

amount of the fee, whichever is less), shall be returned. If an application is withdrawn by the applicant before significant Agency scientific review has begun, the fee, less \$1,200, shall be returned. If an unacceptable or withdrawn petition is resubmitted, it shall be accompanied by the fee that would be required if it were submitted for the first time.

(b) *Waiver of fees for activities initiated by the Agency.* The Agency may waive fees for amended registrations where the amendment has been initiated solely by the Agency. The Agency retains sole discretion in determining when this fee will be waived. The announcement of the fee waiver will accompany the EPA request for an amendment. The Agency will not approve any individual requests for waivers of EPA-initiated activity fees.

(c) *Waiver of fees for activities initiated by applicants.* Upon request by an applicant, together with the supporting documentation or justification described in this paragraph, the Agency may waive or refund fees in whole or in part. A request for waiver must be submitted in accordance with § 152.414(a). An application for which a waiver of fees has been requested will not be accepted for review until the waiver has been granted, or until the waiver has been denied and thereafter the proper fee has been submitted.

(1) *Minor use.* Fees may be waived for applications limited to minor uses that lack commercial feasibility for the pesticide applicant. An applicant requesting a waiver on this basis must provide supporting information that demonstrates that anticipated revenues from the uses that are the subject of the application would be insufficient to pay back the cost of the fee. The burden of proof of the reasonableness of this estimate rests with the applicant.

(2) *IR-4.* Fees will be waived for registration actions that are determined to be specifically associated with tolerance petitions submitted by the Inter-Regional Research Project Number 4 (IR-4 program) when such waiver is deemed by the Agency to be in the public interest.

(3) *Severe economic impact.* The Agency may waive two-thirds of any cumulative registration fee payment in a 12-month period following completion of the applicant's most recent fiscal year that exceeds 3 percent of the applicant's pesticide sales in its most recently completed fiscal year. An applicant requesting a waiver on this basis must

provide documentation (e.g. copy of an annual report, or income tax forms filed with the Internal Revenue Service, or if needed, a notarized statement signed by a corporate officer regarding annual pesticide sales) demonstrating that:

(i) The company applying had less than \$40 million in gross revenue (including all revenue sources) in the most recently concluded fiscal year of operation, and a single fee would constitute more than 3 percent of the applicant's gross revenue from pesticide sales in the most recently completed fiscal year of operation, or

(ii) The company applying had less than \$40 million in gross revenue (including all revenue sources) in the most recently concluded fiscal year of operation, and the cumulative registration fees paid during the 12 months following the applicant's most recently completed fiscal year, including any registration fees paid for the applicant for which a waiver is requested, constitute more than 3 percent of the applicant's gross revenue from pesticide sales in the most recently concluded fiscal year of operation.

(iii) The Agency will not grant such a waiver if it determines that the entity submitting the application has been formed or manipulated to qualify for such a waiver.

(4) *Public interest.* The Agency, in its discretion, may waive in whole or in part any of the fees established herein in the public interest. Examples include, but are not limited to, pesticides offering unique advantages for reducing public health risks, those that significantly reduce a current environmental risk, or a product with extraordinary utility for use in Integrated Pest Management (IPM).

(Approved by the Office of Management and Budget under control numbers 2070-0040 and 2070-0060)

§ 152.414 Procedures

(a) *Procedures for requesting a waiver.* (1) A request for a waiver must be submitted in writing at the time the application is submitted to the Environmental Protection Agency, Office of Pesticide Programs, Registration Division (TS-767C), 401 M. Street SW., Washington, DC 20460.

(2) A payment of \$1,200 for processing the waiver or the amount of the actual fee, whichever is less, must be submitted simultaneously to the address set forth in paragraph (b) of this section. This fee will be refunded (or applied to any resulting partial fee) if the waiver is

granted. Payment of fees for the registration activities, in contrast to the waiver fee, shall not be required until the Agency makes a determination on the waiver request. Since the actual fee is submitted to an address different than the one to which the waiver request is submitted, a copy of the payment document must be submitted with the waiver request that is submitted to the Washington, DC address set forth in paragraph (a)(1) of this section. No fee is required from a person who has no financial interest in the application.

(b) *Procedures for payment of fees.* All fees required by this section must be paid by money order, bank draft, or certified check drawn to the order of the Environmental Protection Agency. All payment of fees must be forwarded to the Environmental Protection Agency, Headquarters Accounting Operations Branch, Office of Pesticide Programs (Registration Fees), P.O. Box 360277M, Pittsburgh, PA 15251. The payments should be specifically labeled "Registration Fees" and should be accompanied only by a copy of the registration application form or the experimental use permit application form, as appropriate. An application will not be accepted for processing until the required fees have been submitted.

(c) *Procedures for submitting application and supporting data.* The application, along with supporting data, shall be forwarded within 30 days of payment to the Washington DC address set forth in paragraph (a)(1) of this section.

(Approved by the Office of Management and Budget under control numbers 2070-0040 and 2070-0060)

PART 172—[AMENDED]

2. In Part 172:

a. The authority citation for Part 172 is revised to read as follows:

Authority: 7 U.S.C. 136c, 136v, and 136w. Section 172.4 is also issued under 31 U.S.C. 9701 and Pub. L. 100-202.

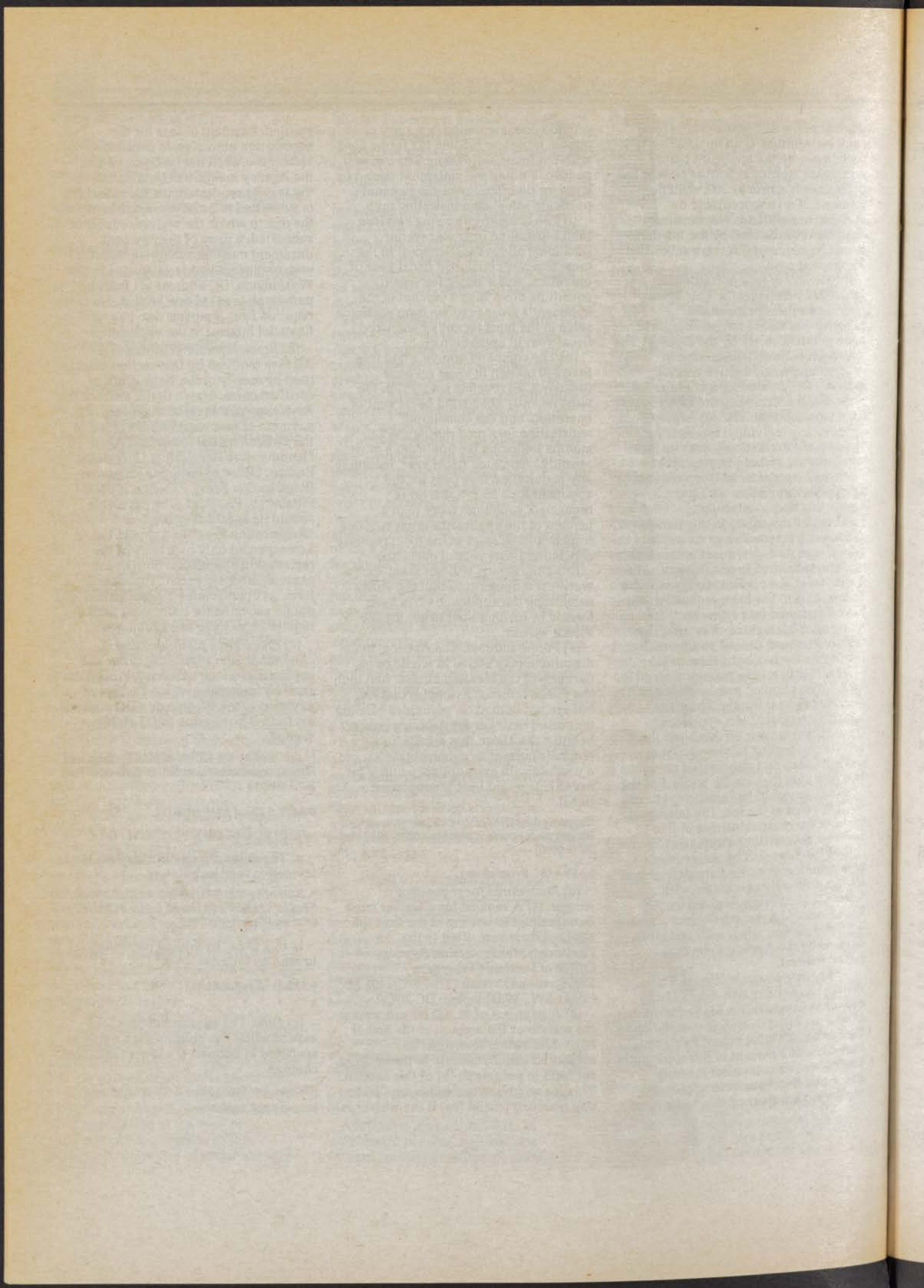
b. In § 172.4, by adding paragraph (c) to read as follows:

§ 172.4 Applications.

(c) *Fees.* The payment of fees for experimental use permits shall apply as specified in Subpart U of Part 152 of the chapter.

[FR Doc. 88-11839 Filed 5-25-88; 8:45 am]

BILLING CODE 5500-50-M



கந்தகம்

Department of Education

48 CFR Ch. 34

Acquisition Regulation; Establishment of Chapter; Final Regulations With Invitation to Comment

DEPARTMENT OF EDUCATION

34 CFR Part 75

48 CFR Ch. 34

Acquisition Regulation; Establishment of Chapter

AGENCY: Department of Education.

ACTION: Final regulations with invitation to comment.

SUMMARY: The Secretary establishes the Department of Education Acquisition Regulation (EDAR) as Chapter 34 of Title 48 of the Code of Federal Regulations. The EDAR is being issued to implement and supplement the Federal Acquisition Regulation (FAR) within the Department of Education. The EDAR incorporates, together with the FAR, the policies, procedures, contract clauses, solicitation provisions and forms that govern the contracting process or otherwise control the relationship between the Department and contractors or prospective contractors.

DATES: These regulations are effective May 26, 1988. Comments must be received on or before July 25, 1988.

ADDRESSES: All comments concerning these regulations should be addressed to Richard Galloway, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue SW. (Room 3519, ROB-3, mail stop 3341), Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Richard Galloway, telephone (202) 732-2525.

SUPPLEMENTARY INFORMATION: Federal acquisition is subject to two related means of regulation: (1) Governmentwide provisions under the FAR; and (2) agencywide provisions under individual agency regulations. The FAR was codified as Chapter 1 of Title 48 of the Code of Federal Regulations on April 1, 1984. The FAR, in turn, authorizes each agency to issue agency acquisition regulations to implement FAR policies and procedures and provide supplementary rules for special agency needs. FAR 1.301(b) requires publication of agency acquisition policy issuances that have a significant effect beyond internal agency operations or a significant cost or administrative impact on contractors or offerors.

The EDAR replaces the Education Department Procurement Regulation (EDPR) (41 CFR Chapter 34). The EDPR remains in effect only for contracts based upon solicitations issued prior to April 1, 1984. The EDPR became

inapplicable to new contract actions when the FAR superseded the Federal Procurement Regulation under which the EDPR had been codified.

The EDAR does not establish new external policy or significantly change existing practice. Rather, the EDAR is the result of (a) conversion of policies established under the EDPR to conform with the FAR, (b) incorporation of standard agency solicitation provisions and contract clauses, and (c) designation of agency discretionary acquisition authorities. Accordingly, the EDAR does not represent new independent policy directions, but rather, reflects policies established by the present governmentwide regulation, the FAR. Further, although the old regulations, *i.e.*, the EDPR, did not incorporate standard agency provisions and clauses, the provisions and clauses in the EDAR do not differ substantially from the provisions and clauses that had been in use under EDPR. Designations of agency acquisition authorities, although required by the FAR, are primarily of internal rather than external significance.

A conforming amendment to the Education Department General Administrative Regulations (EDGAR) was needed to clarify the Department's copyright practice. Section 75.621 of EDGAR is amended in this document by revising the heading to read: Copyright Policy for Grantees; and deleting paragraph (b) from § 75.621. The Department follows the copyright provisions of the FAR, which were established by Federal Acquisition Circular 84-27.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities because the regulations do not significantly change the Department's existing practice.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Invitation to Comment: Interested persons are invited to submit comments and recommendations regarding these regulations.

