(2) In any proceeding where it is determined that another expert in the field cannot practically be obtained; that it is impracticable for the facts or opinions on the same subject to be obtained by other means, and that the former Board employee's testimony is required in the interest of justice.

§ 360.30 Administrative enforcement proceedings.

(a) *Delegation of authority.* The Board Members may delegate their authority under this Subpart.

(b) *Notification of possible violation.* On receipt of information regarding a possible violation of section 207 of Title 18, United States Code, and after determining that such information appears substantiated, the Board Members shall expeditiously provide such information, along with any comments or agency regulations to the Director, Office of Government Ethics, and to the Criminal Division, Department of Justice. The Board should coordinate any investigation on administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the Board that it does not intend to initiate criminal prosecution.

(c) *Notice of disciplinary proceeding and right to hearing.* Whenever the Board has determined after appropriate review that there is reasonable cause to believe that a former Board employee has violated any of the regulations regarding post-employment conflict of interest, it may initiate an administrative disciplinary proceeding by providing the former Board employee with adequate notice of an intention to institute a proceeding and an opportunity for a hearing. The notice to the former Board employee shall include:

(1) A statement of allegations, and the basis thereof, sufficiently detailed to enable the former Board employee to prepare an adequate defense;

(2) Notification of the right to a hearing; and

(3) An explanation of the method by which a hearing may be requested.

(d) *Presiding official.* The presiding officials at the hearing shall be the Board Members or a qualified individual to whom the Board Members have delegated authority to make an initial decision.

(e) *Time, date and place.* The hearing shall be conducted at a reasonable time, date, and place. In setting a hearing date the presiding official shall give due regard to the former Board employee's need for:

(1) Adequate time to prepare a defense properly; and

(2) An expeditious resolution of allegations that may be damaging to his or her reputation.

(f) *Hearing rights.* At a hearing the former employee shall, at a minimum, have the following rights:

(1) To represent oneself or to be represented by counsel,

(2) To introduce and examine witnesses and to submit physical evidence,

(3) To confront and cross-examine adverse witnesses,

(4) To present oral argument, and

(5) To receive a transcript or recording of the proceedings, on request.

(g) *Burden of proof.* In this hearing, the Board has the burden of proof and must establish substantial evidence of a violation.

(h) *Hearing decision.* The presiding official shall make a determination exclusively on matters of record in the proceeding, and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue. Within 15 days of the date of an initial decision, either party may appeal the decision to the Board Members. The Board Members shall base their decision on such appeal solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues. If the Board Members modify or reverse the initial decision, they shall specify such findings of fact and conclusions of law as are different from those of the presiding official.

(i) *Penalty for violation.* The Board Members may take appropriate action under 5 CFR 737.27 in the case of any individual who was found in violation of the regulations on post-employment conflict of interest after a final administrative decision or who failed to request a hearing after receiving adequate notice, by:

(1) Prohibiting the individual from making, on behalf of any other person except the United States, any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on any matter of business for a period not to exceed five years, which may be accomplished by directing agency employees to refuse to participate in any such appearance or to accept any such communication; or

(2) Taking other appropriate disciplinary action.

(j) *Judicial review.* Any person found to have violated the regulations on post-employment conflict of interest may seek judicial review of the administrative determination.

By Authority of the Board.

Dated: November 21, 1986.

For the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 86-27217 Filed 12-3-86; 8:45 am]

BILLING CODE 7905-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 176

[Docket No. 86F-0085]

Indirect Food Additives; Paper and Paperboard Components

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of *N*-methyl-2-pyrrolidone as a solvent for slimicides intended for use in the manufacture of paper and paperboard that contact food. This action responds to a petition filed by GAF Corp.

DATES: Effective December 4, 1986; objections by January 5, 1987.

ADDRESS: Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Julius Smith, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5690.

SUPPLEMENTARY INFORMATION: In a notice published in the Federal Register of March 27, 1986 (51 FR 10571), FDA announced that a petition (FAP 5B3896) had been filed by GAF Corp., 1361 Alps Rd., Wayne, NJ 07470, proposing that § 176.300 *Slimicides* (21 CFR 176.300) be amended to provide for the safe use of *N*-methylpyrrolidone as a solvent for slimicides intended for use in the manufacture of paper and paperboard that contact food.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed use is safe, and that the regulations should be amended as set forth below. In regulating this additive, FDA is denominating it as "*N*-methyl-2-pyrrolidone" because this name is more descriptive than that contained in the notice of filing.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition (address above) by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. Under FDA's regulations implementing the National Environmental Policy Act (21 CFR Part 25), an action of this type would require an abbreviated environmental assessment under 21 CFR 25.31a(b)(1).

Any person who will be adversely affected by this regulation may at any time on or before January 5, 1987, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 176

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, Part 176 is amended as follows:

PART 176—INDIRECT FOOD ADDITIVES: PAPER AND PAPERBOARD COMPONENTS

1. The authority citation for 21 CFR Part 176 continues to read as follows:

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. In § 176.300(d) by alphabetically inserting a new item to read as follows:

§ 176.300 Slimicides.

* * * * *

(d) * * *

* * * * *

N-methyl-2-pyrrolidone (CAS Reg. No. 872–50–4).

* * * * *

Dated: November 20, 1986.

