

Dated: January 22, 1980.

C. R. Thompson,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. 80-3643 Filed 2-1-80; 8:45 am]

BILLING CODE 4910-14-M

33 CFR Part 183

[CGD 76-082]

Ventilation Safety Standards for Recreational Boats

AGENCY: Coast Guard, DOT.

ACTION: Correction of final rule.

SUMMARY: In FR Doc. 79-38640 appearing at page 73025 in the Federal Register of December 17, 1979, paragraph 183.630(a) is corrected by deleting "a" after the word "having", and paragraph 183.630(a)(1) is corrected by adding "A" to precede the word "supply".

FOR FURTHER INFORMATION CONTACT: Mr. Lars E. Granholm, Office of Boating Safety (G-BBT), U.S. Coast Guard, Department of Transportation, Washington, D.C. 20593 (202/426-4027).

Dated: January 30, 1980.

B. E. Thompson,

Rear Admiral, U.S. Coast Guard, Chief, Office of Boating Safety.

[FR Doc. 80-3641 Filed 2-1-80; 8:45 am]

BILLING CODE 4910-14-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[FRL 1384-3]

Nevada Plan Revision: Air Quality Control Region Redesignation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: The Environmental Protection Agency takes final action to approve the redesignation of the Nevada portion (Clark County) of the Clark-Mohave Interstate Air Quality Control Region (AQCR) as an intrastate AQCR. On March 23, 1979, under section 107(e) of the Clean Air Act, as amended, the redesignation was submitted for EPA approval by the Governor of Nevada. The intended effect of this redesignation is to improve management of the air resources in southern Nevada and to be consistent with and in support of a redesignation action by the Governor of Arizona.

EFFECTIVE DATE: February 4, 1980.

FOR FURTHER INFORMATION CONTACT:

Louise P. Giersch, Director, Air and Hazardous Materials Division, Environmental Protection Agency, Region IX, 215 Fremont Street, San Francisco, Calif. 94105, Attn: Douglas Grano, (415) 556-2938.

SUPPLEMENTARY INFORMATION:

Background

Under section 107 of the Clean Air Act, as amended, the Clark-Mohave Interstate AQCR was designated by the Administrator. This AQCR is described in 40 CFR 81.80 as including all of Clark County, Nevada, and Mohave and Yuma Counties, Arizona.

The Governor of Arizona, in a letter dated January 26, 1979, requested that the AQCR's in Arizona be redesignated to conform to the boundaries of the Arizona Planning Districts. This request included the redesignation of the Clark-Mohave Interstate AQCR to an intrastate AQCR consisting of Mohave and Yuma Counties. With the exception of the Clark-Mohave Interstate AQCR, the EPA will address the Arizona redesignations in a separate Federal Register notice.

Clark County Redesignation

In a letter dated March 23, 1979, the Governor of Nevada requested the EPA's approval of his redesignation of the Nevada portion (Clark County) of the Clark-Mohave Interstate AQCR as an intrastate AQCR.

As stated by Governor List, the redesignation will further improve management of the air resources in southern Nevada. The Governor also states that the provisions of section 126 of the Clean Air Act are adequate to protect the citizens of each state from air pollution from new sources located in the other state. Thus the redesignation of Clark County as an intrastate AQCR is expected to have no adverse effect upon interstate air pollution within the present Clark-Mohave Interstate AQCR.

Effects of Redesignation

As a result of this redesignation, minor revisions are being made to the Code of Federal Regulations (CFR). In 40 CFR part 81, the name and description of the AQCR in § 81.80 are being revised, and a new AQCR is being added. In 40 CFR § 52.121 and § 52.1471 (Classification of regions), and in 40 CFR § 52.130 (Source surveillance) the name of the AQCR is being changed.

The EPA is approving this redesignation because it meets the requirements of section 107(e) of the Clean Air Act, as amended, which requires, in effect, that the redesignation be for purposes of improved air quality management. In addition, the Governor of Arizona has consented to the proposed redesignation, as required by section 107(e).

On June 22, 1979 (44 FR 36434) the EPA published a Notice of Proposed Rulemaking, proposing to redesignate Clark County as an intrastate AQCR and inviting public comments on that proposal. No comments were received.

The EPA has determined that this document is not a significant regulation and does not require preparation of a regulatory analysis under Executive Order 12044.

(Sections 107, 110 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7407, 7410, and 7601(a)))

Dated: January 29, 1980.

Douglas M. Costle,
Administrator.

Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Subpart D—Arizona

1. Section 52.121 is revised to read as follows:

§ 52.121 Classification of regions.

The Arizona plan is evaluated on the basis of the following classifications:

Air quality control region	Pollutant				
	Particulate matter	Sulfur oxides	Nitrogen dioxide	Carbon monoxide	Ozone
Arizona-New Mexico Southern Border Interstate....	IA	IA	III	III	III
Mohave-Yuma Intrastate	I	IA	III	I	I
Four Corners Interstate	IA	IA	III	III	III
Phoenix-Tucson Intrastate	I	I	III	I	I

2. Paragraphs (a) and (c)(1) of § 52.130 are revised to read as follows:

§ 52.130 Source surveillance.

(a) The requirements of § 51.19(a) of this chapter are not met since the plan does not contain legally enforceable procedures for requiring sources in Gila, Pinal, and Santa Cruz Counties in the Phoenix-Tucson Intrastate Region, in the Mohave-Yuma Intrastate Region, and in the Arizona portions of the Arizona-New Mexico Southern Border and Four Corners Interstate Regions to maintain records of and periodically report on the nature and amounts of emissions.

(c) *Regulation for source recordkeeping and reporting.* (1) The owner or operator of any stationary source in the counties of Gila, Pinal, or Santa Cruz in the Phoenix-Tucson Intrastate Region (§ 81.36 of this chapter); the Mohave-Yuma Intrastate Region (§ 81.268 of this chapter); or the Arizona portions of the Four Corners or Arizona-New Mexico Southern Border Interstate Regions (§§ 81.121 and 81.99 of this chapter) shall, upon notification from the Administrator, maintain records of the nature and amounts of emissions from such source or any other information as may be deemed necessary by the Administrator to determine whether such source is in compliance with applicable emission limitations or other control measures.

Subpart DD—Nevada

3. Section 52.1470, paragraph (c)(15) is added as follows:

§ 52.1470 Identification of plan.

(c) * * *

(15) Redesignation of the Clark-Mohave Interstate AQCR submitted on March 23, 1979, by the Governor.

4. Section 52.1471 is revised to read as follows:

§ 52.1471 Classification of regions.

The Nevada plan is evaluated on the basis of the following classifications:

Air quality control region	Pollutant				
	Particulate matter	Sulfur oxides	Nitrogen dioxide	Carbon monoxide	Ozone
Las Vegas Intrastate	I	IA	III	I	I
Northwest Nevada Intrastate	I	III	III	III	III
Nevada Intrastate	IA	IA	III	III	III

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

Subpart B—Designation of Air Quality Control Regions

5. Section 81.80 is revised to read as follows:

§ 81.80 Las Vegas Intrastate Air Quality Control Region.

The Las Vegas Intrastate Air Quality Control Region (Nevada) has been revised to consist of the territorial area encompassed by the boundaries of the following jurisdiction or described area (including the territorial area of all municipalities (as defined in section 302(f) of the Clean Air Act, 42 U.S.C. 7602(f)) geographically located within the outermost boundaries of the area so delimited):

In the State of Nevada: Clark County.

6. Section 81.268 is added as follows:

§ 81.268 Mohave-Yuma Intrastate Air Quality Control Region.

The Mohave-Yuma Intrastate Air Quality Control Region (Arizona) has been revised to consist of the territorial area encompassed by the boundaries of the following jurisdictions or described area (including the territorial area of all municipalities (as defined in section 302(f) of the Clean Air Act, 42 U.S.C. 7602 (f)) geographically located within the outermost boundaries of the area so delimited):

In the State of Arizona: Mohave County and Yuma County.

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

41 CFR Part 3-3

Noncompetitive Procurement

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: The Office of the Secretary, Department of Health, Education, and

Welfare is amending the departmental procurement regulations, 41 CFR Chapter 3, to add a new subpart concerning noncompetitive procurement. Coverage of noncompetitive procurement is presently located at § 3-3.802-50, and this section is being cancelled as a result of the establishment of the new Subpart 3-3.53, Noncompetitive Procurement. The regulation is being established as a subpart to emphasize the importance of the subject matter and to facilitate reference.

Changes to the existing regulation are being made in three areas. The first change concerns criteria, § 3-3.5303, where revisions have been made to clarify the term "sources sought synopsis" and to explain its use. The second change concerns review and approval, § 3-3.5306, where revisions have been made to accommodate a recent Federal Procurement Regulations amendment to § 1-3.101(d) which requires that noncompetitive procurements over \$10,000 be reviewed and approved by an official above the contracting officer level prior to negotiations. The third change concerns whole project buys, § 3-3.5308, where a definition and explanation of its use have been added to clarify the concept.

