Defense Memorandum physical fitness programs shall include the following elements.

(i) Health professionals shall consider exercise programs conducive to improved health, and encourage appropriate use by patients. For military personnel, recommendations shall accord with military readiness requirements.

(ii) Commanders and managers should assess the availability of fitness programs at or near work sites and should consider integrating fitness regimens into normal work routines for military personnel as operational commitments allow.

(iii) The chain of command should encourage and support community activities that develop and promote fitness among all target populations. Activities should be designed to encourage the active participation of many people rather than competition among a highly motivated few.

(3) Nutrition programs shall aim to encourage and assist all target populations to establish and maintain dietary habits contributing to good health, disease prevention, and weight control. Weight control involves both nutrition and exercise, and is addressed in part in DoD Directive 1308.1. Nutrition programs include efforts not only to help individuals develop appropriate dietary habits, but also to modify the environment so that it encourages and supports appropriate habits. Additionally, nutrition programs shall include the following elements.

(i) Nutritional advice and assistance shall be provided by appropriate DoD health care professionals to military personnel, retirees, and family members.

(ii) In military and civilian dining facilities, where feasible, calorie information and meals with reduced amounts of fat, salt, and calories shall be made readily available.

(iii) Snack concessions and vending machines, when feasible, shall offer nutritious alternatives, such as fresh fruit, fruit juices, and whole grain products.

(iv) Public information campaigns shall be conducted by the Military Services to alert all target populations about the relationship between diet and risk of chronic diseases.

(4) Stress management programs shall aim to reduce environmental stressors and help target populations cope with stress. Additionally, stress management programs shall include the following elements.

(i) Commanders should develop leadership practices, work policies and procedures, and physical settings that promote productivity and health for military personnel and civilian employees.

(ii) Health and fitness professionals are encouraged to advise target groups on scientifically supported stress management techniques.

(iii) The topic of stress management should be considered for integration into the curricula at appropriate Professional Military Education programs and in the DoD Dependents Schools and Section 6 schools to familiarize students with scientifically supported concepts of stress management for day-to-day problems, life transitions, and life crises.

(5) Alcohol and drug abuse prevention programs shall aim to prevent the misuse of alcohol and other drugs, eliminate the illegal use of such substances, and provide counseling or rehabilitation to abusers who desire assistance in accordance with the provisions of 32 CFR Parts 62a and 62 and DoD Instruction 1010.6 [3] Additionally, alcohol and drug abuse prevention programs shall include the following elements.

(i) Appropriate DoD health care professionals shall advise all pregnant patients and patients contemplating pregnancy about the risks associated with the use of alcohol and other drugs during pregnancy.

(ii) The Military Services shall conduct public education programs appropriate to various target audiences. Programs should include such topics as alcohol and drug use and pregnancy, driving while intoxicated, and adolescent alcohol and drug abuse.

(6) Hypertension prevention programs shall aim to identify hypertension early, provide information regarding control and lifestyle factors, and provide treatment referral where indicated. Early identification of hypertension programs shall include the following elements.

(i) Hypertension screening shall be provided as part of all medical examinations and the annual dental examination for active duty service members. Screening shall also be provided to other beneficiaries, excluding those in the Children's Preventive Dentistry Program, at the time of their original request for care. Patients with abnormal screening results shall receive appropriate medical referrals.

(ii) Each DoD medical facility should periodically offer mass hypertension screening to encourage beneficiaries to monitor their blood pressure regularly.

(iii) Occupational health clinics shall make hypertension screening readily available to civilian employees, and shall encourage employees to use this service.

(iv) Public information campaigns emphasizing the dangers of hypertension and the importance of periodic hypertension screening and dietary regulation shall be conducted.

[3] See footnote 1 to § 85.5(a)(5).

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

August 24, 1988.

[FR Doc. 88-19567 Filed 8-29-88; 8:45 am]

BILLING CODE 3810-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD8-88-16]

Special Local Regulations; Fireworks Display, Morgan City, LA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: Special local regulations are being adopted for The Fireworks Display. This event will be held on 4 September 1988 from 9:00 p.m. until 11:00 p.m. on Berwick Bay in the Atchafalaya River at Morgan City. These regulations are needed to provide for the safety of life on navigable waters during the event.

EFFECTIVE DATES: These regulations become effective on 4 September 1988 at 8:30 p.m. and terminate on 4 September 1988 at 11:30 p.m.

FOR FURTHER INFORMATION CONTACT: CWO William G. Whitehouse, Eighth U.S. Coast Guard District, Tel: (504) 589-2972.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published. Following normal rulemaking procedures would have been impracticable. The details of the event were not finalized until 17 August 1988 and there was not sufficient time remaining to publish proposed rules in advance of the event or to provide for a delayed effective date.