Richard J. Ronk,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 86–27215 Filed 12–3–86; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 905

[Docket No. R-86-1122; FR-1808]

Indian Preference

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule establishes comprehensive new requirements governing the methods to be used in providing Indian preference in contracting, employment, and training in the HUD-assisted Indian housing program. It will provide additional guidance to the affected public, to Indian Housing Authorities, and to HUD administrators concerning departmental policy and the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

EFFECTIVE DATE: March 15, 1987.

FOR FURTHER INFORMATION CONTACT: John V. Meyers, Office of Indian Housing, Room 4232, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410, (202) 755–1015. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On January 7, 1986, HUD published a proposed rule which would (1) consolidate the methods of providing Indian preference in contracting and subcontracting, rather than having one system for contracts and another for subcontracts; (2) provide for varying levels of price differential on invitation-for-bid (IFB) contracts, according to the size of the contract in question (to be used when the bid solicitation is not limited to Indian enterprises and organizations); (3) provide a choice of contracting methods that can be used, at the IHA's discretion (IFB or RFP (Request for Proposal) method); (4) increase competition in the award of contracts, including contracts where the bidding is restricted to Indian organizations and enterprises; and (5) provide a procedure for reviewing complaints concerning the implementation of the methods of Indian preference specified in the rule or concerning alternate methods approved by HUD.

The Department received 24 public comments on the rule. Seven of the comments came from Indian-owned architectural and engineering firms; three from lawyers who represented Indian tribes or Indian organizations; three from Indian Housing Authorities (IHAs); five from Indian tribes; four from tribal employment rights organizations; one from an association of IHAs; and one from an Indian contractors' association. Most of the commenters favored the proposed rule; however, commenters representing Indian-owned architectural and engineering firms, and some of the other commenters strongly suggested that the Request for Proposal method of selecting contractors be altered to exclude non-Indian firms from participating. These and other major public comments are summarized below, followed in each instance by the Department's response.

Section 905.106 Preferences, opportunities, and nondiscrimination in employment and contracting.

One of the goals of HUD's revised rules on Indian preference is to give more tangible meaning to the statutory direction contained in section 7(b) of the Indian Self-Determination and Education Act to the effect that preference will be given to Indians (in training, employment and contracting opportunities) "to the greatest extent feasible."

A commenter stated that the term "greatest extent feasible" is confusing. The courts have construed "greatest extent feasible" to mean "every possible effort"; however, the proposed rule does not make "every possible effort" to provide for Indian preference but, in fact, makes every possible effort to destroy Indian preference in HUD.

Although a definition of "greatest extent feasible" has not been included in the rule, the Department has set forth several methods for implementing and achieving what it believes to be the statutorily intended degree of preference. A one-time, all-purpose definition of such a term is, we believe, unavailing if not impossible. This rulemaking strives to describe, in the context of a particular activity (e.g., bidding on government-assisted contracts), what level of preference must be afforded to meet the broad statutory language.

Section 905.204(a) Indian preference (General).

A number of comments addressed various aspects of the proposed rule's general discussion of the elements of preference policy addressed to Indians, as expressed in the preamble and in § 905.204.

1. A definition of "tribal governing body" is needed in the proposed § 905.204(a)(1)(i). In Alaska, certain nonprofit Native associations which do not qualify as Indian tribes under the Alaska Native Claims Settlement Act, were given the power pursuant to Alaskan statutes to start Indian housing authorities (IHAs). Since these Native associations do not possess the sovereign powers of Indian tribes, their control over Native housing authorities in Alaska is limited by statute.

Also, the proposed § 905.204(a)(1)(i) stated that when a tribal governing body enacts an approved alternate method of providing Indian preference within its jurisdiction, the IHA under that jurisdiction shall implement the alternate method in lieu of the method specified in this section. If Native associations in Alaska qualify as "tribal governing bodies" under the proposed rule, which is unclear because there is no definition, then the IHAs will be placed in very different situations.

The Department has determined that a definition of "tribal governing body" would be helpful in clarifying which tribal entities are eligible to submit alternative methods of preference. For the purposes of this rule, the term "tribal governing body" shall mean:

The governing body of a tribe as defined in § 905.106(a)(1) of this Part which exercises powers of self-government and is Federally recognized.

This definition resolves the concern that village corporations without powers of self-government may otherwise submit alternative methods of Indian Preference. In addition, the term "local governing body" at § 905.204(f)(4) of the proposed rule has been deleted and replaced with a reference to "tribal governing body", for consistency.

2. A commenter stated that Indian preference has nothing to do with cost containment.

HUD's proposed rule made a reference to "cost containment" in discussing HUD decision making regarding the formulation of these preference policies—particularly in reference to dollar preferences added under the rule to Indian bidders.

The statute requires preference "to the greatest extent feasible." The Department believes that several factors must be considered in determining the feasibility of an offered form of preference including, but not limited to, economic considerations (such as cost containment). If economic considerations could not be taken into account in association with a process like bidding on government-assisted contracts, the result would be that HUD or other agencies providing financial assistance to Indians would have no effective means of controlling spending—a result we do not believe the Indian preference legislation could possibly have intended.

3. A commenter stated that since the majority of the tribes have established tribal employment rights offices which enforce Indian preference requirements, IHA's should be required to include these requirements in the bid specifications.

It is a contractual responsibility of an IHA that receives Federal housing funds to implement and enforce the Indian preference requirements applicable to the development or operation of projects subject to Part 905. If local Indian preference requirements exist and they do not conflict with the requirements in this Part, IHAs are encouraged to reference or cite those requirements for the benefit of bidders or to advise the bidders to contact the tribal governing body for any other applicable preference requirements.