All comments submitted in response to these regulations will be available for public inspection, during and after the comment period, in Room 3519, ROB3, 7th and D Streets SW., Washington, DC between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these regulations.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

34 CFR Part 75

Accounting, grant programs—education, Reporting and recordkeeping requirements.

48 CFR Ch. 34

Government procurement.

Dated: July 23, 1987.

Editorial Note.—This was received at the office of the Federal Register May 20, 1988.

William J. Bennett,
Secretary of Education.

(Catalog of Federal Domestic Assistance Number does not apply)

TITLE 34—[AMENDED]

PART 75—[AMENDED]

1. The Secretary amends Title 34, Part 75, of the Code of Federal Regulations by revising the heading of § 75.621, as set forth below, by removing paragraph (b) and removing the paragraph designation "(a)".

§ 75.621 Copyright policy for grantees.
* * *

TITLE 48—[AMENDED]

2. The Secretary amends Title 48 of the Code of Federal Regulations by establishing a new Chapter 34 to read as follows:

CHAPTER 34—DEPARTMENT OF EDUCATION ACQUISITION REGULATION

SUBCHAPTER A—GENERAL

Part 3401 ED Acquisition Regulation System
Part 3402 Definitions of Words and Terms

- Part 3403 Improper Business Practices and Personal Conflicts of Interest
 Part 3404 Administrative Matters
 Part 3405 Publicizing Contract Actions

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

- Part 3408 Required Sources of Supplies and Services
 Part 3409 Contractor Qualifications

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

- Part 3413 Small Purchase and Other Simplified Purchase Procedures
 Part 3414 Sealed Bidding
 Part 3415 Contracting by Negotiation
 Part 3416 Types of Contracts
 Part 3417 Special Contracting Methods

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

- Part 3419 Small Business and Small Disadvantaged Business Concerns
 Part 3424 Protection of Privacy and Freedom of Information
 Part 3425 Foreign Acquisition

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

- Part 3427 Patents, Data, and Copyrights
 Part 3428 Bonds and Insurance
 Part 3432 Contract Financing
 Part 3433 Protests, Disputes, and Appeals

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

- Part 3437 Service Contracting

SUBCHAPTER G—CONTRACT MANAGEMENT

- Part 3442 Contract Administration
 Part 3443 Contract Modifications
 Part 3445 Government Property
 Part 3447 Transportation

SUBCHAPTER H—CLAUSES AND FORMS

- Part 3452 Solicitation Provisions and Contract Clauses.

SUBCHAPTER A—GENERAL

PART 3401—ED ACQUISITION REGULATION SYSTEM

Sec.

- 3401.000 Scope of part.

Subpart 3401.1—Purpose, Authority, Issuance

- 3401.103 Applicability.
 3401.104 Issuance.
 3401.104-2 Arrangement of regulations.
 3401.104-3 Copies

Subpart 3401.3—Agency Acquisition Regulations.

- 3401.304 Agency control and compliance procedures.

Subpart 3401.4—Deviations

- 3401.401 Definition.
 3401.403 Individual deviations.
 3401.404 Class deviations.

Subpart 3401.5—Agency and Public Participation

- 3401.501 Solicitation of agency and public views.
 3401.501-2 Opportunity for public comments.

Subpart 3401.6—Contracting Authority and Responsibilities

- 3401.601 General.
 Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

3401.000 Scope of part.

The Federal Acquisition Regulation System brings together, in Title 48 of the Code of Federal Regulations, the acquisition regulations applicable to all executive agencies of the Government. This part establishes a system of Department of Education (ED) acquisition regulations, referred to as the EDAR, for the codification and publication of policies and procedures of ED which implement and supplement the Federal Acquisition Regulation (FAR).

Subpart 3401.1—Purpose, Authority, Issuance

3401.103 Applicability.

The FAR and the EDAR apply to all acquisitions as defined in FAR Part 2 except where expressly excluded.

3401.104 Issuance.

3401.104-2 Arrangement of regulations.

The regulations in this chapter may be referred to as the Department of Education Acquisition Regulation or the EDAR. References to the EDAR are made in the same manner as references to the FAR (See FAR 1.104-2(c)).

3401.104-3 Copies.

Copies of the EDAR in the Federal Register and Code of Federal Regulations (CFR) form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402.

Subpart 3401.3—Agency Acquisition Regulations

3401.304 Agency control and compliance procedures.

The EDAR is subject to the same review procedures within the Department as other regulations of the Department.

Subpart 3401.4—Deviations

3401.401 Definition.

A deviation from the EDAR has the same meaning as a deviation from the FAR.

3401.403 Individual deviations.

An individual deviation from the FAR or the EDAR must be approved by the Head of the Contracting Activity (HCA).

3401.404 Class deviations.

A class deviation from the FAR or the EDAR must be approved by the Procurement Executive.

Subpart 3401.5—Agency and Public Participation

3401.501 Solicitation of agency and public views.

3401.501-2 Opportunity for public comments.

Unless the Secretary of Education (Secretary) approves an exception, the Department issues the EDAR, including any amendments to the EDAR, in accordance with the procedures for public participation in 5 U.S.C. 553.

Subpart 3401.6—Contracting Authority and Responsibilities

3401.601 General.

Contracting authority vests with the Secretary. The Secretary has delegated this authority to the Deputy Under Secretary for Management who has delegated this authority, with the right to redelegate, to the Procurement Executive and the HCA.

PART 3402—DEFINITIONS OF WORDS AND TERMS

Subpart 3402.1—Definitions

Sec.

- 3402.101 Definitions.

Subpart 3402.2—Definitions Clause

- 3402.201 Contract clause.

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

Subpart 3402.1—Definitions

3402.101 Definitions

As used in this chapter—
 "Head of the Contracting Activity" or "HCA" means the Director, Grants and Contracts Service (GCS), Office of Management of the Department of Education.

"Procurement Executive" means the Comptroller, Office of Management of the Department of Education.

Subpart 3402.2—Definitions Clause

3402.201 Contract clause.

The contracting officer shall insert the clause in 3452.202-1, Definitions, in all solicitations and contracts in lieu of the clause in FAR 52.202-1, except—

- A fixed-price research and development contract that is expected to be \$2,500 or less; or
- A purchase order.

PART 3403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 3403.1—Safeguards

Sec.

3403.101 Standards of conduct.

3403.101-3 Agency regulations.

Subpart 3403.2—Contractor Gratuities To Government Personnel

3403.203 Reporting suspected violations of the Gratuities clause.

Subpart 3403.3—Reports of Suspected Antitrust Violations

3403.301 General.

Subpart 3403.4—Contingent Fees

3403.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 3403.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

3403.602 Exceptions.

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

Subpart 3403.1—Safeguards

3403.101 Standards of conduct.

3403.101-3 Agency regulations.

ED regulations on standards of conduct are in 34 CFR Part 73.

Subpart 3403.2—Contractor Gratuities to Government Personnel

3403.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause must be reported to the HCA in writing detailing the circumstances.

(b) The HCA evaluates the report with the assistance of the Designated Agency Ethics Officer. If the HCA determines that a violation may have occurred, the HCA refers the report to the Procurement Executive for disposition.

Subpart 3403.3—Reports of Suspected Antitrust Violations

3403.301 General.

(a) [Reserved]

(b) Any Departmental personnel who have evidence of a suspected antitrust violation in an acquisition shall—

(1) Report that evidence through the HCA to the Office of the General Counsel for referral to the Attorney General; and

(2) Provide a copy of that evidence to the Procurement Executive.

Subpart 3403.4—Contingent Fees

3403.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

Any Departmental personnel who suspect or have evidence of attempted

or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the Covenant Against Contingent Fees, shall report the matter promptly in accordance with the procedures in 3403.203.

Subpart 3403.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

3403.602 Exceptions.

Exceptions under FAR 3.602 must be approved by the Deputy Under Secretary for Management.

PART 3404—ADMINISTRATIVE MATTERS

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

Subpart 3404.1—Contract Execution

3404.170 Ratification of unauthorized contract awards.

The execution of otherwise proper contracts made by individuals without contracting authority, or by contracting officers acting in excess of the limits of their delegated authority, may be later ratified by the Department. To be effective, a ratification must be—

(a) A written document clearly stating that ratification of a previously unauthorized act is intended; and

(b) Signed by the HCA, or higher level official of the Department, who could have granted authority to enter into the commitment at the time it was made and still has the power to do so.

PART 3405—PUBLICIZING CONTRACT ACTIONS

Subpart 3405.2—Synopsis of Proposed Contract Actions

Sec.

3405.270 Notices to perform market surveys.

Subpart 3405.5—Paid Advertisements

3405.502 Authority.

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

Subpart 3405.2—Synopsis of Proposed Contracts Actions

3405.270 Notices to perform market surveys.

(a) If a sole-source contract is anticipated, the issuance of a notice of a proposed contract action that is detailed enough to permit submission of meaningful responses and subsequent evaluation of the responses by the Government, constitutes an acceptable market survey.

(b) The notice must include—

(1) A clear statement of the supplies or services to be procured;

(2) Any capabilities or experience required of a contractor and any other factors relevant to those requirements; and

(3) The criteria, including relative weights, to be used in the evaluation of responses.

Subpart 3405.5—Paid Advertisements

3405.502 Authority.

Authority to approve publication of paid advertisements in newspapers is delegated to the HCA.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 3408—REQUIRED SOURCES OF SUPPLIES AND SERVICES

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

Subpart 3408.8—Acquisition of Printing and Related Supplies

3408.870 Printing clause.

The contracting officer shall insert the clause in 3452.208-70, Printing, in all solicitations and contracts other than purchase orders.

PART 3409—CONTRACTOR QUALIFICATIONS

Subpart 3409.4—Debarment, Suspension, and Ineligibility

3409.403 Definitions.

3409.406 Debarment.

3409.406-3 Procedures.

Subpart 3409.5—Organizational Conflicts of Interest

3409.502 Applicability.

3409.503 Waiver.

3409.507 Procedures.

3409.570 Offeror certification provision.

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

Subpart 3409.4—Debarment, Suspension, and Ineligibility

3409.403 Definitions.

The Procurement Executive is designated as the "debarment official" and the "suspension official" as defined in FAR 9.403 and is designated as the agency official authorized to make the decisions required in FAR 9.405(a), 9.405-1, 9.405-2, 9.406-1(c), and 9.407-1(d).

3409.406 Debarment.

3409.406-3 Procedures.

The debarment official may enter into a settlement with a contractor under which the contractor voluntarily excludes itself from, or restricts its participation in, Government contracting and subcontracting for a specified period.

Subpart 3409.5—Organizational Conflicts of Interest**3409.502 Applicability.**

This subpart applies to all ED contracts except contracts with other Federal agencies. However, this subpart applies to contracts with the Small Business Administration (SBA) under the 8(a) program.

3409.503 Waiver.

The HCA is designated as the official who may waive any general rule or procedure of FAR Subpart 9.5 or of this subpart.

3409.507 Procedures.

(a) If the effects of a potential or actual conflict of interest cannot be avoided, neutralized, or mitigated before award, the prospective contractor is not eligible for that award. If a potential or actual conflict of interest is identified after award and the effects cannot be avoided, neutralized, or mitigated, ED terminates the contract.

(b) The Procurement Executive is designated as the official to conduct reviews and make final decisions under FAR 9.507(c)(4).

3409.570 Offeror certification provision.

The contracting officer shall insert the provision in 3452.209-70, Organizational Conflict of Interest, in all solicitations.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES**PART 3413—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES**

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

Subpart 3413.1—General**3413.107 Solicitation and evaluation of quotations.**

(a)-(c) [Reserved]

(d) *Information provided by ED.* If ED provides information to a potential quoter concerning a request for quotations, that information must also be provided to all other potential quoters, by amending the request, if—

(1) The information is necessary to quoters in submitting quotations; or

(2) The lack of the information would be otherwise prejudicial to other potential quoters.

(e) *Late quotations.* The procedures in FAR 15.412 must be used for quotations received after the time specified for receipt at the contracting activity, except that late quotations may be accepted if the contracting officer determines in writing prior to the award that it is in the best interest of the Government to do so.