Nevertheless, interested persons wishing to comment may do so by submitting written views, data or arguments. Comments should include their name and address, identify this notice (CGD8-88-16) and the specific section of the proposal to which the comments apply, and give reasons for each comment. Receipt of comments will be acknowledged if a stamped selfaddressed envelope is enclosed. The regulations may change in light of comments received.

Drafting Information

The drafters of this regulation are CWO William G. Whitehouse, Project Officer, Eighth Coast Guard District, New Orleans, LA, and CDR J.A. Unzicker, Project Attorney, Eighth Coast Guard District Legal Office.

Discussion of Regulations

The marine event requiring this regulation is a Fireworks Display called "The Fireworks Display." This event is sponsored by the Louisiana Shrimp and Petroleum Festival and Fair Association, Inc. It will consist of 1 tugboat with 1 or 2 barges for the launching of fireworks. Approximately 25–30 spectator boats are expected for the event. While viewing the event at any point outside the regulated area is not prohibited, spectators will be encouraged to congregate within areas designated by the sponsor.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. A temporary section 100.35-8-88-16 is added to read as follows:

§ 100.35-8-88-16 Berwick Bay, Atchafalaya River, Louisiana

(a) *Regulated area:* The following area will be closed to all vessel traffic: Berwick Bay from the junction of the Lower Atchafalaya River and Bayou Boeuf at Morgan City, LA to the Highway 90 Bridge.

(b) *Special local regulations:* All persons and/or vessels not registered with the sponsors as participants or official patrol vessels are considered spectators. The "official patrol" consists of any Coast Guard, public, state or local law enforcement and/or sponsor provided vessels assigned to patrol the event.

(1) No spectator shall anchor, block, loiter or impede the through transit of participants or official patrol vessels in the regulated area during the effective dates and times, unless cleared for such entry by or through an official patrol vessel.

(2) When hailed and/or signaled, by an official patrol vessel, a spectator shall come to an immediate stop. Vessels shall comply with all directions given; failure to do so may result in a citation.

(3) The Patrol Commander is empowered to forbid and control the movement of all vessels in the regulated area. He may terminate the event at any time it is deemed necessary for the protection of life and/or property. He may be reached on VHF–FM Channel 16, when required, by the call sign "PATCOM."

(c) *Effective dates:* These regulations will be effective from 6:30 p.m. to 11:30 p.m. 4 September 1988.

Dated: August 16, 1988.

W.F. Merlin,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 88-19600 Filed 8-29-88; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

Removal of National Forest Timber

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes additional standards for a Contracting Officer to use in determining whether a prospective purchaser is responsible and capable of performing a particular contract before the Government enters into a contract with that prospective purchaser. In addition, this rule requires increased downpayments from those purchasers of National Forest System timber with a recent record of failure to perform timber sale contracts but who otherwise may meet the responsibility requirements and who are determined to be responsible. These changes should improve timber sale contracting and reduce the number of unperformed and violated contracts with a corresponding reduction in negative effects on management of the National Forests.

EFFECTIVE DATE: This rule is effective September 29, 1988.

FOR FURTHER INFORMATION CONTACT: Questions about this final rule may be addressed to: Ed Whitmore, Timber Management Staff, Forest Service, USDA, P.O. Box 96090, Washington, DC 20013-6090, (202) 475-3758.

SUPPLEMENTARY INFORMATION:

Background

Since 1982 the Forest Service has witnessed a significant upsurge in the number of National Forest timber purchasers who do not complete their sale contracts. Over 1,900 timber sale contracts have been defaulted by approximately 1,300 purchasers. Under contract provisions governing default, the Government estimates it has sustained damages valued in excess of $230 million as a result of these defaults. In addition, there is potential for another estimated $200 million dollars in damages in the event of default of some high-priced sales bid prior to 1982. These sales are vulnerable to default because they were bid when the lumber market was extremely high compared to current prices. Following default, sales are reappraised and reoffered. Damages are determined by subtracting the resale value of the timber from the original bid price.

A timber sale program is designed so that every year the cumulative effects of the program are compatible with and contribute to the planned management of a National Forest. When a timber sale contract is defaulted, the harvest of that timber is delayed until the timber can be resold and cut under the resale contract. In addition to causing a tremendous administrative burden on the agency associated with the rescheduling, reappraising, and reoffering the timber for sale, the delayed harvesting of Federal timber sale contracts can adversely affect management of the natural resources of the National Forest System. A default-delayed harvest may result in adverse economic, resource, and environmental effects which are both direct and indirect, as well as cumulative. Among the major impacts are:

(1) Some timber sales are sold to remove trees for the benefit of other resources. Timber harvest can improve cover/forage ratios for wildlife, increase available water supplies, open vistas for public viewing along roadsides, improve range conditions for wildlife and livestock, or remove potentially hazardous trees in a recreation area. A default-caused delay in the harvest of such a sale will delay these benefits.

