or local law.

5. Implementing Regulations - Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex," 29 CFR Part 1604.

6. Theories of Illegal Discrimination (apply to each basis of discrimination - gender, race, color, etc.)

a. Disparate Treatment: Treating an employee less favorably due to gender or other prohibited basis. The defense is that the action was taken for a non-discriminatory reason. To prevail, the plaintiff must show that the reason is pretextual or that the defendant had a discriminatory reason in addition to the non-discriminatory one.

b. Disparate Impact: Engaging in an employment practice that is facially neutral but which has a significant adverse impact on women or another protected group. The defense is that the action was taken due to business necessity. Prior to Wards Cove Packing Company, Inc. v. Atonio, 109 S. Ct. 2115 (1989), the defendant had the burden of showing that the practice was job-related and a business necessity. Through Wards, it became the burden of the plaintiff to persuade the Court that the defendant had no such business necessity and to show that plaintiff had provided alternatives to the practice that would not have the disparate impact.. The 1991 Civil Rights Act, Pub. L. No. 102-166, Nov. 21, 1991, 105 Stat. 1071, basically reinstated the pre-Wards Cove approach,

B. Fourteenth Amendment of the Constitution (Equal Protection Clause)

1. Applicability - Applies to both Federal and State organizations and individuals, including recipients of Federal financial assistance, who act "under color of state law." Covers both men and women.

2. Remedies - Ordinarily, injunctive relief. Civil Rights Act of 1871, reenacted as 42 U.S.C. Section 1983, however, affords equitable remedies, monetary damages (compensatory and punitive, but not against State agencies), and attorneys' fees for violations of Constitutional rights, including equal protection. Section 1983 reaches only persons acting "under color of state law." Includes action by State and local governmental agencies and officials and private institutions whose involvement with the State, such as licensing, could be classified as "state action." Does not reach purely private conduct. Does not reach Federal agencies, but does reach Federal officials in their individual capacity, when those officials are acting in conjunction with State officials or pursuant to State or local custom, law, or regulation. Covers sex discrimination.

3. See also: Civil Rights Act of 1871, reenacted as 42 U.S.C. Sections 1985 and 1986 (conspiracies to deprive of civil rights or of any other rights, privileges, or immunities secured by the Constitution.) Discrimination involving sex would require the involvement of some State or local governmental officials or some other form of State action.

V. Equal Pay Act of 1963, reenacted as Section 6(d) of the Fair Labor Standards Act of 1938, as amended in 1976 (29 U.S.C. Section 206(d).

A. Implementing Regulations - Equal Employment Opportunity Commission, 29 CFR Part 1620; Department of Labor, Recordkeeping Requirements, 29 CFR Part 516.

B. Coverage - sex-based discrimination in rates of pay, whether paid to men or women. Does not prohibit discrimination in other conditions of employment, such as hiring, firing, promotion, or transfer. Covers only those employees in an enterprise covered by the FLSA that are not exempt under the FLSA. Examples are "bona fide executive, administrative, or professional employees."

C. Defense - Difference in wages paid pursuant to a seniority system, merit system, or a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex. Jobs being compared do not require equal skill, effort, and responsibility and are not pereformed under similar working conditions.

D. Remedies - Injunctive relief, back pay, liquidated damages, punitive damages, attorneys' fees. Punitive seldom assessed. Liquidated damages may be denied by the court if the employer shows that it acted in "good faith" and had "reasonable grounds for believing" that no violation of the FLSA was occurring.

V. Sexual Harassment - Title VII of the Civil Rights Act

A. Illegal Conduct

1. Demands for sexual favors (both explicit and implicit) to avoid adverse employment decisions.

a. Subjective standard: Whether the complainant indicated that the advances were unwelcome and not whether the perpetrator intended them to be sexual harassment.

b. See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

2. Hostile Work Environment

a. Subjective standard: Whether a "reasonable woman" would perceive that an abusive working environment has been created.

b. See Ellison v. Brady, 924 F.2d 872 (9th Cir.,January 23, 1991); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M. D. Fla., January 18, 1991.)

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Doc. 6947b/Oct. 28, 1991, updated, August 1992

HIGHLIGHTS OF DBE CONCESSION REGULATION
49 CFR Part 23, Subpart F
57 FR 84, April 30, 1982

o APPLICABILITY: Applies to any sponsor that has received grant for airport development under Airport and Airway Improvement Act (AAIA), as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987 (AASCEA). (Section 109 of AASCEA amended Section 511(a) of AAIA, regarding concessions and DBE activity.)

o CONCESSION PLANS: Required from all primary airports (commercial service airports with more than 10,000 enplanements annually).

o GENERAL DBE REQUIREMENTS: See 49 CFR 23.93(a)(1), (2), and (3) - nondiscrimination by sponsor; necessary and reasonable steps to foster DBE participation; and inclusion of nondiscrimination requirement in concession agreements and subagreements. Applicable to both primary and nonprimary airports (latter include commercial service airports that are not primary airports, general aviation, or reliever airports).