PART 3414—SEALED BIDDING**Subpart 3414.4—Opening of Bids and Award of Contract**

Sec.

3414.406 Mistakes in bids.

3414.406-3 Other mistakes disclosed before award.

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

Subpart 3414.4—Opening of Bids and Award of Contract**3414.406 Mistakes in bids.****3414.406-3 Other mistakes disclosed before award.**

(a)-(d) [Reserved]

(e) Authority is delegated to the HCA to make determinations under FAR 14.406-3(a)-(d).

PART 3415—CONTRACTING BY NEGOTIATION**Subpart 3415.4—Solicitation and Receipt of Proposals and Quotations**

Sec.

3415.406-3 Part II—Contract clauses.

3415.407 Solicitation provisions.

3415.413-2 Alternate II.

Subpart 3415.5—Unsolicited Proposals

3415.505 Content of unsolicited proposals.

3415.506 Agency procedures.

Subpart 3415.9—Profit

3415.902 Policy.

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

Subpart 3415.4—Solicitation and Receipt of Proposals and Quotations**3415.406-3 Part II—Contract clauses.**

The contracting officer shall insert the clause in 3452.215-33, Order of Precedence, in all contracts other than purchase orders. The contracting officer shall use this clause in lieu of the clause in FAR 52.215-33.

3415.407 Solicitation provisions.

(a) The Freedom of Information Act (FOIA), 5 U.S.C. 552, may require ED to release data contained in an offeror's proposal even if the offeror has identified the data as restricted in accordance with the provision in FAR 52.215-12. The solicitation provision in 3452.215-70, Release of Restricted Data, informs offerors that ED is required to consider release of restricted data under FOIA and Executive Order 12600.

(b) The contracting officer shall insert the provision in 3452.215-70, in all solicitations that include a reference to FAR 52.215-12, Restriction on Disclosure and Use of Data.

3415.413-2 Alternate II.

The Department uses the Alternate II procedures in FAR 15.413-2.

Subpart 3415.5—Unsolicited Proposals**3415.505 Content of unsolicited proposals.**

(a)-(c) [Reserved]

(d) Each unsolicited proposal must contain the following certification:

Unsolicited Proposal Certification by Offeror

This is to certify, to the best of my knowledge and belief, that:

a. This proposal has not been prepared under Government supervision.

b. The methods and approaches stated in the proposal were developed by this offeror.

c. Any contact with employees of the Department of Education has been within the limits of appropriate advance guidance set forth in FAR 15.504.

d. No prior commitments were received from departmental employees regarding acceptance of this proposal.

Date: _____

Organization: _____

Name: _____

Title: _____

(This certification must be signed by a responsible person authorized to enter into contracts on behalf of the organization)

3415.506 Agency procedures.

(a) [Reserved]

(b)(1) The HCA is the contact point to coordinate the receipt and handling of unsolicited proposals.

(2) Offerors shall direct unsolicited proposals to the HCA.

Subpart 3415.9—Profit**3415.902 Policy.**

(a) [Reserved]

(b) The contracting officer shall establish the profit or fee portion of the Government prenegotiation objective in accordance with 48 CFR Chapter 3, Part 315, Subpart 315.9 (Department of Health and Human Services Acquisition Regulation).

PART 3416—TYPES OF CONTRACTS**Subpart 3416.3—Cost-Reimbursement Contracts**

Sec.

3416.303 Cost-sharing contracts.

3416.307 Contract clauses.

Subpart 3416.6—Time-and-Materials, Labor-Hour, and Letter Contracts

3416.603 Letter contracts.

3416.603-3 Limitations.

Subpart 3416.7—Agreements

3416.701 Contract clause.

3416.702 Basic agreements.

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

Subpart 3416.3—Cost-Reimbursement Contracts**3416.303 Cost-sharing contracts.**

(a) [Reserved]

(b) *Application.* Costs that are not reimbursed under a cost-sharing contract may not be charged to the Government under any other grant, contract, cooperative agreement, or other arrangement.

3416.307 Contract clauses.

(a) If the clause in FAR 52.216-7, Allowable cost and Payment, is used in a contract with a hospital, the contracting officer shall modify the clause by deleting the words "Subpart 31.2 of the Federal Acquisition Regulation (FAR)" from paragraph (a) and substituting "34 CFR Part 74, Appendix E."

(b) The contracting officer shall insert the clause in 3452.216-70, Additional Cost Principles, in all solicitations of and resultant cost-reimbursement contracts with nonprofit organizations other than educational institutional, hospitals, or organizations listed in Attachment C to Office of Management and Budget Circular A-122.

Subpart 3416.6—Time and Materials, Labor-Hour and Letter Contracts**3416.603 Letter contracts.****3416.603-3 Limitations.**

If the HCA is to sign a letter contract as the contracting officer, the Procurement Executive executes the written determination under FAR 16.603-3.

Subpart 3416.7—Agreements**3416.701 Contract clause.**

The contracting officer shall insert the clause in 3452.216-71, Negotiated Overhead Rates—Fixed, in contracts with organizations that have fixed indirect cost rates with carryforward adjustments approved by the Government agency responsible for negotiating the organization's indirect cost rates.

3416.702 Basic agreements.

(a)-(d) [Reserved]

(e) *Negotiated overhead rates.* Basic agreements may include negotiated overhead rates for cost-reimbursement contracts. If a negotiated overhead rate is included, the bases to which the rate applies and the period of applicability must also be stated. All pertinent provisions such as final rates for past periods, provisional rates for current or future periods, ceilings, and any specific

items to be treated as indirect costs must also be included.

PART 3417—SPECIAL CONTRACTING METHODS

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

Subpart 3417.2—Options**3417.207 Exercise of options.**

If any provision in a contract requires that an option may only be exercised within a specified time after funds become available, the same provision must specify that the date on which funds are available means the date funds become available to the contracting officer for obligation.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS**PART 3419—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS****Subpart 3419.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns**

3419.705 Responsibilities of the contracting officer under the subcontracting assistance program.

3419.705-2 Determining the need for a subcontracting plan.

3419.708 Solicitation provisions and contract clauses.

Subpart 3419.8—Contracting With the Small Business Administration (The 8(a) Program)

3419.801 General.

3419.870 Acquisition of technical requirements.

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

Subpart 3419.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns

3419.705 Responsibilities of the contracting officer under the subcontracting assistance program.

3419.705-2 Determining the need for a subcontracting plan.

Incremental funding actions must be included in determining whether an acquisition meets the dollar threshold requiring a subcontracting plan.

3419.708 Solicitation provisions and contract clauses.

(a) [Reserved]

(b) If the clause "Small Business and Small Disadvantaged Business Subcontracting Plan" (see FAR 52.219-9) must be used in a solicitation, a notification must be included in the solicitation that advises prospective offerors that subcontracting plans may be requested from all concerns

determined to be in the competitive range.

Subpart 3419.8—Contracting With the Small Business Administration (The 8(a) Program)**3419.801 General.**

The signing of a contract document by the Small Business Administration (SBA) may be accepted by the contracting officer as the certification under FAR 19.801(b)(1).

3419.870 Acquisition of technical requirements.

(a) *Source selection.* (1) Except where SBA selects a concern for an award under section 8(a) or under the circumstances in paragraph (a)(5) of this section, ED selects a nominee for an 8(a) award by SBA through a limited technical competition if technical aspects, methodology, or approach are of primary importance rather than price.

(2) If limited technical competition is used, the concerns to be included are decided by the contracting officer in consultation with OSDBU and the Contracting Officer's Technical Representative (COTR).

(3) (i) ED may require the concerns participating in the limited technical competition to submit written technical proposals. Otherwise, ED holds oral discussions with the participating concerns.

(ii) In a limited technical competition, cost factors may not be included in the technical proposals nor considered during technical discussions of the proposals.

(4) ED evaluates the concerns participating in a limited technical competition based on the written technical proposals or oral discussions. ED nominates, to SBA for subcontract award, the concern that the contracting officer determines to have the best technical capability to perform the contract requirements.

(5) Instead of selecting a nominee through limited technical competition, ED may nominate one 8(a) concern to SBA if that concern has exclusive or predominant capability among 8(a) concerns by reason of experience, specialized facilities, or technical competence to perform the work within the time required.

(6) Each concern nominated for a specific 8(a) requirement must be approved by OSDBU or SBA for that particular requirement before the contracting officer initiates negotiation of 8(a) award terms with the concern.

(b) *Negotiation of 8(a) award.* The contracting officer shall give all possible

assistance required by SBA with respect to SBA's negotiation of an 8(a) award.

(c) *Delegated 8(a) award administration.* If SBA delegates responsibility to ED for administration of the 8(a) award, ED informs SBA of all 8(a) award modifications, progress payments, problems experienced by the subcontractor, and other pertinent matters requested by SBA.

PART 3424—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 3424.1—Protection of Individual Privacy

Sec.
3424.103 Procedures.

Subpart 3424.2—Freedom of Information Act

3424.201 Authority.
Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 3424.1—Protection of Individual Privacy

3424.103 Procedures.

(a) If the Privacy Act of 1974 applies to a contract, the contracting officer shall specify in the contract the disposition to be made of the system or systems of records upon completion of performance of the contract. For example, the contract may require the contractor to completely destroy the records, to remove personal identifiers, to turn the records over to ED, or to keep the records but take certain measures to keep the records confidential and protect the individuals' privacy.

(b) If a notice of the system of records has not been published in the *Federal Register*, the contracting officer may proceed with the acquisition but shall not award the contract until the notice is published, unless the contracting officer determines, in writing, that portions of the contract may proceed without maintaining information subject to the Privacy Act. In this case, the contracting officer may—

(1) Award the contract, authorizing performance only of those portions not subject to the Privacy Act; and

(2) After the notice is published and effective, authorize performance of the remainder of the contract.

Subpart 3424.2—Freedom of Information Act

3424.201 Authority.

The Department's regulations implementing the Freedom of Information Act, 5 U.S.C. 552, are in 34 CFR Part 5.

PART 3425—FOREIGN ACQUISITION

Subpart 3425.1—Buy American Act—Supplies

Sec.
3425.102 Policy.

Subpart 3425.3—Balance of Payments Program

3425.302 Policy.
Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 3425.1—Buy American Act—Supplies

3425.102 Policy.
(a) [Reserved]
(b) The HCA approves determinations under FAR 25.120(a)(4).

Subpart 3425.3—Balance of Payments Program

3425.302 Policy.
The HCA is designated to make all determinations under FAR 25.302. This authority may not be redelegated.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 3427—PATENTS, DATA, AND COPYRIGHTS

Subpart 3427.4—Rights in Data and Copyrights

Sec.
3427.470 Publication and publicity clause.
3427.471 Paperwork Reduction Act clause.
3427.472 Advertising of awards clause.
Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 3427.4—Rights in Data and Copyrights

3427.470 Publication and publicity clause.
The contracting officer shall insert the clause in 3452.227-70, Publication and Publicity, in all solicitations and contracts other than purchase orders.

3427.471 Paperwork Reduction Act clause.

The contracting officer shall insert the clause in 3452.227-71, Paperwork Reduction Act, in all solicitations and contracts.

3427.472 Advertising of awards clause.

The contracting officer shall insert the clause in 3452.227-72, Advertising of Awards, in all solicitations and contracts other than purchase orders.

PART 3428—BONDS AND INSURANCE

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

Subpart 3428.3—Insurance

3428.370 Contract clause.

The contracting officer shall insert the clause in 3452.228-70, Required

Insurance, in all solicitations and resultant cost-reimbursement contracts.

PART 3432—CONTRACT FINANCING

Subpart 3432.1—General

Sec.
3432.170 Method of payment.

Subpart 3432.4—Advance Payments

3432.402 General.
3432.407 Interest.

Subpart 3432.7—Contract Funding

3432.704 Limitation of cost or funds.
3432.770 Prohibition against the use of ED funds to influence legislation or appropriations.
3432.771 Provision for incremental funding.
Authority: 5 U.S.C. 301; 40 U.S.C. 486(C).

Subpart 3432.1—General

3432.170 Method of payment.

The contracting officer shall insert the clause in 3452.232-72, Method of Payment, in all solicitations and contracts.