(2) Some timber harvests are timed to minimize logging damage to the remaining timber or to reduce the spread of pathogens from the overstory to the understory (for example, to reduce the spread of mistletoe). When operations are delayed, the logging may be too late to minimize damage to the remaining timber or to reduce the spread of pathogens.

(3) Some logging is planned to remove some or all of the overstory in order to maintain or increase the growth of the understory. Delays in harvesting the overstory can slow the growth of the remaining smaller trees, resulting in increase brush competition or can postpone needed precommercial thinning of the remaining timber.

(4) If a timber sale contract was planned and offered to achieve commercial thinning of the timber in the sale area, a harvest delay could delay the increased growth of the remaining timber.

(5) Other silviculture treatments such as timber stand improvement in nearby areas may be delayed because the slash in the default-delayed area was not treated when originally planned. This can result in growth losses in those stands and/or an increased cost of treating the logging debris.

(6) Sales are designed to leave a healthy residual stand of timber. Default-caused delays may mean that the planned residual stand would not meet management objectives if the sale were logged as originally designed. This can result in additional delay and expense if the sale has to be redesigned to meet the objectives.

(7) Many sales are made to salvage timber that has been damaged by fire, insects, diseases, or other causes. Such timber is often subject to rapid deterioration. Default-caused delay in the harvest of this timber can cause a significant loss in the timber's volume and value and thus a significant loss of benefits to the American public.

(8) Some sales are prepared to assist control of Forest pest epidemics. Failure to remove such timber in a timely manner can increase the damage to adjacent stands.

(9) If a timber sale default delays construction of a road, the resulting delay in access could affect management of the other resources which would be tributary to the road.

In addition to serious resource problems caused by defaults, the economies of many communities, particularly in the West, are heavily dependent upon the employment generated by the harvest and manufacture of timber from the National Forests. Timber sale defaults can interrupt the flow of timber to those communities.

Defaults may also reduce receipts to the Federal Treasury and revenue sharing payments to local counties that are based on those receipts. The public services provided by many western counties are heavily dependent on these payments. State and county Governments, which depend upon an orderly source of income from the National Forests for funding of roads and schools, are subjected to budget fluctuations when purchasers fail to perform their contracts.

Inequities among purchasers also result from timber sale defaults. Purchasers who default with the exception of delaying the payment of damages are in a stronger financial position to bid on new contracts than they would have been had they performed the defaulted contracts. An inequity exists when purchasers, who have conscientiously performed their high-priced contracts and have suffered economic losses as a result, are required to compete for new contracts against purchasers whose financial ability to bid has been enhanced as a result of their failure to perform their own high-priced contracts.

These adverse impacts are magnified when a high incidence of default occurs. This recent history of defaults and deficient performance is an unacceptable situation requiring better business practices in future sales of public timber.

In light of the upsurge in defaults of timber sale contracts and the attendant adverse effects on National Forest System management, the Department of Agriculture proposed a revision of its regulations at 36 CFR Part 223 governing the sale of timber on National Forest System lands. The proposed rule, published May 20, 1987, at 52 FR 18926, proposed additional criteria for determining a purchaser to be qualified for award of a timber sale contract as well as a requirement for increased downpayments from purchasers with a deficient performance record. Public comment was requested by June 19, 1987. That date was later extended to July 6, 1987 [52 FR 23188].

Response to Public Comments

The Forest Service received comments on the proposed rule from 40 individuals and entities. Comments came from individual timber sale purchasers, timber sale purchaser associations, attorneys, Forest Service employees, a private consulting forester, and a forester employed by another Federal agency but expressing private views. About two-thirds of the responses came from the Pacific Northwest. Eighty-five percent of the responses were from West of the 100th Meridian.

Eighty percent of the respondents supported the proposal for increased downpayments either in its entirety or with suggested modifications to strengthen it. Five precent did not support any part of the increased downpayment proposal.

About 20 percent of the respondents expressed support for the proposal to determine bidder responsibility. Most of the comments pertaining to bidder responsibility expressed a concern that either the standards were too subjective or the pre-bid qualifications should be established.

The following summarizes the major comments and suggestions received and the Department's response to these in the final rule. This final rule reflects full consideration of all comments received.