EFFECTIVE DATE: February 4, 1980.

FOR FURTHER INFORMATION CONTACT:

E. S. Lanham, Office of Procurement Policy, Office of Grants and Procurement, OASMB-OS, Department of Health, Education, and Welfare, Washington, D.C. 20201, 202-245-0481.

SUPPLEMENTARY INFORMATION: Since the noncompetitive procurement regulation was being restructured into the subpart format, some portions have been edited and rewritten for clarity and simplicity. However, the meaning and intent have not been altered from what is presently stated in § 3-3.802-50, except as indicated in the Summary.

It is the general policy of the Department to allow time for interested parties to participate in the rule making process. However, since the amendments are administrative in nature, the public rule making process is deemed unnecessary in this instance. The provisions of this amendment are issued under 5 U.S.C. 301; 40 U.S.C. 486(c).

Therefore, 41 CFR Chapter 3 is amended as set forth below.

Dated: January 28, 1980.

E. T. Rhodes,

Deputy Assistant Secretary for Grants and Procurement.

§ 3-3.802-50 [Deleted]

1. Under Subpart 3-3.8, Price Negotiation Policies and Techniques, of Part 3-3, Procurement by Negotiation, § 3-3.802-50, *Noncompetitive procurements*, is cancelled in its entirety.

2. Under Part 3-3, Procurement by Negotiation, Subpart 3-3.53, Noncompetitive Procurement, is established, and the table of contents for Part 3-3 is amended to add the following:

Subpart 3-3.53—Noncompetitive Procurement

Sec.

- 3-3.5300 Scope of subpart.
- 3-3.5301 Policy.
- 3-3.5302 Exceptions.
- 3-3.5303 Criteria.
- 3-3.5304 Procedures.
- 3-3.5305 Format for the Justification for Noncompetitive Procurement.
- 3-3.5306 Review and approval.
- 3-3.5307 Noncompetitive Review Board.
- 3-3.5308 Whole project buys.
- 3-3.5309 Implementation.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 3-3.53—Noncompetitive Procurement

§ 3-3.5300 Scope of subpart.

This subpart sets forth policies and procedures applicable to all noncompetitive procurements. It describes the criteria for use in determining whether a procurement may be made noncompetitively, describes the justification documents required, and prescribes review and approval requirements.

§ 3-3.5301 Policy.

(a) All negotiated procurements are to be conducted competitively, as required by §§ 1-1.301-1, 1-1.302-1(b), and 1-3.101(d), unless there are compelling and convincing reasons and/or circumstances which justify a noncompetitive procurement. When a proposed procurement appears to be noncompetitive, that is, only one source has been identified, the procuring activity is responsible for ensuring that competition is definitely not feasible, and that positive actions are taken to avoid the need for subsequent or continuing noncompetitive procurements. These actions should include an analysis of the reasons and/or circumstances leading to the determination of why the noncompetitive procurement has resulted, and what steps can be initiated

to preclude noncompetitive procurements in the future.

(b) A noncompetitive procurement may also result from the submission of an unsolicited proposal. In this circumstance, the responsible program office may recommend that a noncompetitive procurement be made to the submitting organization or individual to perform work or services. This recommendation must be in writing and prepared in the "Justification for Acceptance of Unsolicited Proposal" format, as required by § 3-4.910, setting forth the information required by §§ 1-4.909(d) and 1-4.910(b). The "Justification for Acceptance of Unsolicited Proposal" is used in place of the "Justification for Noncompetitive Procurement." Negotiations with a source that has submitted an acceptable unsolicited proposal shall not be initiated until approval is obtained in accordance with this subpart.

§ 3-3.5302 Exceptions.

The provisions of this subpart apply to all negotiated procurements except:

- (a) Procurements of \$500, or less (see § 3-3.603-50(a));
- (b) Procurements of professional services; e.g., for physician, veterinarian, dentist, or legal services negotiated under the authority of 41 U.S.C. 252(c)(4), or where the foregoing kinds of services are for \$10,000 or less and are negotiated under 41 U.S.C. 252(c)(3) (see § 3-3.603-50(b)(4));
- (c) Procurement of architect-engineer services (see §§ 1-4.10 and 3-4.10);
- (d) Procurements of utility services where the services are available from only one source; and
- (e) Acquisitions from or through other Federal Government agencies; e.g., interagency agreements, and contracts with the Small Business Administration pursuant to section 8(a) of the Small Business Act.