Subpart 3432.4—Advance Payments

3432.402 General.

(a)-(d) [Reserved]
(e) The HCA is designated to make determinations under FAR 32.402(c)(1)(iii)(A). This authority may not be redelegated.

3432.407 Interest.

The HCA is designated to authorize advance payments without interest under FAR 32.407(d).

Subpart 3432.7—Contract Funding

3432.704 Limitation of cost or funds.

(a) Under the circumstances in FAR 32.704(a)(1), the contractor shall submit the following information in writing to the contracting officer:

- (1) Name and address of the contractor.
- (2) Contract number and expiration date.
- (3) Contract items and amounts that will exceed the estimated cost of the contract or the limit of the funds allotted.

(4) The elements of cost that changed from the original estimate (for example: labor, material, travel, overhead), furnished in the following format:

- (i) Original estimate.
- (ii) Costs incurred to date.
- (iii) Estimated cost to completion.
- (iv) Revised estimate.
- (v) Amount of adjustment.

(5) The factors responsible for the increase, such as error in estimate or changed conditions.

(6) The latest date by which funds must be available to the contractor to avoid delays in performance, work stoppage, or other impairments.

(b) A fixed fee provided in a contract may not be changed if a cost overrun is funded. Changes in a fixed fee may be made only to reflect changes in the scope of work that justify an increase or decrease in the fee.

3432.770 Prohibition against the use of ED funds to influence legislation or appropriations.

The contracting officer shall insert the clause at 3452.232-70, Prohibition Against the Use of ED Funds to Influence Legislation or Appropriations, in contracts with educational institutions, hospitals, and State and local governments. Contracts with commercial and nonprofit organizations shall be subject to the legislative lobbying prohibitions contained in FAR 31.205-22 and Office of Management and Budget Circular A-122, respectively.

3432.771 Provision for incremental funding.

The contracting officer shall insert the provision in 3452.232-71, Incremental Funding, in a solicitation if a cost-reimbursement contract using incremental funding is contemplated.

PART 3433—PROTESTS, DISPUTES, AND APPEALS

Subpart 3433.1—Protests

Sec.

3433.101 Definitions.

3433.103 Protests to the agency.

Subpart 3433.2—Disputes and Appeals

3433.203 Applicability.

3433.212 Contracting officer's duties upon appeal.

3433.214 Contract clause.

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

Subpart 3433.1—Protests

3433.101 Definitions.

"Filed," as used in this subpart, means that a document has been received by the contracting officer, the General Accounting Office (GAO), or the General Services Administration Board of Contract Appeals (GSBCA).

3433.103 Protests to the agency.

(a)(1) Protests to ED based on alleged improprieties in any type of solicitation that are apparent before bid opening or the closing date for receipt of proposals, must be filed before bid opening or the closing date for receipt of proposals. In the case of negotiated acquisitions, protests based on alleged improprieties that do not exist in the initial solicitation, but that are added later,

must be filed not later than the next closing date for receipt of proposals following the addition. In other cases, protests to ED must be filed not later than ten (10) Federal Government working days after a basis for protest is known or should have been known, whichever is earlier.

(b) With the concurrence of the HCA, the contracting officer is authorized to make a determination, using the criteria in FAR 33.103(a), to award a contract before resolution of a protest.

Subpart 3433.2—Disputes and Appeals

3433.203 Applicability.

The General Services Administration Board of Contract Appeals (GSBCA) is designated to hear any appeal from a final decision of a contracting officer issued pursuant to the "Disputes" clause in a contract. The rules and regulations of the GSBCA are in 48 CFR Chapter 5, Appendix B, and govern the processing of these appeals.

3433.212 Contracting officer's duties upon appeal.

The Office of the General Counsel is designated as the Government Trial Attorney to represent the Government in the defense of appeals before the GSBCA.

3433.214 Contract clause.

The contracting officer shall use the clause in FAR 52.233-1, Disputes, with its Alternate I.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 3437—SERVICE CONTRACTING

Subpart 3437.1—Service Contracts—General

Sec.

3437.102 Policy.

Subpart 3437.2—Consulting Services

3437.270 Consulting services reporting clauses.

3437.271 Services of consultants clauses.

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

Subpart 3437.1—Service Contracts—General

3437.102 Policy.

If a service contract requires one or more end items of supply, FAR Subpart 37.1 and this subpart apply only to the required services.

Subpart 3437.2—Consulting Services

3437.270 Consulting services reporting clause.

The contracting officer shall include the clause in 3452.237-70, Identification of Reports Under Consulting Services

Contracts, in all solicitations and contracts for consulting services.

3437.271 Services of consultants clause.

The contracting officer shall insert the clause in 3452.237-71, Services of Consultants, in all solicitations and resultant cost-reimbursement contracts.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 3442—CONTRACT ADMINISTRATION

Subpart 3442.7—Indirect Cost Rates

Sec.

3442.705 Final indirect cost rates.

Subpart 3442.70—Contract Monitoring

3442.7001 Withholding of contract payments clause.

3442.7002 Litigation and claims clause.

3442.7003 Delays clause.

Subpart 3442.71—Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities

3442.7101 Policy and clause.

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

Subpart 3442.7—Indirect Cost Rates

3442.705 Final indirect cost rates.

The Chief, Cost Determination Branch, Grants and Contracts Service, is delegated the authority to establish final indirect cost rates under FAR 42.705-1 and 42.705-2.

Subpart 3442.70—Contract Monitoring

3442.7001 Withholding of contract payments clause.

(a) The contracting officer shall insert the clause in 3452.242-72, Withholding of Contract Payments, in all solicitations and contracts other than purchase orders.

(b) ED may withhold contract payments if any report required to be submitted by the contractor is overdue, or if the contractor fails to perform or deliver work or services as required by the contract.

(c) The contracting officer shall notify the contractor in writing that payments are being withheld in accordance with the clause.

3442.7002 Litigation and claims clause.

The contracting officer shall insert the clause in 3452.242-70, Litigation and Claims, in all solicitations and resultant cost-reimbursement contracts.

3442.7003 Delays clause.

The contracting officer shall insert the clause in 3452.242-71, Notice to the Government of Delays, in all

solicitations and contracts other than purchase orders.

Subpart 3442.71—Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities

3442.7101 Policy and clause.

(a) It is the policy of ED that all meetings, conferences, and seminars be accessible to persons with disabilities.

(b) The contracting officer shall insert the clause in 3452.242-73, Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities, in all solicitations and contracts.

PART 3443—CONTRACT MODIFICATIONS

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

3443.106 Contract clause.

The contracting officer shall insert the clause in 3452.243-70, Key Personnel, in all solicitations and resultant cost-reimbursement contracts.

PART 3445—GOVERNMENT PROPERTY

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

Subpart 3445.4—Contractor Use and Rental of Government Property

3445.405 Contracts with foreign governments or international organizations.

Requests by, or for the benefit of, foreign governments or international organizations to use ED production and research property must be approved by the HCA. The HCA shall determine the amount of cost to be recovered or rental charged, if any, based on the facts and circumstances of each case.

PART 3447—TRANSPORTATION

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

Subpart 3447.70—Foreign Travel

3447.7000 Foreign travel clause.

The contracting officer shall insert the clause in 3452.247-70, Foreign Travel, in all solicitations and resultant cost-reimbursement contracts.

SUBCHAPTER H—CLAUSES AND FORMS

PART 3452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 3452.2—Texts of Provisions and Clauses

Sec.

3452.202-1 Definitions.

3452.208-70 Printing.

3452.209-70 Organization Conflict of Interest.

Sec.

3452.215-33 Order of Precedence.

3452.215-70 Release of Restricted Data.

3452.218-70 Additional Cost Principles.

3452.218-71 Negotiated Overhead Rates—Fixed.

3452.227-70 Publication and Publicity.

3452.227-71 Paperwork Reduction Act.

3452.227-72 Advertising of Awards.

3452.228-70 Required Insurance.

3452.232-70 Prohibition Against the Use of ED Funds to Influence Legislation or Appropriations.

3452.232-71 Incremental Funding.

3452.232-72 Method of Payment.

3452.237-70 Identification of Reports Under Consulting Services Contracts.

3452.237-71 Services of Consultants.

3452.242-70 Litigation and Claims.

3452.242-71 Notice to the Government of Delays.

3452.242-72 Withholding of Contract Payments.

3452.242-73 Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities.

3452.243-70 Key Personnel.

3452.247-70 Foreign Travel.

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

Subpart 3452.2—Texts of Provisions and Clauses

3452.202-1 Definitions.

As prescribed in 3402.201, insert the following clause in solicitations and contracts:

Definitions (Aug 1987)

(a) The term "Secretary" or "Head of the Agency" (also called "Agency Head") means the Secretary or Under Secretary of the Department of Education; and the term "his/her duly authorized representative" means any person, persons, or board authorized to act for these officials.

(b) The term "contracting officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

(c) The term "Contracting Officer's Technical Representative" means the person representing the Government for the purpose of technical monitoring of contract performance. The Contracting Officer's Technical Representative (COTR) is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the cost or price of this contract or a change in the delivery dates or performance period of this contract.

(d) The term "Department" or "ED" means the Department of Education.

(e) Except as otherwise provided in this contract, the term "subcontract" includes, but is not limited to, purchase orders and changes and modifications to purchase orders under this contract.

(End of clause)

3452.208-70. Printing.

As prescribed in 3408.870, insert the following clause in all solicitations and contracts other than purchase orders:

Printing (Aug 1987)

Unless otherwise specified in this contract, the contractor shall not engage in, nor subcontract for, and printing (as that term is defined in Title I of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract; except that performance involving the reproduction of less than 5,000 production units of any one page, or less than 25,000 production units in the aggregate of multiple pages, shall not be deemed to be printing. A production unit is defined as one sheet, size 8½ by 11 inches, and one side and color only.

(End of clause)

3452.209-70 Organizational Conflict of Interest.

As prescribed in 3409.570, insert the following provision in all certifications:

Organizational Conflict of Interest (Oct 1987)

The offeror certifies that it () is () is not aware of any potential organization conflict of interest that it may have under this procurement. If the offeror is aware of any potential conflict of interest, the offeror shall submit a disclosure statement fully describing the situation. An organizational conflict of interest is as defined and illustrated in FAR 9.5.

(End of provision)

3452.215-33 Order of Precedence.

As prescribed in 3415.406-3, insert the following clause in contracts:

Order of Precedence (Aug 1987)

Any inconsistency in this contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the work statement or specification).

(b) The contract clauses (Section I).

(c) Any incorporated documents, exhibits, or attachment, excluding the work statement or specifications and the contractor's proposal, representations, and certifications.

(d) The work statement or specifications, and

(e) The contractor's proposal, as amended, including representations and certifications.

(End of clause)

3452.215-70 Release of Restricted Data.

As prescribed in 3415.407, insert the following provision in solicitations:

Release of Restricted Data (Aug 1987)

(a) Offerors are hereby put on notice that regardless of their use of the legend set forth in FAR 52.215-12, Restriction on Disclosure and Use of Data, the Government may be required to release certain data contained in the proposal in response to a request for the

data under the Freedom of Information Act. The Government's determination to withhold or disclose a record will be based upon the particular circumstance involving the data in question and whether the data may be exempted from disclosure under the Freedom of Information Act. In accordance with Executive Order 12600 and to the extent permitted by law, the Government will notify the offeror before it releases restricted data.

(b) By submitting a proposal or quotation in response to this solicitation:

(1) The offeror acknowledges that the Department may not be able to withhold nor deny access to data requested pursuant to the Act and that the Government's FOI officials shall make that determination;

(2) The offeror agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by the Act;

(3) The offeror acknowledges that proposals not resulting in a contract remain subject to the Act; and

(4) The offeror agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under the Act.

(c) Offerors are cautioned that the Government reserves the right to reject any proposal submitted with (1) a restrictive legend or statement differing in substance from the one required by the solicitation provision in FAR 52.515-12, *Restriction on Disclosure and Use of Data*, or (2) a statement taking exceptions to the terms of (a) or (b) of this provision.

(End of provision)

3452.216-70 Additional Cost Principles.