General Comments

Two respondents disagreed with the statement in the supplementary information section of the proposed rule document that default of timber sale contracts might create certain adverse environmental impacts. They maintained that the identified impacts had not occurred as a result of default-delayed harvest, and, therefore, should not be listed. The agency disagrees. The discussion in the proposed rule made clear that not all the listed effects on the environment occur from any one default but that these effects *may* occur as a result of default-delayed timber harvest. The National Forests are, in fact, experiencing these impacts either singly or in combination. Therefore, the general findings stand.

Section-by-Section Comments

Section 223.49 Downpayment.

Under the proposed rule, if a purchaser or affiliate has defaulted a Forest Service or Bureau of Land Management (BLM) timber sale contract, and the contract value of the defaulted timber sale(s) was $100,000 or more, the downpayment on the new contract, if awarded to that purchaser, would be twice the amount as that normally required. Further, the purchaser would not be able to apply funds deposited as the downpayment to other uses utnil the last timber on the sale is being harvested. Under the proposal, this provision would apply to defaults occurring 30-calendar days after the effective date of the final rule.

One respondent stated that defaults of BLM timber sales should not be considered with respect to bidders of National Forest timber while another stated that they should be included. Because the two agencies have similar timber sale programs and frequently have common purchasers, purchaser performance on a BLM sale is a valid indicator of the purchaser's likely performance on a National Forest timber sale. Therefore, consideration of defaults of BLM sales is retained in the final rule. Although performance on other Federal timber sales was considered, it is not included due to the dissimilarity of programs involved.

A few respondents expressed concern that the requirement for an additional downpayment would create unequal bidder classes, in violation of the precept of Government contracting which requires that all bidders be treated equally. This concern is not well-founded. All bidders are treated equally. Should any company choose to default a contract(s) at values exceeding the established threshold, the requirement for a double downpayment applies on new sales. In seeking competitive bids for timber sales, the Forest Service attempts to maintain a balance between protecting the public and the Government's interests and recognizing the interests of the private sector. When a company fails to perform a contract or defaults a contract, the Forest Service is obligated to protect the interests of the public and the Government. Where there are future dealings with that purchaser, this final rule provides increased security via the increased downpayment to reflect the increased risk of nonperformance by a party that has previously failed to perform in accordance with contract terms. The requirement for an increased downpayment applies equally to all purchasers with a deficient performance record as identified in the rule and does not establish two classes of purchasers.

A few respondents expressed concern that the proposed rule would not accomplish the objectives of securing performance and reducing risk to the Government. Reasons were varied and conflicting: the additional downpayment requirements might create additional defaults; the additional downpayment may create a penalty while issues are being litigated; or the additional downpayment requirement is too meager. The Forest Service does not agree with these concerns. Timber sale contracting experience indicates that stronger downpayment requirements will not create additional defaults, but instead will serve as an incentive to the orderly completion of contracts for any purchaser who intends to compete for future National Forest timber sale contracts. As to the view that the additional downpayment is too meager, the agency believes a doubling of downpayment should help meet the objective of reducing risk of nonperformance of contracts and of completion of contracts in a timely manner. Those companies who have defaulted contracts will pay no more for timber than purchasers who have not defaulted, although the purchaser with a deficient performance record will have to put more money down upfront and meet more stringent performance standards before the downpayment can be applied to other uses. The Department believes this is in accordance with sound business practices and good policy. Therefore, this final rule retains the requirement of doubling the downpayment for purchasers with a record of deficient performance.

Several respondents including two industry associations recommended removal of the 12-month stipulation, thus requiring the increased downpayment for so long as default damage claims remained unpaid. Additionally, it was suggested that the increased downpayments, including the requirement for 40 percent of bid premium, should apply without regard to average bid ratios. Because these suggestions would strengthen the protection to the Government and simplify administration of the regulation, they are adopted with the proviso remaining that the Chief may determine, prior to advertisement, that timber sales in some areas may have another downpayment rate to achieve the objectives of National Forest System management.

Therefore, the final rule will require that any purchaser or affiliate who defaults a Forest Service or BLM timber sale contract within 30 days after the effective date of this rule shall make a minimum downpayment of 20 percent of the total advertised value of the sale, plus 40 percent of the total bid premium when that purchaser is determined to be the successful bidder on a Forest Service timber sale. The final rule eliminates the reference to bid ratios in determining the additional 40 percent downpayment for overbid. All bid premiums regardless of bid ratios will be subject to the 40 percent downpayment rule once the criteria for the additional downpayment requirement have been established. The requirement of an increased downpayment on Forest Service timber sales shall continue until it is determined (1) that the Government improperly classified the contract(s) as expiring uncompleted or as terminated for cause or (2) the contract value damages claimed by the Government have been paid and corrective actions have been taken by the purchaser to avoid future deficient performance.