This rule leaves latitude to a tribe to carry out (and to require the IHA to carry out) local preference policies that are consistent with the requirements of the regulations.

4. Three commenters suggested that Indian tribes should be allowed to give preference to their members.

Preference for tribal members alone, in HUD's view, unreasonably restricts competition and economic opportunity for all Indians within the same geographic area. However, tribal members may receive a degree of preference through the application of a local preference for all *residents*, without violating this rule.

5. Since little or no new Indian housing is being funded by HUD, there is no reason to revise 24 CFR Part 905, according to a commenter.

Provision of Indian preference is a statutory requirement. It affects all funded activities related to the Indian Housing Program. The requirement is not affected by whether there is funding for new units in any one year.

6. The present 24 CFR Part 905 provides for Indian preference so long as higher cost or greater risk of nonperformance does not result. The final rule should contain a similar provision.

The Department, generally, agrees with the commenter. Since cost is already a factor in evaluating alternate methods submitted by a tribal government, the rule at § 905.204(a)(1)(i) has been revised also to consider as a factor any assessment of greater risk of non-performance.

7. RFPs should be awarded on an "Indian-only" basis because (1) the RFP competition, unlike IFB competition, is not based on price but on quality; (2) there is no evidence that the Indian architectural and engineering firms are not providing services to the IHAs; and (3) the point system under the proposed RFP method would be susceptible to abuse by the IHAs. Open competition with a point system should be permitted only when an IHA has persuaded the HUD field office that there will be insufficient competition if bidding is limited to Indian-owned firms.

The Department has considered comments favoring preference on an "Indian-only" basis and has also considered comments emphasizing self-determination. As a result, the rule provides various options for providing Indian preference to the greatest extent feasible, yet allows for flexibility in permitting self-determination in how a preference is to be provided. The point system set out for RFPs provides for IHA discretion and although the system might conceivably be abused, the rule attempts to provide safeguards against abuse, as well as providing for a complaint processing mechanism.

Section 905.204(b) Eligibility.

Comments on proposed § 905.204(b) focused on contract awards during the pendency of complaints, and on procedural issues associated with determinations of eligibility of individuals and contracts for Indian status:

1. A commenter suggested that the award of a contract or the filling of a position for employment or training should be withheld pending the resolution of a complaint filed by an unsuccessful bidder or applicant.

Normally, the award of a contract or the filling of a position for employment or training should not be held up because of questions or problems that arise during the application procedures. However, a contract award may be withheld, or an employment or training position not filled pending resolution of a complaint, if the IHA determines that a serious violation of HUD Indian preference rules or a tribe's alternate method may have occurred.

2. A commenter proposed that, for an applicant seeking a job or training, the proposed regulation put all the burden on the local authority—and not on the Tribal government, "where it should rightly be."

The burden of determining eligibility for Indian preference under Part 905 ultimately rests with the IHA. It is not the responsibility of the tribe. On the other hand, the responsibility for providing sufficient evidence of eligibility for preference to the IHA is upon the individual or entity seeking the preference.

3. To eliminate "fronts," a revision to the rule was proposed by a commenter to: (1) Require that proof of Indian eligibility be submitted no less that 15 days before bid opening and (2) include language to the effect that in any Indian or non-Indian jointly owned corporation or joint venture in which the non-Indian party is larger and more experienced than the Indian party, the burden should fall on the entity to demonstrate that the Indian party is in fact the actual majority owner and is in fact in control of the entity. If the entity fails to meet this burden, it must be disqualified.

The final rule has been revised to allow an IHA to state in its solicitation that bidders must submit evidence of eligibility within a specified time period before the scheduled bid opening. The time period may differ for the evaluation of applicants for eligibility, depending upon the type of solicitation and the number of anticipated bidders and the complexity of the review.

Section 905.204(c) Indian preference in the award of contracts and subcontracts.

1. A commenter suggested that the proposed rule be revised by adding language (a) allowing an Indian subcontractor to match the lowest bid submitted by a non-Indian firm and (b) requiring the IHA to demand validation of any subcontract amount which is artificially low and appears designed to circumvent the Indian subcontract preference requirements.

The Department does not support allowing an Indian subcontractor to match the lowest bid submitted by a non-Indian firm. Among other reasons, the Indian subcontractor may not be capable of completing the work at the lower bid, and non-Indian bidders would be discouraged from bidding on any such projects, given the "second bite" that the commenter's suggested procedure would provide to rival Indian contractors. The suggested procedure might also encourage Indian contractors to make bad faith, higher-than-necessary "first round" bids, on the theory that they have nothing to lose.

On the commenter's second point, HUD believes validation of "artificially low" bids is not necessary, since the contractor is obligated to complete the work at the contract price.

2. A commenter urged that an important consideration in the selection of an Indian-owned architectural and engineering firm should be the extent that the firm and its consultant firms provide employment and training for Indian people. A structured point system and a consistent presentation format for the consideration of this employment and training should be established by HUD, to be used by IHAs in evaluating of Indian-owned architectural and engineering candidates.

Section 905.204(e)(2)(ii) of the final rule provides for the award of points by the IHA in evaluating proposals from Indian-owned and non-Indian-owned architectural and engineering firms (among other RFP contractors) based on their plans to employ and train Indians.

3. The point system under the RFP provides no protection against abuse, according to several commenters. The IHA could first decide which firm it wants and then distribute the points in whatever way is necessary to ensure that the chosen non-Indian firm wins.