Insert the following clause in solicitations and contracts as prescribed in 3416.307(b):

Additional Cost Principles (Aug 1987)

(a) *Bid and Proposal Costs.* Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal grants, contracts, and other agreements, including the development of scientific, cost and other data needed to support the bids, proposals and applications. Bid and proposal costs of the current accounting period are allowable as indirect costs; bid and proposal costs of past accounting periods are unallowable as costs of the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable. Bid and proposal costs do not include independent research and development costs or pre-award costs.

(b) *Independent research and development costs.* Independent research and development is research and development that is not sponsored by Federal and non-Federal grants, contracts, or other agreements. Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs of sponsored research and development. The costs of independent research and development,

including its proportionate share of indirect costs, are unallowable.

(End of clause)

3452.216-71 Negotiated Overhead Rates—Fixed.

Insert the following clause in cost-reimbursement contracts as prescribed in 3416.701:

Negotiated Overhead Rates—Fixed (Aug 1987)

(a) Notwithstanding the provisions of the clause entitled "Allowable Cost and Payment", the allowable indirect costs under this contract shall be obtained by applying negotiated fixed overhead rates for the applicable period(s) to bases agreed upon by the parties, as specified below. A negotiated fixed rate(s) is based on an estimate of the costs which will be incurred during the period for which the rate(s) applies. If the application of the negotiated fixed rate(s) against the actual bases during a given fiscal period produces an amount greater or less than the indirect costs determined for that period, the greater or lesser amount(s) will be carried forward to a subsequent period.

(b) The contractor, as soon as possible but no later than six months after the close of its fiscal year, or such other period as may be specified in the contract, shall submit to the contracting officer or the duly authorized representative, with a copy to the cognizant audit activity, a proposed fixed overhead rate or rates based on the contractor's actual cost experience during the fiscal year, including adjustment, if any, for amounts carried forward, together with supporting cost data. Negotiation of fixed overhead rates, including carry-forward adjustments, if any, by the contractor and the contracting officer, or the duly authorized representative, shall be undertaken as promptly as practicable after receipt of the contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify (1) the agreed fixed overhead rates, (2) the bases to which the rates apply, (3) the fiscal year, unless the parties agreed to a different period, for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs.

(e) Pending establishment of fixed overhead rates for any fiscal year or different period agreed to by the parties, the contractor shall be reimbursed either at the rates fixed for the previous fiscal year or other period or at billing rates acceptable to the contracting officer, subject to appropriate adjustment when the final rates for the fiscal year or other period are established.

(f) Any failure of the parties to agree on any fixed rate or rates or to the amount of any carry-forward adjustment under this clause shall not be considered a dispute for decision by the contracting officer within the meaning of the Disputes clause of this contract. If for any fiscal year or other period specified in the contract, the parties fail to

agree to a fixed overhead rate or rates, it is agreed that the allowable indirect costs under this contract shall be obtained by applying negotiated final overhead rates, in accordance with the terms of the Allowable Cost and Payment clause, in effect on the date of this contract.

(g) Submission of proposed fixed, provisional, and/or final overhead rates, together with appropriate data in support thereof, to the contracting officer or the duly authorized representative and agreements on fixed, provisional, and/or final overhead rates entered into between the contractor and the contracting officer or the duly authorized representative, as evidenced by negotiated overhead rate agreements signed by both parties, shall satisfy the requirements of paragraphs (b), (c), (d), and (e) of this clause. (End of clause)

3452.227-70 Publication and Publicity.

As prescribed in 3427.470, insert the following clause in all solicitations and contracts other than purchase orders:

Publication and Publicity (Aug 1987)

(a) Unless otherwise specified in this contract, the contractor is encouraged to publish and otherwise promote the results of its work under this contract. A copy of each article or work submitted by the contractor for publication shall be promptly sent to the Contracting Officer's Technical Representative. The contractor shall also inform the representative when the article or work is published and furnish a copy in the published form.

(b) The contractor shall acknowledge the support of the Department of Education in publicizing the work under this contract in any medium. This acknowledgment shall read substantially as follows:

"This project has been funded at least in part with Federal funds from the U.S. Department of Education under contract number _____. The content of this publication does not necessarily reflect the views or policies of the U.S. Department of Education nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government."

(End of clause)

3452.227-71 Paperwork Reduction Act.

As prescribed in 3427.471, insert the following clause in all solicitations and contracts:

Paperwork Reduction Act (Aug 1987)

(a) The Paperwork Reduction Act of 1980 (Pub. L. 96-511) applies to contractors that collect information for use or disclosure by the Federal Government.

If the contractor will collect information requiring answers to identical questions from 10 or more people then no plan, questionnaire, interview guide, or other similar device for collecting information may be used without first obtaining clearance from the Deputy Under Secretary for Management (DUSM) or his/her delegate within the Department of Education (ED) and the Office of Management and Budget (OMB).

Contractors and Contracting Officers' Technical Representatives shall be guided by the provisions of 5 CFR Part 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the Department's Paperwork Clearance Officer to determine the procedures for acquiring DUSM and OMB clearance.

(b) The contractor shall obtain the required DUSM and OMB clearance through the Contracting Officer's Technical Representative before expending any funds or making public contacts for the collection of information described in (a) above. The authority to expend funds and proceed with the collection shall be in writing by the contracting officer. The contractor must plan at least 120 days for DUSM and OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the contractor will be considered in accordance with the Excusable Delays or Default clause of this contract. (End of clause)

3452.227-72 Advertising of Awards.

As prescribed in 3427.472, insert the following clause in all solicitations and contracts other than purchase orders:

Advertising of Awards (Aug 1987)

The contractor agrees not to refer to awards issued by the Department of Education in commercial advertising in such a manner as to state or imply that the product or service provided is endorsed by the Federal Government or is necessarily considered by the Government to be superior to other products or services. (End of clause)

3452.228-70 Required Insurance.

As prescribed in 3428.370, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Required Insurance (Aug 1987)

(a) The contractor shall procure and maintain such insurance as required by law or regulation, including but not limited to the requirements of FAR Subpart 28.3 or by the written direction of the contracting officer. Prior written approval of the contracting officer shall be required with respect to any insurance policy the premiums for which the contractor proposes to treat as a direct cost under this contract and with respect to any proposed qualified program of self-insurance. The terms of any other insurance policy shall be submitted to the contracting officer for approval upon request.

(b) Unless otherwise authorized in writing by the contracting officer, the contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of or damage to Government property. (End of clause)

3452.232-70 Prohibition Against the Use of ED Funds to Influence Legislation or Appropriations.

The following clause is to be used in accordance with 3432.770:

Prohibition Against the Use of ED Funds to Influence Legislation or Appropriations (Apr 1987)

No part of any funds under this contract shall be used to pay the salary and expenses of any contractor, or agency acting for the contractor, to engage in any activity designed to influence legislation or appropriations pending before the Congress. (End of clause)

3452.232-71 Incremental Funding.

As prescribed in 3452.771, insert the following provision in solicitations:

Incremental Funding (Aug 1987)

(a) Sufficient funds are not presently available to cover the total cost of the complete project described in this solicitation. However, it is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause titled "Limitation of Funds" in FAR 52.232-22. Under that clause, which will be included in the resultant contract, initial funds will be obligated under the contract to cover an estimated base performance period. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the entire period of performance. This intent notwithstanding, the Government will not be obligated to reimburse the contractor for cost incurred in excess of the periodic allotments, nor will the contractor be obligated to perform in excess of the amount allotted.

(b) The Limitation of Cost clause in FAR 52.232-20 shall supersede the Limitation of Funds clause in the event the contract becomes fully funded. (End of provision)

3452.232-72 Method of Payment.

As prescribed in 3432.170, insert the following clause in all solicitations and contracts:

Method of Payment (Aug 1987)

(a) Payments under this contract will be made either by check or by wire transfer through the Treasury Financial Communications System at the option of the Government.

(b) The contractor shall forward the following information in writing to (designated payment party) not later than seven days after receipt of notice of award.

(1) Full name (where practicable), title, phone number, and complete mailing address of responsible official(s) to whom check payments are to be sent, and who may be contacted concerning the bank account information requested below.

(2) The following bank account information required to accomplish wire transfers:

(i) Name, address, and telegraphic abbreviation of the receiving financial institution;

(ii) Receiving financial institution's nine-digit American Bankers Association (ABA) identifying number for routing transfer of funds. (Provide this number only if the receiving financial institution has access to

the Federal Reserve Communications System.)

(iii) Recipient's name and account number at the receiving financial institution to be credited with the funds.

(iv) If the receiving financial institution does not have access to the Federal Reserve Communications System, provide the name of the correspondent financial institution through which the receiving financial institution receives electronic funds transfer messages. If a correspondent financial institution is specified, also provide the address and telegraphic abbreviation of that institution and its nine-digit ABA identifying number for routing transfer of funds.

(c) Any changes to the information furnished under paragraph (b) of this clause shall be furnished to (designated payment office) in writing at least 30 days before the effective date of the change. It is the contractor's responsibility to furnish these changes promptly to avoid payments to erroneous addresses or bank accounts.

(d) The document furnishing the information required in paragraphs (b) and (c) must be dated and contain the signature, title, and telephone number of the contractor's official authorized to provide it, as well as the contractor's name and contract number. (End of clause)

3452.237-70 Identification of Reports Under Consulting Services Contracts.

As prescribed in 3437.270, insert the following clause in all solicitations and contracts for consulting services:

Identification of Reports Under Consulting Service Contracts (Aug 1987)

The contractor shall set forth on the cover of every report submitted pursuant to this contract the following information:

(a) Name and business address of the contractor; (b) Contract number; (c) Contract dollar amount; (d) Whether the contract was competitively or noncompetitively awarded; (e) Name of the Contracting Officer's Technical Representative and complete office identification and address; and (f) Names of the managerial and professional personnel responsible for the content and preparation of the report. (End of clause)

3452.237-71 Services of Consultants.

As prescribed in 3437.271, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Services of Consultants (Aug 1987)

Except as otherwise expressly provided elsewhere in this contract, and notwithstanding the provisions of the clause of the contract entitled "Subcontracts Under Cost-Reimbursement and Letter Contracts," the prior written approval of the contracting officer shall be required:

(a) If any employee of the contractor is to be paid as a "consultant" under this contract; and

(b) For the utilization of the services of any consultant under this contract exceeding the

daily rate set forth elsewhere in this contract or, if no amount is set forth, \$150, exclusive of travel costs, or if the services of any consultant under this contract will exceed 10 days in any calendar year.

If that contracting officer's approval is required, the contractor shall obtain and furnish to the contracting officer information concerning the need for the consultant services and the reasonableness of the fees to be paid, including, but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by consultant to others for performing consultant services of a similar nature.

(End of clause)

3452.242-70 Litigation and Claims.

As prescribed in 3442.7002, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Litigation and Claims (Aug 1987)

(a) The contractor shall give the contracting officer immediate notice in writing of:

(1) Any action, filed against the contractor arising out of the performance of this contract, including any proceeding before any administrative agency or court of law, and also including, but not limited to, the performance of any subcontract hereunder; and

(2) Any claim against the contractor for a cost which is allowable under the clause entitled "Allowable Cost and Payment."

(b) Except as otherwise directed by the contracting officer, the contractor shall immediately furnish the contracting officer copies of all pertinent papers received under that action or claim.

(c) If required by the contracting officer, the contractor shall:

(1) Effect an assignment and subrogation in favor of the Government of all the contractor's rights and claim (except those against the Government) arising out of the action or claim against the contractor; and

(2) Authorize the Government to settle or defend the action or claim and to represent the contractor in, or to take charge of, the action.

(d) If the settlement or defense of an action or claim is undertaken by the Government, the contractor shall furnish all reasonable required assistance. However, if an action against the contractor is not covered by a policy of insurance, the contractor shall notify the contracting officer and proceed with the defense of the action in good faith.

(e) To the extent not in conflict with any applicable policy of insurance, the contractor may, with the contracting officer's approval, settle any such action or claim.

(f)(1) The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to

the extent that the contractor would have been compensated by insurance that was required by law, regulation, contract clause, or other written direction of the contracting officer, but which the contractor failed to secure through its own fault or negligence.

(2) In any event, unless otherwise expressly provided in this contract, the contractor shall not be reimbursed or indemnified by the Government for any cost or expense of liability that the contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may arise from the performance of this contract.

(End of clause)

3452.242-71 Notice of the Government of Delays.