The respondents specifically agreed with holding the downpayment deposits until the last timber on the contract was reached with one of them further suggesting that the downpayment be held on all contracts until *after* the final timber was removed whether or not the purchaser had previously defaulted. The retention of downpayments in excess of the value of the remaining timber would be unnecessary are might the considered to be punitive in nature. The intent of the rule is to protect the Government proportionate to increased risks, to minimize defaults, and to assure the orderly completion of contracts, rather than to punish those who do default. Therefore, this final rule retains the requirement that the downpayments required under this rule will not be available for other uses until the amount of unremoved timber is equal to or less than the amount of the downpayment. This is consistent with the concept that a downpayment is intended to protect the Government and public.

A few respondents suggested that the requirements for additional downpayments should not include default of sales bid prior to 1982 when bidding was generally higher and which is resulting in more contract defaults. This suggestion has been carefully evaluated but not incorporated into the final rule. The objective of the additional downpayment is to protect the Government's interest where there is additional risk of nonperformance as indicated by past conduct. Given all of the circumstances, there is no basis to differentiate among defaulted contracts based on speculative reasons for an individual default. The additional downpayment requirement needs to apply to all contractors who default contracts of a certain amount of timber and who have outstanding damages remaining to be paid, including sales bid prior to 1982.

A few respondents offered that defaulters should not be allowed to bid on Forest Service or BLM timber sales either in perpetuity or so long as outstanding default damages remain uncollected. Adoption of this proposed change would result in de facto debarment and would deny due process and the opportunity to consider mitigating circumstances provided under the debarment and suspension procedures. Debarment regulations at 36 CFR Part 223, Subpart C will continue to guide the Forest Service Debarring Official in the determination of whether a purchaser who has failed to perform in accordance with contract terms will be excluded from bidding on or award of Forest Service timber sale contracts. Therefore, this suggestion is not adopted as part of this rulemaking.

A few respondents recommended that the requirement for additional downpayments should not include defaults that were in dispute. To adopt this recommendation would likely increase the number of defaults that are disputed or litigated in order to delay or avoid the additional downpayments. Additionally, adoption of this suggestion would undermine incentives for minimizing defaults of future sales while disputes exist. Therefore, this suggestion is not incorporated in the final rule. The requirement for additional downpayment for new sales applies until the default damage claims are resolved. Should it be determined that no contract or contracts were properly classified as expiring uncompleted or terminated for cause with a value of $100,000 or more, or it is determined that the remaining value of those terminated or expired contracts is less than $100,000, any existing contract(s) would no longer be subjected to the requirement of an additional downpayment and any remaining unobligated portion of a required extra downpayment would be refunded or credited towards existing balances on the contract requiring the extra downpayment. This has been clarified in the final rule.

One respondent suggested that the requirement for additional downpayments should recognize default situations arising from good faith efforts to complete the contract as opposed to those where little or no effort was made. This suggestion is not incorporated into the final rule since the reasons for a particular default would be difficult to determine and the results of defaulted contracts are essentially the same regardless of the reason; that is, management of the National Forest System is adversely affected. To differentiate would not address the purpose of the proposed rule: To improve purchaser responsibility and to reduce risk to the Government.

One respondent recommended that the value of unscaled timber, or value of timber not cut and removed be increased from $100,000 to $500,000 before the increased downpayment be required on new sales. Conversely, several respondents suggested that all defaulters regardless of the value of remaining timber should be subjected to the increased downpayment requirement. Should the limit be increased to $500,000, it appears that too many defaulters would not be covered by the increased downpayment requirement, and the objectives of the rulemaking would not be achieved. Under Forest Service analyses, the $100,000 threshold reflects a balance between impacts on small business concerns and increased administration of impacted contracts, on the one hand, and an appropriate point at which the Government needs additional security in the form of an increased downpayment. Whether a purchaser's default(s) fall above or below the threshold, the Contracting Officer will be required to affirmatively find that the purchaser is responsible following the guidance of 36 CFR 223.101. Therefore, the final rule retains the $100,000 level of the proposed rule.

A few respondents recommended that additional bid deposits should be imposed as an incentive to assure that contracts are signed once they are bid. One respondent suggested that failure to execute a contract once it was bid should cause the sale to be treated as a default for purposes of triggering a double downpayment. The situation of the high bidder refusing to execute the contract has not been a common occurrence up to this point in time. The agency already has established procedures for recovering damages through bid deposits when contracts are not executed after bidding. The additional standards for determining purchaser responsibility as a prerequisite to award of a timber sale, which are being incorporated in the new 36 CFR 223.101, should provide adequate incentives against refusal to execute contracts.