The rule attempts to curb potential abuse in the award of contracts. RFPs are subject to HUD field office review before publication, and the award of a contract by an IHA is also subject to HUD approval. However, in cases where abuse is evident, bidders may file under the complaint procedures. The Department does not believe it is practicable to provide all-purpose bidding procedures. The purpose of the rule is to set out a mechanism under which the Indian preference statute can be carried out, not to preempt tribal and IHA autonomy.

4. A commenter stated that a bidding process that allows any Indian contractor to charge more than a non-Indian contractor is wrong.

HUD disagrees with the commenter. Providing preference through a price differential is acceptable under section 7(b) of the Indian Self-Determination and Education Assistance Act. The controlling factor is that any bid must meet HUD cost-control standards developed under the United States Housing Act of 1937 and other controlling authorities.

5. According to a commenter, the mathematical formula (24 CFR 905.204(c)) to be used by an IHA in the award of contracts and subcontracts under the Invitation for Bid (IFB) method would be unworkable because it was too complicated for some IHAs, tribes and contractors.

The Department does not believe that the percentage differential method is too complicated to implement. In fact, when applied to a single contract on which bids are advertised, management of the § 905.204(c) formula is quite simple and direct.

6. According to a commenter, the § 905.204(c) requirement that two or more bids or proposals must be received in a closed contracting procedure would be unworkable because (1) there is no requirement for two bids in customary bidding procedures and practices; (2) most contractors will not participate in such a procedure if they believe their bid or proposal will be defeated because it was the only one submitted.

The Department believes that a policy of requiring two or more bids is a fair procedure in a normal bidding process and that such a policy encourages competition. One bid is not desirable but in some cases is realistic. For that reason, the final rule permits—subject to HUD field office approval—acceptance of one bid in unusual situations when a job cannot attract two or more bids.

7. A commenter argued that the Request for Proposal sections of the proposed rule would violate the ruling in *Alaska Chapter, Associate General Contractors of America* v. *Pierce* (694 F 2nd 1162), which stated that non-Indian firms have no grounds for receiving equal protection in applying for Federal contracts which benefit Indians.

The Department does not agree that the RFP section of the proposed rule violates the ruling in the *Alaska Chapter* case. To the contrary, this section contains a preference for Indian contractors which is similar to the preference upheld by the court in the *Alaska Chapter* case on the basis that it does not violate the equal protection clause.

Section 905.204(d) Preference by an IHA in contracting, employment, and training.

1. A commenter stated that § 905.204(d) is unacceptable because it permits an IHA to waive Indian preference in contracting simply by documenting its findings and putting those findings in a file. A waiver should require the prior approval of the HUD field office and the tribe.

The section, as proposed, did not authorize an IHA to "waive" Indian preference; however, it did give an IHA discretion to determine that providing preference is not feasible. The HUD Headquarters Office of Indian Housing will track IHA implementation of the Indian preference requirements (*i.e.*, number of contracts, subcontracts and proposals awarded to Indian owned firms, the number of Indians hired by contractors, subcontractors and IHAs) through computer system analysis, and with monitoring visits as feasible.

Section 905.204(e) Preference by contractors and subcontractors in employment and training of Indians.

1. A commenter recommended that the definition of "core crew" be revised as follows: "A member of a contractor's or subcontractor's crew who is a regular, permanent (40 hour a week) employee and is in a supervisory or other key position such that the employee would face serious financial loss if that position were filled by a person who had not previously worked for the contractor or subcontractor."

The Department does not support a more restrictive definition of "core crew" than that proposed. The definition of "core crew" set out in the proposed rule is retained.

Section 905.204(f) Other preference requirements.

1. Several commenters questioned the proposed rule's impact on the independent authority of Indian tribal governments to make their own preference requirements.

This rule governs the provision of Indian preference in Indian housing projects developed by IHAs under Part 905. It is the intent of the rule to ensure that preference requirements—whether provided under the methods outlined in this rule or under a tribal method permitted by HUD to be adopted for use by a particular IHA—satisfy the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act. It is not the intent or desire of the Department to rule upon, confirm, or endorse the authority of a tribal government to create laws under its powers of self-government.

2. The requirement that HUD Indian preference regulations shall apply whenever more than half of the financial assistance for the development or operation of a project is from HUD may, as a practical matter, mean that the non-HUD funding is lost, according to a commenter. Adoption of a waiver provision where such a result appeared likely may permit individual projects to be saved.

In response to this concern, the final rule has been revised to state that if both HUD funds and non-Federal funds are used for a project, the work related to the funds shall be separated so that HUD Indian preference regulations are limited to work financed by HUD. If the funds cannot be separated, then HUD's Indian preference regulations will apply to the total project. However, such situations shall be reviewed on a case-by-case basis to determine the best method for providing preference to the greatest extent possible.

Section 905.204(g) Complaint procedure.

1. Several commenters stated that there should be a specific time period within which a complainant must file his or her complaint with the Indian Field Office of HUD.

This section has been revised to state that a complainant has six months from the date of the alleged adverse action of the IHA (e.g., denial of contract or proposal; denial of employment or training position) to file a complaint with the appropriate Indian Field Office of HUD.

Other Matters

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB control number 2577-0076.

This final rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The number of small entities impacted by the rule is not expected to be substantial. Approximately one hundred general construction contracts, large and small, are executed under the Department's Indian housing program each year.