As prescribed in 3442.7003, insert the following clause in all solicitations and contracts other than purchase orders:

Notice to the Government of Delays (Aug 1987)

Whenever the contractor has knowledge that any actual or potential situation, including but not limited to labor disputes, is delaying or threatens to delay the timely performance of work under this contract, the contractor shall immediately give written notice thereof, including all relevant information with respect thereto, to the contracting officer.

(End of clause)

§ 3452.242-72 Withholding of Contract Payments.

As prescribed in 3442.7001, insert the following clause in all solicitations and contracts other than purchase orders:

Withholding of Contract Payments (Aug 1987)

Notwithstanding any other payment provisions of this contract, failure of the contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, or failure to meet any of the requirements of the contract, will result in the withholding of payments under this contract in such amounts as the contracting officer deems appropriate, unless the failure arises out of causes beyond the control, and without the fault of negligence, of the contractor, as defined by the clause entitled "Excusable Delays" or "Default", as applicable. The Government shall promptly notify the contractor of its intention to withhold payment of any invoice or voucher submitted. Payment will be withheld until the failure is cured, a new delivery schedule is agreed upon, or payment is made as part of a termination settlement.

(End of clause)

3452.242-73 Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities.

As prescribed in 3442.7101(b), insert the following clause in all solicitations and contracts:

Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities (Aug 1987)

The contractor shall assure that any meeting, conference, or seminar held pursuant to the contract will meet all applicable standards for accessibility to persons with disabilities pursuant to Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) and any implementing regulations of the Department.

(End of clause)

3452.243-70 Key Personnel.

As prescribed in 3443.106(b), insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Key Personnel (Aug 1987)

The personnel designated as key personnel in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, or otherwise substituting any other personnel for specified personnel, the contractor shall notify the contracting officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the contract effort. No diversion or substitution shall be made by the contractor without the written consent of the contracting officer; provided, that the contracting officer may ratify a diversion or substitution in writing and that ratification shall constitute the consent of the contracting officer required by this clause. The contract shall be modified to reflect that addition or deletion personnel.

(End of clause)

§ 3452.247-70 Foreign Travel.

As prescribed in 3447.7000, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Foreign Travel (Aug 1987)

Foreign travel shall not be undertaken without the prior written approval of the contracting officer. As used in this clause, "foreign travel" means travel outside the fifty States comprising the United States, the District of Columbia, and Canada.

(End of clause)

[FR Doc. 88-11719 Filed 5-25-88; 8:45 am]

BILLING CODE 4000-01-M

Environmental Protection Agency

Thursday
May 26, 1988

Part IV

Environmental Protection Agency

40 CFR Part 86

Control of Air Pollution From New Motor
Vehicles and New Motor Vehicle Engines:
Nonconformance Penalties for Heavy-
Duty Engines and Heavy-Duty Vehicles,
Including Light-Duty Trucks; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL-3372-9]

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: Nonconformance Penalties for Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks; Final Rule

AGENCY: Environmental Protection Agency [EPA].

ACTION: Final rule.

SUMMARY: EPA is promulgating a final rule revising the regulation codified in Subpart L of 40 CFR Part 86, that makes nonconformance penalties (NCPs) available for specific Federal emission standards, to include a provision which will waive payment of penalties to EPA for those heavy-duty vehicles and engines (collectively referred to as HDVs) which are certified under the Federal NCP process and are titled, registered or principally used in the State of California under a California NCP program. EPA will waive collection of the amount due under 40 CFR section 86.1113(g) provided the identical nonconformance penalty is paid to the State of California. However, EPA reserves the right to collect any penalties which have been waived if a manufacturer fails to pay the quarterly penalty to the State of California when due, or if the amount of the penalty paid to the State of California is less than that which would have been due to EPA under the regulations.

EFFECTIVE DATE: June 27, 1988.

ADDRESSES: Public Docket: Copies of material relevant to this rulemaking are contained in Public Docket Number A-87-14, Central Docket Section, U.S. Environmental Protection Agency, Room 4, South Conference Center (LE-132), Waterside Mall, 401 M Street SW., Washington, DC 20460. The docket may be inspected between 8:00 am and 3:00 pm on weekdays. As provided in 40 CFR Part 2, a reasonable fee may be charged for photocopying.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Tesoriero or Mr. Anthony Erb, Manufacturers Operations Division (EN-340F), Office of Mobile Sources, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Telephone (202) 382-2487 or (202) 382-2536, respectively.

SUPPLEMENTARY INFORMATION: I. Background

Section 206(g) of the Clean Air Act (Act) requires EPA to issue a certificate of conformity for HDVs which exceed a section 202(a) emissions standard, but do not exceed an upper limit associated with that standard, if the manufacturer pays a nonconformance penalty (NCP) established by EPA by regulation. Congress intended NCPs as temporary relief for manufacturers which have difficulty complying with technology—forcing heavy-duty emission standards which otherwise might force some manufacturers out of the market place.

On August 30, 1985 (50 FR 35374) EPA published a final rule promulgating the administrative aspects of the NCP program. On December 31, 1985 (50 FR 53454), EPA promulgated a final rule making NCPs available for specific emission standards taking effect in model years 1987 and 1988. The regulations are codified in Subpart L of 40 CFR Part 86. These regulations did not specifically prohibit or allow NCPs for HDVs destined for the California market. However, California regulations, at that time, did not allow for NCPs and, thus, did not allow a manufacturer to obtain a California certificate of conformity for a nonconforming vehicle or engine based on payment of an NCP to EPA.

On December 8, 1986, the Executive Director of the State of California Air Resources Board (CARB) sent to EPA a letter describing a proposed California NCP program. A copy of this letter is available in the Public Docket Number A-87-14. It pointed out that the availability of NCPs for Federal HDVs had created a disparity between California and Federal HDV requirements. Thus, unless a California NCP program were implemented, beginning with the 1988 model year,¹ fewer HDV models would be available for sale in California than in neighboring states and California consumers might be encouraged to purchase and register higher emitting HDVs in other states. Assuming this occurred, these HDVs, along with other Federally certified vehicles engaging in interstate commerce, would travel a substantial number of miles on California highways each year and contribute to emissions within the State.

The December 8, 1986 letter also stated that to address this situation, the California Legislature had enacted

Assembly Bill 3683 (AB 3683). This new law authorized CARB to implement an NCP program applicable to sales of HDVs in California which do not meet CARB emission standards, but which have already been certified under the Federal NCP program, contingent upon the following factors:

(1) That Federal emission standards and test procedures applicable to the specified HDVs are identical to the emission standards and test procedures adopted by the CARB; and

(2) That it is established that payment of nonconformance penalties to the State of California may substitute for payment of nonconformance penalties to the Federal Government.

The law (AB 3683) specified that the NCPs to be established are to be identical to those established by EPA for the same HDVs. All fees collected pursuant to AB 3683 are to be deposited in the State of California Air Pollution Control Fund and will provide a mechanism for funding measures to mitigate emission increases within the State from HDVs certified under the NCP process, thereby ensuring protection of California's ambient air quality.

In the December 8, 1986 letter, the CARB requested that EPA provide assistance in establishing a California NCP program. The CARB NCP program is very similar to the Federal NCP program. For pollutants where CARB and EPA have the same standards and procedures, noncomplying HDVs could be sold for titling, registration or principal use in the State of California if the manufacturer agrees to pay an NCP and the HDV emissions do not exceed an upper limit. The penalty rates and upper limit used for the California NCP program in such cases are identical to the Federal penalty rates and upper limits. However, California will not offer NCPs for pollutants which have standards or procedures that are not identical to Federal standards and procedures.² Moreover, under the CARB program, NCP payment to the State of California will substitute for payment to the Federal Government for HDVs sold for titling, registration or principal use in the State of California. The NCP payments made to the State of California would be used to mitigate any

¹ There was no need for a California NCP program for the 1987 model year since Title 13 of the California Administrative Code, Section 1956.7 allowed manufacturers that had certified for California in 1986, to carry forward that certification to the 1987 model year.

² For the 1988 and 1989 model years, the only difference between the Federal and California standards for Heavy-Duty Engines is for oxides of nitrogen (NOx). The Federal NOx standard is 10.7 grams per brake horsepower hour (g/BHP-hr) and the California NOx standard is 6.0 g/BHP-hr for these years. Beginning in 1990 and for later model years, the Federal and California NOx standard will be the same.

resultant emission increases that would occur within California.

On January 21, 1988, EPA proposed that the regulation governing payment of Federal NCPs be amended to include a provision which would waive payment of penalties to EPA for those HDVs which are certified under the Federal NCP process and registered, titled or principally used in the State of California under a California NCP program (53 FR 1716). EPA offered to hold a public hearing on the proposal but none was requested.

II. Statutory Authority

Section 206(g) of the Act, 42 U.S.C. 7525(g), requires EPA to issue a certificate of conformity for heavy-duty vehicles or engines which exceed a section 202(a) emissions standard, but do not exceed a "practicable" upper limit determined by EPA, if the manufacturer pays a nonconformance penalty (NCP), that would escalate with time, established by rulemaking.³ The purposes of section 206(g), in general, are to encourage EPA to promulgate stringent HDV standards by giving those manufacturers unable to meet certain standards a temporary means of continuing to market nonconforming HDVs, while creating incentives for such manufacturers eventually to bring the HDVs into conformance or, ultimately, to discontinue their manufacture. Since under California's program the California NCPs and HDV standards would have to be identical to the Federal NCPs and standards for the pollutants for which NCPs are currently available, waiving payment of NCPs to EPA based on payment of identical NCPs to California would continue to carry out the purposes and intent of section 206(g). Moreover, EPA would retain authority to collect NCPs in any case in which the California NCP program did not result in the manufacturer actually paying adequate penalties to California. Thus, the amendment is within the scope of the authority granted by section 206(g).

In its comments on the proposed rule Cummins Engine Company (Cummins) expressed some concern that allowing the waiver of the Federal NCP payment when all California HDV emission standards and procedures are not yet identical to Federal emission standards and procedures would not serve the purposes of section 206(g). EPA does not agree with Cummins' comment and has addressed Cummins' concerns in the "Discussion of Final Rule and Comments" section of this regulation.

³ Section 206(g) of the Act does not expressly require that NCPs be paid to EPA.

III. Discussion of Final Rule and Comments

This final rule adopts most of the provisions proposed in the NPRM for the reasons stated in that NPRM. Thus, EPA will not discuss all of the provisions of the final rule in this notice. Instead, EPA will discuss only the most significant provisions, or those that have been revised or that were addressed in the comments.

EPA is revising 40 CFR Part 86, Subpart L to waive payment of NCPs to EPA, under certain conditions, for those nonconforming HDVs which are certified under the Federal NCP process and which are titled, registered or principally used in California, and for which the manufacturers have paid NCPs to California in the same amount that EPA would have been paid. EPA reserves the right to collect a waived amount (in full or in part, as appropriate) if the manufacturer has not demonstrated either that it has paid California an amount equal to the penalty which has been assessed under the Federal NCP rule, or that the HDVs claimed to have been titled, registered or principally used in California were, in fact, titled, registered or principally used in California. Moreover, if in a later model year a manufacturer brings a previously nonconforming HDV configuration into compliance with the standards and certifies that HDV configuration, EPA will be responsible only for a portion of the refund (if any) to the manufacturer of the engineering and development component of the penalty. EPA's portion of the refund will be proportional to the amount of the NCP payment for HDVs of that configuration paid to EPA.

During the time that was available for public comment on the NPRM, only three organizations provided written comments. All three are vehicle or engine manufacturers.

The Chrysler Corporation supported the revisions as proposed and recommended a speedy publication of the final rule so that the California NCP program could be implemented without delay.

General Motors Corporation (GM) supported the revision and stated it is extremely interested in the implementation of the California NCP program as quickly as possible so that existing market demand can be satisfied. However, GM also stated its concern that proposed language requirements for a specific emissions label statement on California nonconformance engines and vehicles would be unnecessarily restrictive. GM believes that its current product

ordering and production system efficiently differentiates between any engines or vehicles that are built to be introduced in commerce in California and those built to be introduced only in the other 49 states. GM requested that the proposed labeling requirement be modified to allow approval of alternative processes to demonstrate separation of California and 49-state NCP engines and vehicles. In the Proposed Action section of the NPRM, EPA stated that other forms of demonstration of the HDV destination could be acceptable. However, in the proposed regulatory language EPA failed to include a provision permitting alternative demonstrations. Thus, in response to GM's comment a provision has been made in the final rule to allow for manufacturers to make such a demonstration in lieu of using the suggested label language.