o REQUIREMENTS FOR NONPRIMARY AIRPORTS: In addition to general requirements above, nonprimary (as defined above) must take appropriate outreach steps to encourage available DBE's to participate as concessionaires whenever opportunities arise.

o DEFINITION OF CONCESSION: A for-profit enterprise, located on an airport, subject to Subpart F, engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire/or the owner of a terminal, if other than the sponsor.

o EXCLUSION OF AERONAUTICAL SERVICES: "Concession" does not include aeronautical activies such as scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in normal passenger or freight carrying capacities; fixed base operators; flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

o OTHER EXCLUSIONS: Suppliers, flight kitchens, and inflight caterers servicing air carriers; other businesses servicing airlines through the provision of fuel, skycap services, baggage handling, etc.; government agencies; industrial plants; farm leases; individuals leasing hangar space; custodial and security contracts; individual taxis with permits; telephone, electricity, gas, and other utilities; and management contracts.

o TYPES OF AGREEMENTS: Concessions may be operated under leases, licenses, subleases, permits, contracts, and other instruments or arrangements. Nature of operation, rather than type of legal document, determines status of enterprise.

o SIZE STANDARDS: Except in case of car rental agencies, pay telephone cocnessions, and banks, standard for "small business concern" shall be average of preceding 3 years' annual gross receipts, not to exceed $30,000,000 (adjusted periodically for inflation). Pay telephone standard - not more than 1,500 employees. Bank standard - total assets of not more than $100,000,000. Car rental agency standard - average of preceding 3 years' annual gross receipts, not to exceed $40,000,000 (adjusted periodically for inflation).

o TEMPORARY GRANDFATHER CLAUSE: Firms certified as MBE's/WBE's/DBE's prior to June 1, 1992, effective date of this Subpart, that now exceed the size standards may continue to count toward the goals until the end of the current agreement, including the exercise of options, provided the firm remains otherwise eligible.

o CALCULATION OF GOALS: Goals shall be calculated on basis of gross receipts of all covered concessions, except where sponsor provides acceptable rationale for calculating as percentage of total number of concession agreements on airport during the goal period.

o EXCLUSION OF GROSS RECEIPTS NOT GENERATED BY CONCESSION ACTIVITY: Any portion of a firm's gross receipts that are not generated by the concession activity, are excluded from the calculation.

o CERTIFICATION PROCEDURES: CERTIFICATION PROCEDURES SET FORTH IN SECTION 23.51 of PART 23 apply, but on-site visits are not mandatory. May be performed to validate the certification information obtained from a DBE firm. See Section 23.95(f)(4).

o DBE SET-ASIDES: Where not prohibited by state or local law and determined by sponsor to be necesary to meet DBE goals, procedures to implement DBE set-asides shall be established.

o BUSINESS STRUCTURES NOT ELIGIBLE FOR DBE CERTIFICATION: Generally, arrangements that do not provide for ownership and control of a specified part of the business or a particular activity by the socially and economiclaly disadvantaged owners. Examples: Limited partnerships in which a non-DBE is the general partner.

o BUSINESS STRUCTURES ELIGIBLE FOR DBE CERTIFICATION: Sole proprietorships; corporations; partnerships, including joint ventures; and franchises or licenses that meet the certification standards in Section 23.95(g)(3) in regard to affiliation.

o DBE REQUIREMENTS IN BID SOLICITATIONS: Sponsors may impose requirements on competitors for concession agreements as a means of achieving DBE goals.

o DBE CONCESSION REQUIREMENTS FOR PRIVATE TERMINALS: Private owners of terminals stand in the shoes of the airport sponsor and are subject to the DBE concession requirements of this Subpart.

o LONG-TERM EXCLUSIVE LEASES: Holders of exclusive, long-term leases (more than 5 years), whether DBE or non-DBE, must arrange for DBE participation for the term of the lease. It no longer is necessary to apply to the Secretary for an exemption from the prohibition against such leases, but a DBE participation plan must be submitted to the responsibile FAA Civil Rights Officer for approval, and special local circumstances must exist that make it important to enter such an agreement.

COMPLIANCE PROCEDURES: Enforcement is through Section 519 of the AAIA, as amended, and any regulations issued pursuant thereto, and not through Subparts D and E of Part 23.

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Presidential Documents

Title 3—

The President

Executive Order 12836 of February 1, 1993

Revocation of Certain Executive Orders Concerning Federal Contracting

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to eliminate Executive orders that do not serve the public interest, it is hereby ordered as follows:

Section 1. Executive Order No. 12818 of October 23, 1992 (prohibiting the use of project agreements on Federal construction contracts), and Executive Order No. 12800 of April 13, 1992 (requiring Federal contractors to post a notice that workers are not required to join unions), are revoked.