This rule was listed as Sequence Number 964 in the Department's Semiannual Agenda of Regulations published on October 27, 1986 (51 FR 38424, 38468) under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 905

Grant programs: Housing and community development, Loan programs: Housing and community development, Low and moderate income housing, Public housing, Homeownership.

Accordingly, the Department amends 24 CFR Part 905 as follows:

PART 905—[AMENDED]

1. The authority citation for 24 CFR Part 905 is revised to read as set forth below, and any authority citation following any section in Part 905 is removed.

Authority: Secs. 3, 4, 5, 6, 9, 11, 12, and 16, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437b, 1437c, 1437d, 1437g, 1437i, 1437j, and 1437n); sec. 7(b), Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)); sec. 7(d), Department of

Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. In 24 CFR 905.106, paragraph (a) is revised to read as follows:

§ 905.106 Preferences, opportunities, and nondiscrimination in employment and contracting.

(a) *Indian Self-Determination and Education Assistance (preference for Indians).* HUD has determined that Projects under this part are subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). The language of this paragraph (a) must be included in all contracts executed by the IHA and in all subcontracts arising out of contracts executed by the IHA. Section 7(b) requires that any contract or subcontract entered into for the benefit of Indians shall require that, to the greatest extent feasible—

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or subcontracts be given to "Indians". That Act defines "Indians" to mean persons who are members of an Indian tribe, and defines "Indian tribe" to mean any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(2) Preference in the award of contracts, or subcontracts in connection with the administration of contracts be given to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452). The Indian Financing Act of 1974 defines: "economic enterprise" to mean any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that the Indian ownership must constitute not less than 51 percent of the enterprise; "Indian organization" to mean the governing body of any Indian tribe or entity established or recognized by such governing body; "Indian" to mean any person who is a member of any tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs and any "Native" as defined in the Alaska Native Claims Settlement Act; and Indian "tribe" to mean any Indian tribe, band, group, pueblo, or community including Native villages and Native groups (including corporations organized by Kenai, Jeneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs.

* * * * *

3. Section 905.204 is revised to read as follows:

§ 905.204 Indian preference.

(a) *General.* (1)(i) This section outlines specific methods an IHA must follow to provide, to the greatest extent feasible, preference to Indian organizations and Indian-owned economic enterprises in contracting and subcontracting, and to Indians in employment and training. If, however, a tribal governing body enacts an alternate method of providing Indian preference within its jurisdiction and the Assistant Secretary for Public and Indian Housing approves the alternate method as meeting the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act for use in the HUD-assisted Indian housing program, the IHA under that jurisdiction must implement the alternate method in lieu of the methods specified in this section. (For purposes of this section, "tribal governing body" means the governing body of an Indian tribe, as defined in § 905.106(a)(1) which exercises powers of self-government and is Federally recognized.) Alternate methods that provide for local tribal preference will not be approved. HUD will, however, consider for approval alternate methods that provide for local resident Indian preference, so long as application of the local preference does not exclude Indian organizations, enterprises, or individuals who are not residing within the Indian governing body's jurisdiction. HUD's review of alternate methods of providing preference will include the extent to which the proposed method minimizes the risk of nonperformance, promotes competition, assures cost containment, reduces administrative burdens and furthers local priorities and objectives while providing effective Indian preference.

(ii) This section also contains, in paragraph (g), review procedures for complaints alleging the inadequate or inappropriate provision of Indian preference. (These complaint procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this section, including alternate methods enacted and approved in the manner described in paragraph (a)(1)(i) of this section.)

(iii) The amendments to § 905.106(a) and § 905.204 published on (insert date of publication) shall only apply to bids and proposals which are advertised after March 15, 1987.

(b) *Eligibility.* (1) An applicant seeking to qualify for preference in contracting and subcontracting shall submit proof of Indian ownership to the IHA or contractor. Proof of Indian ownership shall include, but shall not be limited to:

(i) Certification by a tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. IHAs shall accept the certification of a tribe that an individual is a member.

(ii) Evidence such as stock ownership, structure, management, control, financing and salary or profit sharing arrangements of the enterprise.

(2) An applicant seeking to qualify for preference in employment and training shall submit, to the IHA or contractor, certification by a tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. IHAs and contractors shall accept the certification of a tribe that an individual is a member.

(3) An applicant seeking a contract or a subcontract shall submit evidence sufficient to demonstrate to the satisfaction of the IHA or the contractor, as appropriate, that the applicant has the technical, administrative, and financial capability to perform contract work of the size and type involved, and within the time provided, under the proposed contract (*see* also § 905.211). An applicant seeking employment and training shall submit evidence sufficient to demonstrate to the satisfaction of the IHA or the contractor, as appropriate, that the applicant possesses the qualifications required for employment or training.

(4) An IHA may state in its solicitation that bidders must submit evidence of eligibility within a specified time period before a scheduled bid opening.

(5) If an IHA or contractor determines that an applicant is ineligible for Indian preference, the IHA or contractor shall so notify the applicant in writing before the award of the contract or before filling the position or providing the training sought by the applicant.