In response to comments, the final rule clarifies that once a higher downpayment is triggered, it applies throughout the National Forest System except in those areas where the Chief determines that another downpayment rate is necessary to achieve the management objectives of the National Forest System.

Section 223.101 Determination of purchaser responsibility.

In addition to revising downpayment requirements, the Forest Service proposed to incorporate many of the bidder responsibility standards found in the Federal Acquisition Regulations [48 CFR 9.104] into the rules governing timber sale contracts. Under the proposal, before any bidder could be awarded a Forest Service timber sale contract, the Contracting Officer would have to determine that the bidder has met all of the conditions of the sale offer and that the bidder is responsible. To be determined responsible for award of a timber sale contract, the Contracting Officer must determine that the purchaser has adequate financial resources to perform the contract or can obtain them, can perform within the contract term, has a satisfactory record of performance, has a satisfactory record of integrity and business ethics, is able to obtain necessary equipment and supplies, and is otherwise qualified and eligible to receive an award of the contract.

Although not as popular as the proposal for increased downpayments, several respondents supported the proposal for determining purchaser responsibility. In addition, a few indicated support if it were modified. Suggested modifications were to establish more specific criteria for determining tenacity, perseverance, and integrity and that the determination of responsibility should rest with an authority higher than the Contracting Officer.

The standards for determining responsibility of Government procurement contractors in the Federal Acquisition Regulations (48 CFR 9.104) have been used successfully by Contracting Officers for other than timber sale contracts for several years without establishing additional criteria. A "cookbook" approach is inappropriate. The intent is to allow sufficient flexibility to ensure that all relevant information is considered. It is believed that Forest Service timber sale Contracting Officers will be equally successful in applying these established standards.

Fiscal personnel of the agency will be available to and consulted by the Contracting Officer. If there is disagreement with the Contracting Officer's determination, the prospective purchaser may submit to the Contracting Officer additional information for reconsideration. If a prospective purchaser believes a determination on respsonbibility is without a reasonable basis, that determination may be reviewed by the General Accounting Office (4 CFR Part 21). Therefore, additional guidelines have not been added to the final rule.

A few reviewers suggested that the standards for determining purchaser responsibility presume that the prospective purchaser is not responsible until proven otherwise. The Department disagrees. The regulation implements the Department's policy that the Government should only do business with those responsibile business interests who are willing and able to operate under the terms of the contracts. Accordingly, the Contracting Officer cannot award a timber sale contract until that purchaser's responsibility has been affirmatively determined. Since the information necessary to establish responsbility can only be provided by the prospective purchaser, the burden of proof is properly placed on the prospective purchaser. It is only logical that the Contracting Officer must conclude that a prospective purchaser is not responsbile if there is no information clearly indicating responsibility.

A few respondents expressed concern that the provision for Small Business Administration (SBA) review and issuance of a Certifcate of Competency would create two classes of bidders by allowing another agency to conclusively determine whether a small business is responsbile where the Forest Service initiatlly determined they were not responsible, while providing only Forest Service review for large business. This provision would not establish a new policy. Under existing law, the Small Business Administration has authority to conclusively determine any or all elements of a small business concern's responsibility by issuing or declining to issue a Certificate of Competency (15 U.S.C. 637(b)(7)). This authority applies to the sale of Federal property as well as Government procurement. Therefore, the final rule retains this provision.

One of the respondents further suggested that the Forest Service was improperly defining the 12-month period within which it may be presumed that a purchaser is not responsible as being before the bid date rather than the award date. In light of several comments, the final rule has been clarified and revised to follow the language of the Federal Acquisition Regulations. The presumption that a purchaser is not responsible will exist where the purchaser is or recently has been seriously deficient in performance of timber sale contracts. As a general guideline, deficient performance within the last 12 months will be considered to be recent performance. Because responsibility shall be determined before *award* of each timber sale contract, it is the purchaser's performance up to that point in time that is to be considered. While current and recent performance are the best indicators of present responsibility and are the basis for the rebuttable presumption, a purchaser's entire performance record should be considered in determining whether or not the purchaser is presently responsible.

Several respondents suggested that the Forest Service should establish additional pre-bid qualifications rather than determine whether a prospective purchaser is responsible after the date of any oral auction but prior to award. The agency believes that additional pre-bid standards may help protect the Government's and timber purchasers' interests and is examining the opportunities available, including establishing more restrictive pre-bid qualifications. The Forest Service will continue to study pre-bid qualifications to complement the purchaser responsibility determinations made prior to award. Any such action would be by a separate rulemaking.