§ 3-3.5303 Criteria.

The criteria provided below are to be used in determining whether a proposed noncompetitive procurement is justifiable. The critical question to be answered in each justification is why the opportunity to meet a procurement requirement cannot be made available to more than one source. It is critical to the justification of a noncompetitive procurement that reasonable, informed opinions, which are supported by available facts, be provided. Each of the criteria is illustrative of possible reasons. The more facts that are offered and the more knowledgeable the opinions about the marketplace are, the greater is the support to conclude that a noncompetitive procurement is justified.

If the contracting officer or the approving official concludes that the support offered to justify a noncompetitive procurement is not convincing, or where there is some unresolved doubt, a sources sought synopsis should be issued to test the marketplace. (The term "sources sought synopsis," as used in this subpart, means the type of synopsis specified in § 1-1.1003-7(b)(7). When the requirement is for other than research and development, the notice in § 1-1.1003-7(b)(7) should be appropriately modified to describe the specific type of service or item to be procured. The sources sought synopsis does not permit potential sources to request solicitations and, therefore, is merely an opportunity for the marketplace to indicate its interest in submitting bids, offers, or quotations for a future procurement.) If there is only one source identified as a result of the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement. As each justification for noncompetitive procurement is reviewed against the following criteria, the reviewer should ask: why the procurement cannot be competed, are there sufficient grounds for excluding all other actual or potential offerors, what action can be taken to obtain competition in the instant procurement, and what action is needed to avoid the need for a subsequent or a continued noncompetitive procurement? Each applicable criterion cited below should be addressed in the justification, and specific rationale supporting each criterion must be provided.

(a) There is only one source in existence which can perform the contract requirements. The existence of one source for the purposes of this regulation should be a matter of fact, and not a matter dependent upon the relative and limited knowledge of sources known by the project or contracting officers. This criterion may not be used to justify a noncompetitive procurement prior to testing the marketplace by issuing a sources sought synopsis. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement.

(b) One source controls copyrights, patent rights, trade secrets, technical data, secret processes, or other proprietary data which are essential to the performance of the contract requirements; the source refuses to license or otherwise make the foregoing data available to other sources; and the

requirement cannot be revised to allow other sources to compete who do not have access to the foregoing data. Factual information should be provided to support the use of this criterion, such as the citation of copyrights, exactly what is covered by the copyright or other data which is necessary to the contract performance, and why the requirement cannot be revised to permit competition. The mere existence of the rights does not in and of itself justify noncompetitive procurement. It must be shown that the Government cannot meet its requirement(s) without the use of the proprietary data. Any doubts should be resolved by summarizing the procurement requirement and issuing a sources sought synopsis. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement. (Note: When this criterion is to be used, the contracting officer is required to obtain legal advice from OGC-BAL.)

(c) One source or individual has a truly unique idea, approach, or equipment which has no like or equal, and this represents the only known item which can meet the Government's needs. (Unsolicited proposals are excluded from the provisions of this paragraph and shall be processed in accordance with §§ 1-4.9 and 3-4.9.) Except in very rare cases, the fact that a proposer submits a proposal containing a unique idea or approach does not, in itself, justify noncompetitive procurement. Mere claims of uniqueness must not be cited in justifications to deviate from the competitive process. There may be other potential sources with equally suitable approaches or ideas which could accomplish the same end results. Except in cases which are convincingly supported by a panel opinion or a consensus of experts who are very familiar with the sources available in the marketplace, the opinion of uniqueness should be tested. The claim that the unique item is the only one which can meet the Government's needs should be based on the objective requirements of the Government, not the personal preferences of the originator. When a test of the claim of uniqueness is appropriate, the project officer should draft a description of the activity's requirement that does not compromise the unique idea or proprietary data of the proposer, and the procurement office shall issue a sources sought synopsis. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement.

(d) A specific item of equipment must be obtained as part of an activity's program responsibility to test and evaluate certain kinds and types of products. This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive procurements. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item or equipment required.

(e) Only one source has complex or specialized physical facilities and/or equipment which, by reason of exclusive use, access or ownership, or by reason of clear superiority to facilities and equipment available to other sources, is capable of adequately meeting the technical requirements of the proposed procurement. It must be shown that the success of the proposed procurement is critically dependent upon the use of the facilities and equipment of this one source. Specific details should be provided as to why the facilities and/or equipment are mandatory for the contract performance, and why the facilities and/or equipment of others cannot meet the contract requirements. This criterion should not be used to justify a noncompetitive procurement without first defining what equipment and/or facilities are needed, and by issuing a sources sought synopsis asking for sources with comparable equipment and/or facilities. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement.