(c) *Indian preference in the award of contracts and subcontracts.* (1) Preference in the award of contracts and subcontracts that are let under an Invitation for Bids (IFB) process (e.g., conventional bid construction contracts, material supply contracts) shall be provided as follows:

(i) The IFB may be restricted to qualified Indian-owned enterprises and Indian organizations. The IFB should, however, not be so restricted unless the IHA has a reasonable expectation that the required minimum number of qualified Indian-owned enterprises or organizations are likely to submit responsive bids. If two or more (or at the IHA's option, a number greater than two specified in the IFB) qualified Indian enterprises or organizations submit responsive bids, award shall be made to the qualified enterprise or organization with the lowest responsive bid. If fewer than the minimum required number of qualified Indian enterprises or organizations submit responsive bids, the IHA shall reject all bids, and shall readvertise the IFB in accordance with paragraph (c)(1)(ii) of this section. In unusual circumstances and subject to HUD approval, the IHA may accept one bid, e.g., the IHA determines that the single bid received is of an unusually favorable price, or the IHA determines that delays caused by readvertising would subject the project to higher construction costs.

(ii) If the IHA prefers not to restrict the IFB as described in paragraph (c)(1)(i), above, or if an insufficient number of qualified Indian enterprises or organizations submit responsive bids in response to an IFB under paragraph (c)(1)(i), the IHA or contractor shall advertise for bids inviting responses from non-Indian as well as Indian owned economic enterprises and Indian organizations. Award shall be made to the qualified Indian enterprise or organization with the lowest responsive bid if that bid is within budgetary limits established for the specific project or activity for which bids are being taken and no more than "X" higher than the total bid price of the lowest responsive bid from any qualified bidder. "X" is determined as follows:

	X=lesser of—
When the lowest responsive bid is less than $100,000.	10% of that bid, or $9,000.
When the lowest responsive bid is:	
At least $100,000, but less than $200,000.	9% of that bid, or $16,000.
At least $200,000, but less than $300,000.	8% of that bid, or $21,000.
At least $300,000, but less than $400,000.	7% of that bid, or $24,000.
At least $400,000, but less than $500,000.	6% of that bid, or $25,000.
At least $500,000, but less than $1 million.	5% of that bid, or $40,000.
At least $1 million, but less than $2 million.	4% of that bid, or $60,000.
At least $2 million, but less than $4 million.	3% of that bid, or $80,000.
At least $4 million, but less than $7 million.	2% of that bid, or $105,000.
$7 million or more	1% of the lowest responsive bid, with no dollar limit.

If no responsive bid by a qualified Indian enterprise or organization is within the stated range of the total bid price of the lowest responsive bid from any qualified enterprise, award shall be made to the bidder with the lowest bid.

(2) Preference in the award of contracts and subcontracts that are let under a Request for Proposals (RFP) process (e.g., for turnkey proposal construction contracts, professional service contracts) shall be provided as follows:

(i) The RFP may be restricted to qualified Indian-owned economic enterprises and Indian organizations. The RFP should, however, not be so restricted unless the IHA has a reasonable expectation that the required minimum number of qualified Indian-owned economic enterprises or Indian organizations are likely to submit responsive proposals. If two (or, at the IHA's option, a number greater than two specified in the RFP) qualified Indian-owned economic enterprises or Indian organizations submit responsive proposals, award shall be made to the qualified Indian-owned economic enterprise or Indian organization with the best proposal. If fewer than the minimum required number of qualified Indian-owned economic enterprises or Indian organizations submit responsive proposals, the IHA shall reject all proposals and shall readvertise the RFP in accordance with paragraph (c)(2)(ii) of this section. The IHA shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance the IHA places on each evaluation factor and subfactor.

(ii) If the IHA prefers not to restrict the RFP solicitation as described in paragraph (c)(2)(i), above, or if an insufficient number of qualified Indian enterprises or organizations satisfactorily respond under that procedure, the IHA shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance an IHA places on each evaluation factor and subfactor. Notification that Indian preference is applicable to this procurement shall be included in the RFP solicitation.

(A) An IHA shall set aside a minimum of 15% of the total number of available rating points for the provision of Indian preference in the award of contracts and subcontracts. The percentage or number of points set aside for preference and the method for allocating these points shall be specified in the RFP.

(B) IHAs may require that contractors solicit subcontractors by using an RFP based on a point system, and that contractors set aside a minimum of 15% of the available rating points for the provision of Indian preference in subcontracting. The RFP shall explain the criteria to be used by the contractor in evaluating proposals submitted by subcontractors.

(3) Provisions applicable to all contracts.

(i) In all cases, the IHA shall include in the IFB or RFP a description of the contract and subcontract bidding procedures which are to be employed, including the actual language of paragraph (c)(1)(i), (c)(1)(ii), (c)(2)(i) or (c)(2)(ii) of this section, as appropriate. A finding by an IHA either that a subcontract was awarded without using the procedure required by the IHA, or that the contractor falsely represented that subcontracts would be awarded to Indian enterprises or organizations, shall be grounds for termination of the contract between the IHA and its contractor, or for other penalties as appropriate. These grounds for termination of the contract or for the imposition of other penalties shall be set out in the IFB or RFP and shall be included in each contract and subcontract.

() Each IFB and RFP shall state whether the IHA maintains lists of Indian-owned economic enterprises and Indian organizations by speciality (e.g., plumbing, electrical, foundations), which are available to developers, contractors, and subcontractors to assist them in meeting their responsibility to provide preference in connection with the administration of contracts and subcontracts.

(i) The IHA shall require a statement from all prospective contractors or developers describing how they will provide Indian preference in the award of subcontracts. Each IHA shall describe in its IFB or RFP what provisions each prospective developer or contractor must include in its statement and the factors that will be used by the IHA in judging the statement's adequacy. Any bid or proposal that fails to include the required statement shall be rejected as nonresponsive. An IHA may require that a comparable statement be provided by subcontractors to their contractors, and may require a contractor to reject any bid or proposal by a subcontractor that fails to include the statement, as specified by the IHA in the IFB or RFP.