One respondent expressed concern that financial information should not be available to others, including Freedom of Information Act (FOIA) inquiries, and that Contracting Officers should be the only persons to have access to financial statements. The Forest Service will provide confidentiality to information submitted for purposes of determining responsibility to the maximum extent allowed by law. Any FOIA requests for information submitted for this purpose will be handled with full consideration of available exemptions from disclosure, particularly where disclosure of the information could reasonably be expected to cause substantial competitive harm. If, after careful agency review, the agency determines that it may be required to disclose any portion of the records, the Forest Service will notify the submitter of any records containing confidential commercial information when those records have been requested under the Freedom of Information Act and allow an opportunity for the purchaser to object to disclosure of the records. (See Executive Order 12600 of June 23, 1987, 52 FR No. 122.) Current Forest Service policy strictly limits access to the information solely to personnel who use these data on a need to know basis.

Summary of the Final Rule

This final rule has substantial support in the agency record, viewed as a whole, and full attention has been given to the comments received in preparing the final regulations.

The final rule adds additional criteria and a procedure for determining a purchaser to be qualified for award of a timber sale contract. It further implements this Department's policy established in the public interest and for the Government's protection that the Forest Service shall award timber sale contracts only to responsible business concerns and individuals. The Department believes these requirements are necessary and follow good business practices while allowing flexibility and without being unduly burdensome on either party to the proposed transaction.

When reviewing bids, a Contracting Officer shall not award a timber sale contract unless he or she is able to determine from information in his or her possession that the prospective purchaser is a responsible individual or entity. Determining responsibility requires analysis of the particular facts involving that prospective purchaser. For example, when an analysis of the purchaser's financial ability to perform all contracts in a portfolio indicates the purchaser is in financial jeopardy, award of a new sale would be withheld. The prospective purchaser's past record of performance and business dealings is also clearly a factor to be considered. Section 223.101(b)(3) will require that the purchaser have a satisfactory performance record on timber sale contracts in order to be found responsible. This is sound business practice consistent with other Government contracting.

However, because of the recent large number of defaulting purchasers, the requirement of a satisfactory performance record alone could result in numerous determinations that prospective purchasers are not responsible and that contracts should not be awarded to those prospective purchasers. Many purchasers with previously good performance records have failed to perform or to satisfactorily perform contracts in recent years. Due to the unique structure of the timber industry, there may be some districts or communities where no existing purchaser would qualify to buy additional timber under a strict application of this standard. Such a large-scale result under current circumstances would not be in the public interest for the ongoing recovery of the timber industry, for dependent communities, or for proper management of the National Forest System.

Therefore, this rule provides a degree of flexibility, at § 223.101(b)(3), which provides that a Contracting Officer may determine a prospective purchaser that has been seriously deficient in previous contract performance to be responsible if the Contracting Officer determines that the circumstances of previous deficiencies were (1) properly beyond the purchaser's control, or (2) that the purchaser has taken appropriate corrective action.

With respect to the first criterion and defaults of high-priced timber, the price a purchaser bids for a particular sale generally is within the control of that purchaser. As to the second criterion, corrective action taken by the purchaser to avoid future deficiencies in performance and the corresponding reduction of risk to the Government in doing business with that prospective purchaser are also clearly relevant to the determination of current responsibility. Among actions taken by the purchaser which reduce the risk of deficient performance to the Government and which will be among the facts considered by the Contracting Officer, is an increased downpayment required of a purchaser with the serious performance deficiencies identified in § 223.49(e).

Under the final rule, if a purchaser or its affiliates have outstanding obligations to the Government through defaulting of Forest Service or Bureau of Land Management timber sale contracts after the effective date of this rule, and the contract value of the previously defaulted timber is $100,000 or more, the downpayment on any new contract, if awarded to that purchaser, will be approximately twice the amount as that currently required pursuant to 36 CFR 223.49. The additional downpayment required by this final rule reflects some of the additional risk of doing business with a purchaser who has failed to perform on another contract but who otherwise meets all of the requirements of the sale and is determined to be a responsible entity. For example, the decision by a company to default a contract may be an economic one. The company may otherwise have had a good performance record and generally be on sound economic footing but choose to default a contract to reduce its economic losses.