An example for an alternative system that could be approved would be one in which the manufacturer clearly informs its distributors and dealers in writing of the guidelines used to determine whether it is appropriate to sell a HDV to a customer for titling, registration or principal use in California or in the other 49-states and the manufacturer has an established communication link with the distributor or dealers through which it can receive feedback to determine that appropriate decisions are being made as to the sale of California or 49-state HDVs.

Moreover, upon consideration of GM's comments, EPA also has determined that the proposed labeling requirement could have unnecessarily restricted the waiver of NCP payment to only those HDVs delivered to dealers in California. In the NPRM, EPA proposed that it would waive payment of NCPs to EPA for those HDVs which were certified under the Federal NCP process and which "entered into commerce in the State of California" under a California NCP program. After further review, EPA has determined that the phrase, "entered into commerce in the State of California" could have been construed in an overly restrictive way to preclude waivers of NCP payments where prospective purchasers have a legitimate need to take delivery of a California HDV outside of California. Such a case could exist where a business established in a state other than California desires to purchase an HDV which will be titled, registered or principally used in California. Under such circumstances, it may be appropriate to deliver a California-designated HDV outside of California. Thus, to avoid any potential confusion,

the phrase, " * * * entered into commerce in the State of California * * * " in the NPRM has been revised and clarified in the appropriate sections of the Final Rule to read, " * * * which are titled, registered or principally used in the State of California."

The Cummins Engine Company (Cummins) made several comments concerning this rulemaking. Cummins questions the authority of the CARB to adopt an NCP program unless CARB, "has adopted emission standards and test procedures which are identical to the corresponding Federal emission standards and test procedures." Cummins also stated its belief that the granting of a waiver of Federal preemption by EPA to CARB for collection of NCPs would be inappropriate unless CARB agrees to adopt a program which is totally consistent with EPA's. Further, Cummins stated that the changes proposed in section 86.1113-87(h)(iii) would require that EPA make an independent decision as to whether CARB has the statutory authority to adopt NCPs as proposed. The specific language in the NPRM stated, "Such a waiver of preemption would be applicable only if the Administrator finds that: (A) California has adopted emission standards and test procedures for heavy-duty vehicles or engines which are identical to the corresponding Federal emission standards and test procedures for which NCPs are available, (B) California has adopted nonconformance penalty fees, requirements and other procedures identical to corresponding Federal nonconformance penalty fees, requirements and other procedures, and (C) all criteria for a waiver under section 209(b) have been met."

Cummins also expressed concern regarding whether the proposed rule was consistent with the intent of section 206(g).

As explained below, Cummins' concerns regarding the authority of CARB to adopt an NCP program are beyond the scope of this rulemaking. Cummins' claim that EPA should not grant a waiver of Federal preemption under section 209(b) of the Clean Air Act for CARB's NCP program, unless EPA independently determines that California's HDV emission standards and NCP program are identical in every respect to the Federal HDV emission standards and NCP program, is not appropriate in the context of this section 206(g) rulemaking. However, Cummins' argument would be appropriate, and will be considered, in the context of EPA's separate proceeding under section

209(b) to determine whether CARB's NCP program is entitled to a waiver of preemption or is within the scope of a previous preemption waiver.⁴

Upon review of Cummins' comment and the proposed revisions to section 86.1113-87(g)(1)(iii), EPA believes that the proposal itself may have caused some confusion by suggesting that EPA would determine whether CARB's NCP program is subject to a waiver from preemption based, in part, on whether California's standards and NCP procedures are identical to Federal standards and NCP procedures. Such a consideration would be appropriate, if at all, in the context of a separate section 209(b) proceeding. This rulemaking, by contrast, should be and is limited to establishing whether and how to waive payment of NCPs under section 206(g). Thus, this final rule clarifies the scope and purpose of this rulemaking by deleting any reference to the criteria for granting a preemption waiver from revised section 86.1113-87(g)(1)(iii). Of course, the existence of an applicable 209(b) preemption waiver (if not the grounds for granting one) is a legitimate criterion for determining whether to waive NCP payments, as stated in the NPRM and adopted in this Final Rule.

Regarding Cummins' concerns about whether this rule is consistent with the intent of section 206(g), the proposed rule stated "waiving payment of NCPs to EPA based on payment of identical NCPs to California will continue to carry out the purpose and intent of section 206(g)." Cummins commented that it believes, "California use of Federal NCPs without [complete] alignment between California and Federal standards and on a pollutant-by-pollutant basis would be inconsistent with the intent of the NCP program." Cummins bases this comment on its belief that "the Federal NCP program and schedule reflects . . . a balancing of costs and technology trade-offs designed to encourage conformance with all standards while not creating competitive disadvantages for those manufacturers that conform to all of the standards."

EPA disagrees with Cummins' conclusions. Under the present circumstances, for the 1988 and 1989 model years, EPA does not believe that manufacturers of complying vehicles will be at a competitive disadvantage or that there will be a disincentive to

conformance with emission standards if California does not align all of its HDV standards with Federal standards and limits its NCP program to only those pollutants for which California and Federal standards are identical.

NCPs were developed to cope with the situation where manufacturers faced different costs to comply with technology-forcing standards. Section 206(g) contemplated that it would be initially less costly for some technological laggard manufacturers to pay NCPs than to comply with standards. Thus, the NCP penalty rates are devised so that it could be cost effective, on a temporary basis, for a technological laggard to pay an NCP, whereas it would not be cost effective for such a manufacturer to build a complying engine. Other manufacturers who are capable of developing technology, however, may find it more cost effective to build complying engines.

In its comments Cummins seems to assume that for all manufacturers it would be less expensive to pay an NCP rather than develop the technology to comply with emission standards. For the reasons stated above, EPA does not believe this is a valid assumption.

Even if EPA accepted Cummins' argument, currently all CARB and Federal heavy-duty engine emission standards, except for 1988-1989 model year oxides of nitrogen (NO_x) standards, are identical. Therefore, the only pollutants which could cause Cummins concern are NO_x and particulates (in that there is a possibility of trading off particulate emissions to achieve additional NO_x control.)

The Federal and California NCP programs will not permit NCPs for NO_x in the 1988 and 1989 model years. Thus, the NO_x NCP penalty rate is not an issue in the decision of whether or not to waive Federal collection of the NCP payment if an NCP payment has been made to California because manufacturers will not have the option of paying an NCP for HDVs which exceed the NO_x standard.

The Federal program will permit payment of an NCP for HDVs that exceed the particulate standard. However, California has decided not to permit payment of an NCP for HDVs that exceed the particulate standard. Even if California did permit the payment of NCPs for HDVs that exceeded the particulate standard, the Federal NCP penalty rate for particulates was developed assuming a 0.6 gram per brake horsepower hour (g/BHP-hr) particulate standard (the current Federal and California

⁴ This is not to say that EPA agrees with Cummins' comment that CARB's proposed NCP program would exceed CARB's statutory authority or that EPA should not defer to CARB's assessment of its own authority.

particulate standard) and a 6.0 g/BHP-hr NO_x standard (the applicable Federal NO_x standard at the time the particulate penalty rate was developed⁴ and the current California NO_x standard). Thus, Cummins' suggestion that the temporary discrepancy between the California and Federal NO_x standards somehow changes the technological and economic factors underlying the Federal NCP rate for particulates is factually incorrect. Therefore, it would not be inappropriate to apply the Federal particulate NCP penalty rate to California vehicles which exceed the particulate standard. However, at this time, this is essentially an academic issue since California does not now intend to allow NCPs for, and thus they will not certify for sale in California, any HDVs that exceed the particulate standard.

Based on the reasoning described above, EPA believes that waiving payment of pollutant-specific NCPs to EPA based on payment of identical NCPs to California carries out the purpose and intent of section 206(g).

IV. Impacts of the Final Rule

A. Economic Impact

Because the use of NCPs is optional, manufacturers have flexibility to choose whether or not to use NCPs for California HDVs based on their ability to comply with emission standards. If manufacturers elected not to use NCPs to introduce HDVs into California, these manufacturers and the users of their products will not incur any additional costs related to NCPs.

The use of NCPs may provide some direct cost savings to HDV manufacturers that lack the technological capability to conform with emission standards immediately. In the absence of NCPs, a manufacturer that desires to market in California and has difficulty certifying HDVs in conformance with emission standards, or fails an emissions audit, has only two alternatives: fix the nonconforming engines or vehicles, perhaps at prohibitive cost; or refrain from selling such engines or vehicles for titling, registration or principal use in the State of California. The availability of NCPs provides manufacturers with a third alternative with some potential cost savings: continue production and market HDVs in California upon payment of a penalty for each HDV that exceeds the standard until emissions conformance is achieved.

Therefore, NCPs represent a regulatory mechanism that allows affected manufacturers increased flexibility. A decision to use NCPs may be the manufacturer's only way to continue to sell HDVs for titling, registration or principal use in California. Hence, this rule may be considered to have a favorable economic impact on some manufacturers.

The CARB has pointed out that many of the HDVs marketed in California are incomplete vehicles and are completed by secondary manufacturers based on specific customer needs. Without California NCPs, these secondary manufacturers and their customers within the State of California will likely suffer adverse economic impacts due to the inability of the primary manufacturer to deliver the required HDVs and the resulting inability of the secondary manufacturers within the State of California to produce the product the consumers require.

B. Environmental Impact

Because the use of NCPs is an option elected by affected manufacturers, EPA cannot be sure to what extent NCPs will be used for HDVs marketed in California.

If manufacturers are able to market all their engines in California without using NCPs, all HDVs produced will need to be in conformance with the regulatory requirements. In this situation, the environmental benefits estimated during the Federal rulemakings that established the emission regulations will not be affected.

If some manufacturers do elect to participate in the NCP program, some HDVs will be marketed in California that will be emitting pollutants above applicable standards. However, Congress contemplated such a possibility when it mandated that EPA provide Federal NCPs. The magnitude of this reduced environmental benefit is proportional to the number of HDVs subject to NCPs and their degree of nonconformance; the upper limits on the availability of NCPs exclude gross emitters from being introduced into commerce. In previous rulemakings concerning NCPs, EPA estimated that an NCP would not be used for more than 10 percent of the HDVs for which NCPs are available in the first year that they were available and that they would be used for less than one percent in the third year. These percentages are not expected to be different for the State of California. The long-term environmental impact from NCP usage is expected to be very small, if any, due to the high penalty rates and the annual adjustment

factor that rapidly increases penalty rates when NCP usage is significant. Of course, any reduction in environmental benefit generally refers not to an increase in emissions from previous levels, but from levels that would otherwise occur from tightened emission standards without NCPs.

Further, the NCP payment to the State of California will be used to mitigate any emission increases that occur as a result of NCPs. This may lead to some improvement over the potential situation wherein consumers, in order to meet their specific vehicle needs, may purchase nonconforming vehicles certified under the existing Federal NCP process in bordering states for primary use on California roadways.

Because the emission impacts of the NCPs in the State of California are anticipated to be very small, compared to the total emissions of California HDVs which in fact comply with emission standards, and because the extent of NCP usage in any specific model year cannot be accurately predicted at this time, no specific air quality impact analysis has been made regarding this rule.

V. Compliance with Regulatory Flexibility Act

Under section 605 of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Administrator is required to prepare a regulatory flexibility analysis or to certify that this regulation would not have a significant economic impact on a substantial number of small business entities. None of the affected HDV primary manufacturing entities meet the requirements for classification as a small business. Moreover, as already discussed, the NCP waiver program can be expected to have salutary effects on manufacturers, both primary and secondary. Thus, I certify that this rule would not have a significant adverse impact on a substantial number of small entities.

VI. Administrative Designation

Under Executive Order 12291, the Administrator has determined that this regulation is not "major" and therefore not subject to the requirement of a draft Regulatory Impact Analysis.