(iv) Each contractor or subcontractor shall submit a certification (supported by credible evidence) to the IHA in any instance where the contractor or subcontractor believes it is infeasible to provide Indian preference in subcontracting. The IHA may examine the evidence submitted and may accept or reject the certification.

(4) The Indian preference requirements contained in this subsection shall be subject to additional preference provisions in § 905.204(f).

(d) *Preference by an IHA in contracting, employment and training.* (1) To the greatest extent feasible, IHAs shall, in the conduct of their own operations, adhere to the requirements regarding preference in contracting. Where the provision of preference is determined by an IHA to be infeasible, an IHA shall document in writing the basis for its findings and shall maintain for three years the documentation in its files for HUD review and provide HUD with a copy of the determination within 20 days of its issuance.

(2) To the greatest extent feasible, preference shall be given to qualified Indians for employment or training for IHA staff positions. Each IHA shall document the method and justification used in selecting individuals for employment or training. A finding by HUD that an IHA has not provided preference to the greatest extent feasible to Indians in selecting individuals for employment or training shall be grounds for HUD to invoke its remedies under this Part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(3) The Indian preference requirements contained in this subsection shall be subject to additional preference provisions in § 905.204(f).

(e) *Preference by contractors and subcontractors in employment and training of Indians.*

(1) IFB Contracts.

(i) For contracts let under an IFB, the IFB shall state that each contractor and subcontractor must include in its bid response a statement detailing its employment and training opportunities and its plans to provide preference to Indians in implementing the contract; and the number or percentage of Indians anticipated to be employed and trained. The IFB shall explain the criteria to be used by the IHA or the contractor in evaluating contractor or subcontractor statements.

(ii) Any bid that fails to include the required statement, or that includes a statement that does not meet minimum standards required by the IHA or contractor (as appropriate) shall be rejected as nonresponsive.

(iii) Failure to comply with the submitted statement shall be a ground for cancellation of the contract or for the assessment of penalties or other remedies. The IFB and the contract shall describe the actions that may be taken by an IHA for noncompliance with the undertakings set out in the contractor's or subcontractor's statement.

(iv) A finding by HUD that an IHA has entered into a contract that failed to include an acceptable statement on preference in employment and training shall be grounds for HUD to invoke its remedies under this part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(2) RFP Contracts.

(i) For contracts let under an RFP, the RFP shall state that each contractor and subcontractor must include in its proposal response a statement detailing its employment and training opportunities and its plan to provide preference to Indians in implementing the contract; and the number or percentage of Indians anticipated to be employed and trained. The RFP shall explain the criteria to be used by the IHA or the contractor in evaluating contractor or subcontractor statements.

(ii) For contracts awarded under paragraph (c)(2)(i) of this section where a point system is not used to evaluate the relative merits of proposals), any proposal that fails to include the required statement, or that includes a statement that does not meet minimum standards required by the IHA or contractor (as appropriate), shall be rejected as nonresponsive. For contracts awarded under paragraph (c)(2)(ii) of this section e a point system is used to evaluate the relative merits of proposals) ten percent of the total points available during evaluation of the proposal shall be awarded on the basis of the content of the statement. (These points are in addition to and separate from any points awarded for the provision of Indian preference in contracting or subcontracting in accordance with paragraphs (c)(2)(ii) (A) and (B) of this section.) Proposals that fail to include a statement shall be rejected as nonresponsive.

(iii) Failure to comply with the submitted statement shall be a ground for cancellation of the contract or for the assessment of penalties or other remedies. The RFP and the contract shall describe the actions that may be taken by an IHA for noncompliance with the undertakings set out in the contractor's or subcontractor's statement.

(iv) A finding by HUD that an IHA has entered into a contract that failed to include an approved statement in implementing preference in employment and training opportunities shall be grounds for HUD to invoke its remedies under this part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(3) Provisions on employment or training applicable to all contracts. The IHA shall require contractors and subcontractors to provide preference to the greatest extent feasible by hiring qualified Indians in all positions other than core crew positions, except where the contractor adequately advertises a position and no Indian either qualifies or accepts the terms of employment. The IHA shall indicate what it considers to be adequate advertisement in the IFB or RFP (as appropriate) and in the contract. A core crew employee is an individual who is a bona fide employee of the contractor or subcontractor at the time the bid or proposal is submitted; or an individual who was not employed by the contractor or subcontractor at the time the bid or proposal was submitted, but who is regularly employed by the contractor or subcontractor in a supervisory or other key skilled position when work is available. Each contractor shall submit a list of all core crew employees with its bid or proposal.

(4) The Indian preference requirements contained in this subsection shall be subject to additional preference provisions in § 905.204 (f).

(f) *Other preference provisions applicable to §§ 905.204 (c), (d), and (e).* (1) When both HUD and non-Federal funds are used for a project, the work to be accomplished with the funds should be separately identified, and HUD's Indian preference regulations must be applied to the work financed by HUD. If the funds cannot be separated, HUD's Indian preference regulations will apply to the total project.