(f) Government-owned facilities which are essential to the performance of the contract are available to only one source. Efforts should be made to determine from the cognizant Government agency whether the Government-owned facilities can be made available to more than one source. If this is not possible, then a noncompetitive procurement may be justified.

(g) Full and free competition is precluded because of geographic, socioeconomic, or epidemiologic considerations necessarily associated with the procurement. This criterion is intended to recognize certain limits to achieving full and free competition which sometimes follow from certain program legislation and special program requirements. This criterion may not be used in the absence of these established limits, and may be used only when it can be shown that there is only one source which can perform the particular procurement.

(h) The required services must be procured from a certain State, interstate, or local government unit, or from a non-profit organization comprised of officers or representatives of these governmental units, and the organization or unit is unique in its ability to meet the contract requirements. This criterion is intended to recognize that when dealing with governmental entities or their representatives, there are certain cases when only one entity is available to perform, and/or has a unique ability to accomplish, the work. This criterion should not be used to obtain supplies or services which are or can be provided from the commercial marketplace. Where there is more than one unit or organization which can meet the contract requirements, a noncompetitive procurement cannot be justified, unless a Federal or State statute dictates the source. The fact that the governmental units or other nonprofit organizations may offer a lower price or agree to cost share is not adequate reason to justify a noncompetitive procurement.

(i) Time is of the essence and only one known source can meet the Government's needs within the required time frame, and/or time will not permit the testing of a product offered by a source, other than a sole source, to meet the delivery schedule. However, the recognized extreme of public exigency in § 1-3.202 is not to be taken lightly. Public exigency, or other reasons causing situations where time is of the essence, may not be used to justify a noncompetitive procurement without first showing that a limited competition using abbreviated procedures is impossible. If a limited competition is impossible, it must be shown that the recommended contractor possesses the unique capability to perform the required work on time to the exclusion of all other firms. The considerable latitude of the contracting officer to determine the method best suited to satisfy the urgent need is limited by the need to try and achieve a limited competition, if at all possible, and, if not, to determine that the proposed contractor is uniquely able to meet the Government's requirements in time.

(j) There is existing equipment which, for reasons of compatibility and interchangeability, requires an item which is manufactured only by one source. This criterion is for use in procurements where a particular brand name item is required, and an "or equal" will not meet the Government's requirements. This criterion may not be used when there are other manufacturers available which may be able to produce acceptable items even

though their products might require some adjustments and modifications. These other manufacturers must be given the opportunity to compete.

(k) The segments of the project are so intertwined that it is impossible to successfully accomplish the project objectives if all segments are not procured from the same contractor (see § 3-3.5308). This criterion is intended for use under research and development procurements and the procurement of studies. It is only to be used when there is a necessity to procure the total package in order to successfully complete the project. This criterion cannot be used when segments of the project can be completed separately by different contractors. The possibility that additional work may be done more conveniently or even at less expense by the original contractor is not sufficient reason to justify a noncompetitive procurement.

§ 3-3.5304 Procedures.

(a) The program office should discuss prospective noncompetitive procurement requests with their supporting procuring activity as early as possible during the procurement planning stage (see § 3-3.50), preferably before submitting the requisition or request for contract. The discussions may resolve uncertainties, provide program offices with names of other sources, allow proper scheduling of the procurement, and avoid delays which might otherwise occur should it be determined that a noncompetitive procurement is not justified.

(b) When a program office desires to obtain certain goods or services by contract without competition, it shall, at the time of forwarding the request for contract, furnish the procuring activity a "Justification for Noncompetitive Procurement" prepared in accordance with this subpart. All justifications shall be submitted initially to the contracting officer.

(c) The contracting officer who receives a justification for processing shall ascertain whether the document is complete, shall request advice from pricing, audit, legal, and other staff offices as appropriate, and shall forward the justification, including his or her concurrence or non-concurrence, to the appropriate approving official. When the contracting officer does not concur with the justification, a written explanation setting forth the reasons must be provided the approving official. If the noncompetitive procurement is disapproved by the approving official, the contracting officer shall promptly notify the concerned program office.

(d) All required approvals shall be obtained prior to issuing a solicitation to, or commencement of contract negotiations with, the proposed contractor. Preliminary arrangements or agreements with the proposed contractor made by someone other than the contracting officer will have no effect or influence on the rationale to support a noncompetitive procurement.