Sec. 2. The heads of executive agencies shall promptly revoke any orders, rules, or regulations implementing Executive Order No. 12818 of October 23, 1992, or Executive Order No. 12800 of April 13, 1992, to the extent consistent with law.

William J. Clinton

THE WHITE HOUSE,
February 1, 1993.

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Filed 2-2-93; 11:29 am]
Billing code 3195-01-M

Editorial note: For a White House statement on these revocations of Federal contracting regulations, see issue 5 of the *Weekly Compilation of Presidential Documents*.

ATTACHMENT D

Presidential Documents

Executive Order 12818 of October 23, 1992

Open Bidding on Federal and Federally Funded Construction Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, in order to (1) promote and ensure open bidding on Federal and federally funded construction projects; (2) increase competition in Federal construction contracts and contracts under Federal grants or cooperative agreements; (3) reduce construction costs; (4) expand job opportunities, especially for small businesses; and (5) uphold the associational rights of workers freely to select, or refrain from selecting, bargaining representatives and to decide whether or not to be union members, so as to provide access to employment opportunities on Federal and federally funded construction projects for all workers; thereby promoting the economical and efficient administration and completion of Federal and federally funded construction projects, it is hereby ordered as follows:

Section 1. (a) To the extent permitted by law, before any executive agency may award any construction contract after the effective date of this order, or obligate funds pursuant to such contract, it shall ensure that neither the agency's bid specifications, project agreements, nor other controlling documents, nor those of any contractor or construction manager, shall:

(1) Require bidders, offerors, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(2) Otherwise discriminate against bidders, offerors, contractors or subcontractors for refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(3) Require any bidder, offeror, contractor or subcontractor to enter into, adhere to, or enforce any agreement that requires its employees, as a condition of employment, to:

(i) become members of or affiliated with a labor organization; or

(ii) pay dues or fees to a labor organization, over an employee's objection, in excess of the employee's share of labor organization costs relating to collective bargaining, contract administration, or grievance adjustment.

(b) No contractor, and no subcontractor under a Federal contract, shall require, as a condition of any subcontract relating to a Government construction contract, that the party with which it contracts impose or enforce any of the elements specified in section 1(a)(1)–(3) above in performing its subcontract. This section does not prohibit a contractor or subcontractor from voluntarily entering into an otherwise lawful agreement with a labor organization regarding its own employees.

(c) Contracts awarded before the effective date of this order, and subcontracts awarded pursuant to such contracts, whenever awarded, shall not be governed by this order.

Sec. 2. (a) The heads of executive agencies shall, within 30 days of the date of issuance of this order, review all statutes under their jurisdiction that provide authority to issue grants or enter into cooperative agreements for construction projects and identify any statute that provides authority to condition a grant

award or cooperative agreement on the recipient's or party's agreement that neither bid specifications, project agreements, nor other controlling documents pertaining to the grant or cooperative agreement contain any of the elements specified in section 1(a)(1)–(3), above.

(b) The heads of executive agencies shall exercise any authority identified pursuant to section 2(a), to the extent consistent with law, so as to preclude the grant recipient or party to a cooperative agreement from imposing any of the elements specified in section 1(a)(1)–(3) above in connection with any such grant or cooperative agreement, awarded or entered into after the date of such exercise.

Sec. 3. (a) In the event that a Federal contractor or construction manager does not perform in accordance with section 1 above, the executive agency shall take such action as may be appropriate, as determined by the agency, consistent with law or regulation, including, but not limited to, debarment, suspension, termination for default, or withholding of payments.

(b) In the event that a recipient of a Federal grant or party to a cooperative agreement does not perform in accordance with section 2(b) above, the executive agency that awarded the grant shall take such action, as determined by the agency, consistent with law or regulation, as may be appropriate.

Sec. 4. (a) The head of an executive agency may exempt a particular project, contract, subcontract, grant, or cooperative agreement from the requirements of any or all of the provisions of sections 1 and 2 of this order, if the agency head finds that special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security.

(b) A finding of "special circumstances" under section 4(a) may not be based on the possibility of, or an actual labor dispute concerning the use of:

(1) contractors or subcontractors who are nonsignatories to, or otherwise do not adhere to, agreements with one or more labor organizations, or

(2) employees on the project who are not members of or affiliated with a labor organization.

Sec. 5. (a) "Construction contract" as used in this order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) "Executive agency" as used in this order shall have the same meaning it has in 5 U.S.C. 105.

(c) "Labor organization" as used in this order shall have the same meaning it has in 42 U.S.C. 2000e(d).

Sec. 6. Within 30 days of the issuance of this order, the Federal Acquisition Regulatory Council shall take whatever action is required to amend the Federal Acquisition Regulation in order to implement the provisions of this order.

Sec. 7. This order is not intended to create any right or benefit, substantive or procedural, enforceable by a nonfederal party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 8. This order shall become effective 30 days after the date of this order.

George Bush

THE WHITE HOUSE,
October 23, 1992.

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