(A) The NCP waiver program for the California HDVs would not result in an annual adverse effect on the economy of \$100 million or more. NCPs, in general, merely provide a temporary, economically viable, alternative to other possible actions at least as costly as NCPs that may be utilized when a manufacturer is unable to comply with a

⁴ When the Federal NCP rules were finalized, EPA had promulgated a 6.0 g/BHP-hr NO_x standard to take effect in May 1988. Subsequently, pursuant to a court order the 6.0 NO_x standard was deferred until May 1990.

standard. This concept was discussed in the Economic Impact section.

(B) This waiver program will not result in adverse cost or price impacts above those that would otherwise occur from compliance with the emission standards themselves.

(C) This waiver program will not have significant adverse effects 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.

As required by Executive Order 12291, this Final Rulemaking has been submitted to the Office of Management and Budget (OMB) for compliance with regulatory development criteria and for general content. Any written OMB

comments and any EPA written response to those comments are available for inspection in the public docket for this rulemaking.

VII. Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. and have been assigned OMB control number 2060-0132.

VIII. Judicial Review

This rulemaking is a final Agency action within the meaning of section 307(b) of the Clean Air Act. Under section 307(b), judicial review of this action is available only in the

appropriate federal court of appeals upon filing of a petition for review within 60 days of the date of publication of this Federal Register notice. Review may not be obtained in any subsequent proceeding to enforce these regulations.

List of Subjects in 40 CFR Part 86

Administrative practice and procedure, Air pollution control, Gasoline, Motor vehicles, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

Authority: Section 202, 203, 206, 207, 208, 215 and 301(a) of Clean Air Act, as amended; 42 U.S.C. 7521, 7522, 7524, 7525, 7541, 7542, 7549, 7550 and 7601(a).

Dated: May 20, 1988.

Lee M. Thomas,
Administrator.

TABLE OF CHANGES

Section	Change	Reason
1. Part 86, Authority.....	Add cities.....	Clarification.
2. Section 86.1113-87:		
(a)(4).....	Amend paragraph to redefine terms to include California-designated engines and vehicles.....	Do.
(g)(1).....	Amend paragraph to provide for the waiver of a portion of the NCP payment due to EPA each quarter equal to the amount a manufacturer pays to California. Formula to calculate waived amount is presented. Addition of requirement that "California only" designation be added to emission label or that manufacturers develop an alternative method which will be approved by EPA demonstrating that engines or vehicles will be registered, titled or principally used in California.	Do.
(a)(3)(i).....	Amend paragraph to provide for manufacturer's submittal of information documenting introduction into commerce for the State of California and payment of NCPs to California.	Do.
(h).....	Amend paragraph to provide for refund of a portion of the engineering and development component of the penalty when such is applicable to reflect that EPA responsibility will be limited only to that portion of vehicles or engines for which NCPs were paid to EPA.	Do.

PART 86—[AMENDED]

For the reasons set forth in the preamble, Part 86, Subpart L, Chapter 1 of the Title 40, Code of Federal Regulations is amended as follows:

1. The authority citation for Part 86 is revised to read as follows:

Authority: Sections 202, 203, 206, 207, 208, 215, 301(a), Clean Air Act, as amended (42 U.S.C. 7521, 7522, 7524, 7525, 7541, 7542, 7549, 7550, and 7601(a)).

2. In § 86.1113-87 of Subpart L, paragraphs (a)(4), (g)(1), (g)(3)(i), and (h) are revised to read as follows:

§ 86.1113-87 Calculation and payment of penalty.

(a) * * *

(4) The terms in the above formulas have the following meanings and values, which may be determined separately for each subclass and pollutant for which an NCP is offered. The production of Federal and California designated engines or vehicles shall be combined for the purpose of this section in

calculating the NCP for each engine or vehicle.

NCP_n = NCP for year n for each applicable engine or vehicle

CL = Compliance level for year n for applicable engines or vehicles

S = Emission standard

UL = Upper limit as determined by section 86.1104-87, except that, if the upper limit is determined by section 86.1104-87(c), the value of UL in paragraph (a)(2) of this section shall be the prior emission standard for that pollutant.

UL' = Upper limit as determined by section 86.1104-87(c). This value is not used in the above formulas.

X = Compliance level above the standard at which NCP₁ equals COC₉₀

$$X = \frac{\text{COC}_{90}}{(F)(\text{MC}_{90})} + S$$

PR₁ = Penalty rate when CL < X

PR₂ = Penalty rate when X < CL < applicable upper limit

n

Π AAF_i = Running product, i.e.,

(AAFI)X(AAF₂)X . . . X(AAF_n)

i = 1

i = An index representing a year. It represents the same year for both Federal and California designated engines or vehicles of the same production model year.

n = Index representing the number of model years for which the NCP has been available for an engine or vehicle subclass (i.e., n = 1 for the first year that the NCP is available, and so on until n = n for the nth year that the NCP is available). The factor "n" is based on the model year the NCP is first available, as specified in section 86.1105-87 for the engine or vehicle subclass and pollutant for both Federal and California designated engines and vehicles.

COC₉₀ = Estimate of the average total incremental cost to comply with the standard relative to complying with the upper limit.

COC₉₀ = Estimate of the 90th percentile total incremental cost to comply with the standard relative to complying with the upper limit.

MC₉₀ = Estimate of the average marginal cost of compliance (dollars per emission unit) with the standard.

F = Factor used to estimate the 90th percentile marginal cost based on the average marginal cost (the minimum value of F is 1.1, the maximum value of F is 1.3).

AAF_i = Annual adjustment factor for year i,
frac_{i-1} = Fraction of engines or vehicles of
a subclass using NCPs in previous year
(year i-1).

A_i = Usage adjustment factor in year i:
A_i = 0.10 for i = 2; A_i = 0.08 for i > 2.

I_i = Percentage increase in overall consumer
price index in year i.

(g)(1) Except as provided in paragraph
(g)(2) of this section, the nonconformance
penalty or penalties assessed under this
subpart must be paid as follows:

(i) By the quarterly due dates, i.e.,
within 30 days of the end of each
calendar quarter (March 31, June 30,
September 30 and December 31), or
according to such other payment
schedule as the Administrator may
approve pursuant to a manufacturer's
request, for all nonconforming engines
or vehicles produced by a manufacturer
in accordance with paragraph (b) of this
section and distributed into commerce
for that quarter.

(ii) The penalty shall be payable to
U.S. Environmental Protection Agency,
NCP Fund, P.O. Box 360277M,
Pittsburgh, PA 15251, except as provided
in paragraph (iii).

(iii) Payment of a portion of the
amount due each quarter under this
section for any vehicle(s) or engine(s) is
waived equal to the amount which the
manufacturer has paid the State of
California as a nonconformance penalty
for nonconforming vehicle(s) or
engine(s) titled, registered or principally
used in the State of California, provided
a waiver of Federal preemption under
section 209(b) of the Clean Air Act
permitting the State of California to
collect NCPs for those vehicle(s) or
engine(s) is approved by the
Administrator. The nonconformance
penalty for which payment is waived by
EPA and due to the State of California
shall be payable in accordance with
California regulations and is calculated
for each engine or vehicle subclass as
follows:

$$W_{q,n} = (Cal_{q,n})(NCP_n)$$

where:

n = Index representing the number of model
years for which the NCP has been
available (same as "n" in paragraph
(a)(4)).

q = calendar quarter for which an NCP
payment is due.

W_{q,n} = waived portion of the NCP payment
for calendar quarter q of year n.

Cal_{q,n} = number of engines or vehicles of the
subclass titled, registered or principally
used in the State of California during
calendar quarter q of year n.

NCP_n = the NCP for year n for the subclass
(same as "NCP_n" in paragraph (a)(4)).

(iv) EPA reserves the right to collect
any nonconformance penalties
previously waived under paragraph
(g)(1)(iii) if:

(A) The manufacturer has not
adequately demonstrated that it has
paid the amount due to California for
any quarter; or

(B) The payment by the manufacturer
to California is less than that which
would be due to EPA for the number of
HDVs titled, registered or principally
used in California in that quarter; or

(C) The manufacturer has not
adequately demonstrated that all
vehicles claimed to have been titled,
registered or principally used in the
State of California were in fact titled,
registered or principally used in the
State of California.

(v)(A) In the situation described in
paragraph (g)(1)(iv)(A), EPA reserves the
right to collect the entire NCP amount
assessed under this Subpart.

(B) In the situations described in
paragraphs (g)(1)(iv)(B) and (C), EPA
reserves the right to collect the
difference between the amount that is
due to EPA for the vehicles in question
and the lesser amount (if any) paid to
the State of California.

(C) A statement on the emissions
label required under Subpart A of 40
CFR Part 86 that the engine or vehicle is
designated for title, registration or
principal use only for the State of
California will constitute adequate
demonstration that the engine or vehicle
was titled, registered or principally used
in the State of California, for the
purpose of this section. Other forms of
demonstration that a vehicle was titled,
registered or principally used in the
State of California would be acceptable
if the manufacturer submits a request for
approval of an alternative
demonstration plan to the Director,
Manufacturers Operations Division, U.S.
Environmental Protection Agency, EN-
340F, Washington, DC 20460, and if that
request is approved prior to the
production of such vehicles.

(g)(3)(i) Corporate identification,
identification and quantity of engines or
vehicles subject to the NCP,
identification and quantity and proof of
title, registration or principal use in the
State of California for any engines or
vehicles subject to California NCPs and
documentation of the NCP paid to the

State of California under paragraph
(g)(1)(iii) of this section, certificate
identification (number and date), and
NCP payment calculations, if applicable.

(h) A manufacturer that certifies as a
replacement for the nonconforming
configuration, a configuration that is in
conformance with applicable standards,
and that performs a production
compliance audit (PCA) in accordance
with § 86.1112-87(a) that results in a
compliance level below the applicable
standard, will be eligible to receive a
refund of a portion of the engineering
and development component of the
penalty. The engineering and
development component will be
determined by multiplying the base
penalty amount by the engineering and
development factor for the appropriate
subclass and pollutant in § 86.1105-87.
The amount refunded will depend on the
model year in which the certification
and PCA take place. In cases where
payment of penalties have been waived
by EPA in accordance with paragraph
(g)(1)(iii) of this section, EPA will refund
a portion of the engineering and
development component. The
proportionate refund to be paid by EPA
will be based on the proportion of
vehicles or engines of the
nonconforming configuration for which
NCPs were paid to EPA. The refund is
calculated as follows:

$$R_{tot} = D_n \times F_{EAD} \times NCP_1 \times Prod_{tot}$$

$$R_{cal} = (Prod_{cal}/Prod_{tot}) \times (R_{tot})$$

$$R_{EPA} = R_{tot} - R_{cal}$$

Where:

n = index representing the number of model
years for which the NCP has been
available for an engine or vehicle
subclass (i.e., n = 1 for the first year that
NCPs are available, . . . , n = n for the
nth year the NCPs are available; same as
"n" in paragraph (a)(4)).

D_n = discount factor depending on the number
of model years (n) for which NCPs were
available at the time of certification and
PCA of the replacement configuration,
and its value is as follows:

$$D_1 = 0.90$$

$$D_2 = 0.79$$

$$D_3 = 0.67$$

$$D_4 = 0.54$$

$$D_5 = 0.39$$

$$D_6 = 0.23$$

$$D_7 = 0.05$$

$$D_n = 0.00 \text{ for } n = 8 \text{ or larger}$$

F_{EAD} = the engineering and development
factor specified in section 86.1105-87 for
the appropriate subclass and pollutant

NCP_1 = the penalty for each engine or vehicle during the first (base) year the NCP is available as calculated in paragraph (a)

$Prod_{tot}$ = total number of engines or vehicles produced in the subclass for which NCPs were paid to EPA or to the State of California

$Prod_{cal}$ = number of engines or vehicles in the subclass demonstrated to have been titled, registered or principally used in the State of California and for which NCPs were paid to the State of California under paragraph (g)(1)

R_{tot} = Total refund due to the manufacturer for the engineering and development component of the NCP

R_{cal} = Refund due to the manufacturer from the State of California for the engineering and development component of the NCP

R_{EPA} = Refund due to the manufacturer from EPA for the engineering and development component of the NCP.

[FR Doc. 88-11833 Filed 5-25-88; 8:45 am]

BILLING CODE 6560-50-M