(e) It is the responsibility of the approving official to determine whether a contract may properly be awarded without competition. The program office and project officer are responsible for furnishing the contracting officer and approving official with pertinent factual information and opinions necessary to make such determinations. Other staff offices shall advise the contracting officer and approving official as requested.

§ 3-3.5305 Format for the justification for noncompetitive procurement.

(a) The format for the justification for noncompetitive procurement in excess of \$10,000 will be a separate, self-contained document. Justifications for noncompetitive procurements of \$10,000 or less may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

(b) Justifications for noncompetitive procurement, whether over or under \$10,000, shall fully express what is to be procured and the reasons why the requirement should not be competed. Justifications must offer reasons which go beyond inconvenience and must explain why it is impossible to obtain competition. The justification will be documented only with information that is based on facts rather than untested and unsubstantiated conclusions or opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

(c) Justifications for noncompetitive procurements in excess of \$10,000 will be presented in two parts.

(1) Part I will contain background information about the program and a description of the procurement. The following information should be included:

- (i) Date.
- (ii) Agency, program office, and project officer (name, address, and telephone number).
- (iii) Project identification (Program legislation including citations or other internal program identification data such as title, contract number, etc.).
- (iv) Descriptive title of the project. (Attach a full description of the contract requirement. This may be a

specification, purchase description, or statement of work. If the procurement, as contemplated at the outset, is a "whole project buy" (see § 3-3.5308) and is expected to exceed \$100,000, a procurement plan, as required by § 3-3.50, shall be prepared by the project officer and attached to the justification. The description of the whole project buy must include what is being procured, the estimated cost of the whole and component parts, phases, options, continuations, etc., and the periods of time involved. The description is critical to the approving official's understanding of what he/she is being asked to approve, and for subsequent use by the procurement or project offices.)

(v) Explain whether the procurement is an entity in itself, whether it is one in a series, or part of a related group of procurements.

(vi) Proposed contractor (name and address).

(2) Part II will include the facts and reasons to justify a noncompetitive procurement.

(i) Part II will begin with the following statement:

I recommend that this procurement be non-competitively negotiated with (Name of proposed contractor)

in the amount of _____ for the following reasons:

(ii) Immediately following the preceding statement, each of the applicable criteria listed in § 3-3.5303 must be addressed, and specific support for each criterion's use must be included.

(iii) At the end of Part II, signatory lines should be provided as follows:

Recommended:
Project Officer _____
Date _____
Concur:
Project Officer's Immediate Supervisor _____
Date _____
Concur:
Contracting Officer _____
Date _____
Approved:
Approving Official _____
Date _____

§ 3-3.5306 Review and approval.

Justifications for noncompetitive procurements shall be processed for review and approval as follows:

(a) For small purchases over \$500, but not over \$10,000, the justification, which must address the applicable criteria in § 3-3.5303, may be in the form of a paragraph or paragraphs contained in the requisition or request for contract. The contracting officer is authorized to review and approve (or disapprove) the justification.

(b) For procurements over \$10,000, but not over \$99,999, the justification shall

be submitted to the contracting officer for review. The contracting officer will either concur or nonconcur, and forward the justification to the principal official responsible for procurement for approval. (When the contracting officer and principal official responsible for procurement are the same individual, the approval will be made by the Noncompetitive Review Board or by the principal POC, agency, or regional official responsible for administration (see (c), below)). The principal official responsible for procurement may redelegate justification approval for procurements between \$10,000 and \$25,000 to the chief of the procurement office, provided that individual is at least one level above the contracting officer who will sign the contract.

(c) All justifications for noncompetitive procurements \$100,000 or over shall be submitted through the contracting officer to the Noncompetitive Review Board (see § 3-3.5307) for approval, unless the POC head, agency head, or principal regional official has determined that the activity will not use a Noncompetitive Review Board. If the Board is not used, the justifications for \$100,000 and over shall be submitted through the contracting officer for approval by the principal POC, agency, or regional official responsible for administration. This process shall apply to all activities except the Public Health Service. In the case of the Public Health Service, its agencies, and subelements, all justifications for noncompetitive procurements \$100,000 and over shall be submitted to the contracting officer for review. For procurements ranging from \$100,000 to \$499,999, the contracting officer shall submit the justification through management channels to the "head of the agency" for approval. (This approval authority may be redelegated only to the deputy administrator, director, or commissioner.) For procurements of \$500,000 or more, the contracting officer shall submit the justification through management channels to the Assistant Secretary for Health for approval. (This approval authority may be redelegated only to the Deputy Assistant Secretary for Health Operations.)