(2) Each IHA shall be responsible for monitoring Indian preference implementation in subcontracting, employment, and training by its contractors and subcontractors. Should incidents of noncompliance be found to exist, the IHA shall take appropriate remedial action. A finding by HUD that the IHA has not provided adequate monitoring or enforcement of Indian

preference may result in a determination by HUD that the IHA is in breach of the ACC or that the IHA lacks administrative capability. Such a finding may constitute grounds for HUD to invoke its remedies under this part or under the ACC, which remedies shall include, but are not limited to, the denial of future projects.

(3) Preference in contracting, subcontracting, employment, and training applies not only on-site, on the reservation, or within the IHA's jurisdiction, but also to contracts with firms that operate outside these areas (e.g., employment in modular or manufactured housing construction facilities).

(4) Each IHA should include in the IFB or RFP any applicable local preference requirements properly imposed by the tribal governing body, or should advise bidders to contact the tribal governing body to determine any applicable preference requirements.

(g) *Review procedures for complaints alleging inadequate or inappropriate provision of preference.* (1) Each complaint (including complaints against an IHA) shall be in writing, signed, and filed with the IHA.

(2) A complaint must be filed with the IHA no later than 20 days from the date of the action (or omission) upon which the complaint is based.

(3) Upon receipt of a complaint, the IHA shall promptly stamp the date and time of receipt upon the complaint, acknowledge its receipt in writing to the complainant within five (5) days, and shall investigate, and within 15 days shall either meet, or communicate by mail or telephone, with the complaining party in an effort to resolve the matter. In all cases, but especially where the complaint indicates that expeditious action is required to preserve the rights of the complaining party, the IHA shall endeavor to resolve the matter as expeditiously as possible. If noncompliance with Indian preference requirements is found to exist, the IHA shall take appropriate steps to remedy the noncompliance and to amend its procedures so as to be in compliance. If the matter is not resolved to the satisfaction of the complaining party, or if the IHA has failed to communicate with the complaining party in an effort to resolve the complaint within 15 days following the IHA's receipt of a complaint, the complaining party may file a written complaint with the appropriate Indian Field Office of HUD. In any event, complaints filed with HUD must be received within six months after the alleged adverse action by the IHA, contractor or subcontractor. The address of the Indian Field Office and the name of the appropriate Indian program officer shall be included in the initial communication from the IHA acknowledging receipt of the complaint.

(4) Upon receipt of a written complaint, the HUD Indian Field Office will request that the IHA provide a written report setting forth all relevant facts, including, but not limited to, the date the complaint was filed with the IHA; the name of the complainant; the nature of the complaint, including the manner in which Indian preference was or was not provided; and actions taken by the IHA in addressing or resolving the complaint. The IHA shall provide copies of its report and all relevant documents concerning the complaint to HUD within ten days after receipt of the HUD request.

(5) Upon receipt of the IHA's report, the HUD Indian Field Office will determine whether the actions taken by the IHA comply with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act, and with Indian preference requirements under this part. Notification of the Field Office's determination shall be provided to the IHA and to the complaining party, orally or in writing, no later than 30 days following HUD's receipt of the complaint. If the notice is oral, it shall be promptly confirmed in writing. If the complaining party's alleged injury will occur during this 30-day period, the HUD Indian Field Office will make a good faith effort to make its determination before the occurrence of such injury (e.g., contract award).

(6) Where the HUD Indian Field Office determines on the basis of the facts provided by the IHA and on the basis of other available information that there has been noncompliance with Indian preference requirements, the Field Office shall instruct the IHA to take appropriate steps to remedy the noncompliance and to amend its procedures so as to be in compliance.

(7) The decision of the HUD Indian Field Office may be appealed to the Assistant Secretary for Public and Indian Housing. The decision of the Assistant Secretary for Public and Indian Housing shall constitute final agency action for purposes of the Administrative Procedure Act.

(Approved by the Office of Management and Budget under control number 2577-0076)

Dated: November 20, 1986.

J. Michael Dorsey,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 86-27198 Filed 12-3-86; 8:45 am]

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DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 553

U.S. Army Military District of Washington; Arlington National Cemetery Visitors Rules

AGENCY: Department of the Army, DOD.

ACTION: Final rule.

SUMMARY: This change amends the Visitors' Rules for Arlington National Cemetery. The change allows the Secretary of the Army to bar violators of the rules from conducting memorial services and ceremonies within the Cemetery for two years.

EFFECTIVE DATE: January 2, 1987.

FOR FURTHER INFORMATION CONTACT: Harriet Antiporowich, Arlington National Cemetery, Arlington, VA 22211-5003, (202) 695-3191.

SUPPLEMENTARY INFORMATION: Proposed rulemaking was published on page 29115 of the **Federal Register** of August 14, 1986. Interested parties were given the opportunity to comment. No comments have been received.

The sanctions placed on individuals or organizations who violate the Arlington National Cemetery Visitors' Rules are changed by this proposed rule.

Presently the Code of Federal Regulations provide that any person who violates the provisions of paragraphs (d), (e), (f), (g), (h), or (i) of 32 CFR 553.22 be subject to the penalties set out in Title 40 United States Code section 318c.

The proposed change would also allow the Secretary of the Army to bar violators from conducting memorial services or ceremonies at Arlington National Cemetery for two years from the date of such violation. Use of this administrative sanction would not require prosecution of the violator as a prerequisite.

Executive Order 12291

This rule does not constitute a "major" rule as defined by Executive Order 12291.

Regulatory Flexibility Act

This rule does not have "significant" economic impact on a substantial number of small "entities" as defined by the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

Paperwork Reduction Act

There are no collection of information requirements contained in this rule that require approval by the Office of