(d) Each POC, agency, or regional office may prescribe Board reviews for noncompetitive procurements under \$100,000 if reduced levels of review would be more consistent with the dollar ranges of contracts awarded.

§ 3-3.5307 Noncompetitive Review Board.

(a) The Noncompetitive Review Board, referred to as the "Board", is responsible for comparing the reasons

given in justifications for noncompetitive procurements against the criteria cited in § 3-3.5303, and for making judgments as to the applicability of the policy requirements for competition to specific procurements. If it is determined by the POC head, agency head, or principal regional official to use a Board, the Board shall be established and maintained in compliance with this section.

(b) Boards shall be established by the POC head, agency head, or principal regional official and be directly responsible to that individual. The POC heads are responsible for establishing Boards as needed in their POCs and respective elements. The Assistant Secretary for Management and Budget is responsible for establishing a Board in the Office of the Secretary. The principal regional officials are responsible for establishing Boards in their regional offices. The number and geographical location of Boards will be decided by the POC heads based upon the volume of noncompetitive procurements to be reviewed and the need for timely decisions, provided that the composition of the Boards meet the requirements of the following paragraph.

(c) The POC head, agency head, or principal regional official, as appropriate, shall appoint the Board members. The Board shall be established and delegated the authority by the appointing official to represent and make decisions on behalf of the appointing official with respect to approving or disapproving certain justifications for noncompetitive procurements. The Board shall be comprised of five members, or their alternates, as specified below:

(1) *Chairperson.* There will be a permanent chairperson on the Board who shall be the principal official responsible for administration. The chairperson should represent the appointing official and be able to review actions submitted to the Board from an activity-wide point of view. The chairperson will designate which of the alternate members will attend individual Board meetings and will assure that the proceedings of each meeting are recorded.

(2) *Procurement official.* There will be a key procurement official appointed to the Board. This official will be the principal official responsible for procurement. Where the activity has more than one contracting office, the principal officials responsible for procurement of the respective contracting offices will be designated alternate members. In this case, a principal official responsible for procurement will serve on the Board to

review proposed noncompetitive procurements expected to be assigned to his/her office for procurement action. Whenever the principal official responsible for procurement and the contracting officer are the same individual, the official one administrative level above the principal official responsible for procurement shall represent the contracting office in the Board actions.

(3) *Program officials.* Two representatives will be selected from officials at the activity level which have responsibility for program policy or operations, program planning and evaluation, scientific affairs, research, etc., and/or from the program divisions of the activity that sponsor contract projects. The members should be selected on the basis of their knowledge of a program as a whole, but should not ordinarily be involved in the initiation and management of particular or single projects.

(4) *Contracting officer.* The contracting officer responsible for the procurement to which the justification for noncompetitive procurement relates shall serve as a nonvoting member. When Board meetings consider justifications for procurements involving more than one contracting officer, each contracting officer may attend and offer opinions on the justification pertinent to him/her.

As a further note, the project officer, that individual in the program office who originated the justification and who will be responsible for the project management of the contract project, cannot be a member or alternate on the Board. However, the project officer may be invited by the chairperson to the Board meeting during which the justification will be discussed. The project officer should be prepared to answer questions raised by the Board.

(d) Meetings of the Board shall be conducted as follows:

(1) If the estimated amount of the procurement is more than \$500,000, a formal meeting of the Board is required. If the estimated amount of the procurement is \$500,000 or less, a formal meeting of the Board need not be held if the chairperson, procurement official, and contracting officer concur that a noncompetitive procurement is justified. If any one of these three persons is of the opinion that a noncompetitive procurement is not justified, a formal meeting must be held. Formal meetings will include all appropriate members and will be convened by the chairperson. No action shall be considered by the Board unless the chairperson, procurement official, and two program officials are present.

Decisions of the Board will be by majority rule. In case of a tie vote, the action will be resolved in favor of seeking competition.

(2) The chairperson may seek independent counsel from any source inside or outside of the activity if he/she feels that additional advice is necessary for the Board to reach a sound decision.

(3) The Board shall maintain a written record of the justifications reviewed and the decision made on each. If a justification is approved, only Board approval need be indicated. If a justification is disapproved, the reasons should be stated in writing and forwarded to the originator of the justification. The written decision of the Board should be made a part of the contract file.

§ 3-3.5308 Whole project buys.

(a) "Whole project buy" is a term used to describe a procurement concept whereby a project consists of distinctly identifiable segments or phases which are so interdependent that they must be viewed as a total package and must be procured from a single contractor to ensure consistency and to meet the overall project objectives. This concept is only to be used when it is necessary to procure the whole project or total package from a single contractor in order to complete the project successfully; that is, the identifiable segments or phases cannot be separated and procured individually from other than the single contractor without jeopardizing the successful completion of the project. The whole project buy concept serves as an excellent management tool in that it provides the Board or approving official with detailed and interrelated aspects of the proposed procurement action of a complex project. It also serves to motivate program and procurement personnel to focus their attention on the various aspects of the project and to plan and prepare an indepth analysis encompassing the total project and its component parts. This should result in the development of a procurement plan which identifies all pertinent information concerning the segments or phases of a project, while providing a comprehensive overview of the total project.

(b) Any whole project buy which exceeds \$100,000 in the aggregate and which contemplates any noncompetitive procurement actions of any dollar value at any time during the project life shall be submitted to the Board or approving official for approval. This requirement applies even if the first of a series of related procurements in a whole project buy is less than \$100,000. It applies to

projects with several related procurement actions where the first part of the project is either competitively or noncompetitively awarded, and there are to be subsequent noncompetitive procurements with the original contractor. This requirement applies to all procurements regardless of whether the noncompetitive procurement is called a renewal, follow-on, continuation, extension, etc., is to be effected by means of a contract modification, or is a new start.

(c) Justifications of whole project buys submitted to the Board or approving official shall fully describe what the complete requirement is, how the requirement will be divided into procurement actions, the total estimated cost of the whole project and each individual procurement action, the total period of time for the whole project and each procurement action, and whether all or what parts of the whole project will be procured noncompetitively. For projects where an end point cannot be forecast with certainty, as in the case of basic research, the whole project buy will be the circumscribed amount of time which the program office presently intends to continue the effort.

(d) If the Board or approving official clearly approves the noncompetitive procurement action(s) at the outset of a whole project buy, and the whole project buy results in an original contract followed by either a noncompetitive new contract, or noncompetitive modification to the original contract for work, dollars, and time approved by the Board or approving official, these subsequent noncompetitive procurement actions will not have to be resubmitted for approval. However, whole project buys may not be approved in excess of three (3) years, and approval is limited to that explicitly contained in the justification. If a part of the whole project buy is not included in the justification or there are changes in the project which would amend the whole project buy as approved, the excluded part and/or changes will require a separate review and approval. If there are questions as to what was approved, the questionable material shall be submitted to the Board or approving official for clarification.

(e) Once a whole project buy has been approved at an appropriate level, any RFP issued for the procurement shall contain a notification to all potential offerors that the RFP is for the first phase of a whole project buy, the balance of which is projected to be awarded noncompetitively to the successful offeror. It shall also contain as complete a description as possible of

the project so that potential offerors may gain an understanding of the full scope of the project. Finally, the notification shall also state that the Government reserves the right to conduct competitive procurements for the subsequent phases if this becomes possible.

§ 3-3.5309 Implementation.

Each POC, agency, and regional office is responsible for implementing this regulation. Implementing instructions and subsequent changes shall be furnished to the Deputy Assistant Secretary for Grants and Procurement, OS, for review and approval prior to implementation.

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Office of Education

45 CFR Part 121a

Assistance to States for Education of Handicapped Children

AGENCY: Office of Education, HEW.

ACTION: Technical Amendment; Final rule.

SUMMARY: Two changes are made in the existing requirements for the annual report of children served:

(1) The date is changed on which State educational agencies count the number of children residing in the State who are receiving special education and related services. The "child count" is now a once a year requirement.

(2) Since these revisions make it possible for State educational agencies to finalize their count data two months earlier, this document also amends the due date for the report.

EFFECTIVE DATE: These regulations are expected to take effect 45 days after they are transmitted to the Congress. They are transmitted to the Congress several days before they are published in the *Federal Register*. The effective date is changed by statute if Congress disapproves the regulations or takes certain adjournments. If you want to know the effective date of these regulations, call or write the Officer of Education contact person.

FOR FURTHER INFORMATION CONTACT: Mr. William D. Tyrrell, U.S. Office of Education, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Avenue SW. (Room 4920, Donohoe Building), Washington, D.C. 20202. Telephone: (202) 245-9405.

SUPPLEMENTARY INFORMATION: The proposed rules for the child count