The standard downpayment represents a monetary commitment to perform the contract at issue and reduces the risk of nonperformance. Where a timber sale purchaser has failed to perform under one contract, the Government may reasonably assume that that purchaser may fail to perform on another contract in the future. The additional downpayment required by this rule reflects the additional risk of doing business with a purchaser who has failed to perform on another contract but who otherwise meets all of the requirements of the sale and is determined to be a responsible entity. Sound business practice requires this additional security where it is determined to do further business with a concern even though that concern has failed to perform on one or more other contracts.

By contrast, a prospective purchaser who has been seriously deficient in contract performance, absent mitigating circumstances, is not a responsible entity with which the Government should do business. Under this final rule, such a prospective purchaser would be denied award (36 CFR 223.101(b)(3)). Furthermore, failure to perform and serious contract violations are listed causes for debarment which, dependent upon the seriousness of the purchaser's acts or omissions and any mitigating factors, may lead to a debarment decision by the Forest Service Debarring Official (36 CFR 223.137, 52 FR 43324–43334, November 12, 1987).

Affiliates are included in the requirement for additional downpayments and, where appropriate, in determining purchaser responsibility to assure that the Government's interests are protected when doing business. When one company or individual directly or indirectly controls or has the power to control the other, an affiliation is determined to exist. Common management, common ownership, and contractual relationships are among the factors considered in determining affiliation. The Forest Service will use the Small Business Administration regulations on affiliation found at 13 CFR 121.3 as guidance in determining whether or not concerns are affiliated. The inclusion of affiliates will help to assure that sales are operated and to reduce the risk of nonperformance.

The intent of this rulemaking is to improve procedures for the sale of public timber in light of recent experiences. The Department believes better timber sale contracting may prevent or at least minimize the adverse effects of delayed performance discussed above.

Regulatory Impact

This action has been submitted to the Office of Management and Budget for review pursuant to Executive Order 12291. It has been determined that this regulation is not a major rule. It does not change the total amount a purchaser would pay for National Forest System timber, although it would affect when a purchaser with a recent history of poor timber sale contract performance would pay for timber.

The procedures implemented in this rule will not have an annual effect on the economy of $100 million or more, will not result in major increases in costs for consumers, individual industries, Federal, State or local Government agencies or geographic regions, and will not have significant adverse effects on the ability of United States-based industries to compete with foreign-based enterprises in domestic or export markets. On the contrary, the proposed requirements will contribute to the economic well-being of timber dependent communities, the orderly flow of timber to market and of receipts to the Treasury, strengthen the orderly accomplishment of resource management objectives, and reduce administrative costs associated with settling claims against defaulting purchasers.

It has also been determined that this rule will not have significant economic impact on a substantial number of small entities. There are very few small entities that have defaulted more than $100,000 worth of Federal timber. While it cannot be predicted with certainty how many small business concerns will choose to default in the future, this final rule would affect less than 50 small entities were it to be applied to existing defaulters. In addition, the Certificate of Competency procedures as applied by the Small Business Administration will continue to cover small firms under the proposed bidder responsibility standards.

Based on both experience and environmental analysis, the rule will have no significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4) Furthermore, the proposed rule will not result in additional procedures or paperwork not already required by law. Therefore, no additional reviews or clearances pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), or implementing regulations at 5 CFR Part 1320 are required.

Lists of Subjects in 36 CFR Part 223

Exports, Government contracts, National forests, Reporting and recordkeeping requirements, Timber.

Therefore, for the reasons set forth above, Subpart B of Part 223, chapter II of Title 36 of the Code of Federal Regulations is amended as follows:

PART 223—[AMENDED]

1. The authority citation for Part 223 continues to read as follows:

Authority: Sec. 14, Pub. L. 94–588, 90 Stat. 2958, 16 U.S.C. 472a, unless otherwise noted. Secs. 223.49 and 223.50 also issued under Sec. 2, Pub. L. 98–478, 98 Stat. 2213, 16 U.S.C. 618.

Subpart B—[Amended]

2. Amend § 223.49 by adding new paragraphs (a)(5), and (e) through (i) to read as follows:

§ 223.49 Downpayment.

(a) * * *

(5) *Affiliate.* Concerns or individuals are affiliates if directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. In determining whether or not

affiliation exists, the Forest Service shall consider all appropriate factors, including, but not limited to, common ownership, common management, and contractual relationships.

* * * * *

(e) A purchaser or any affiliate of that purchaser, awarded a Forest Service timber sale contract must meet the additional downpayment requirements of paragraph (g) of this section under the following circumstances:

(1) The purchaser or its affiliate after September 29, 1988 has failed to perform in accordance with the terms of a Forest Service or Bureau of Land Management timber sale contract which results in notification by a Contracting Officer that a contract has expired uncompleted or is terminated for cause; and

(2) The estimated value of the unscaled timber on scaled sales, or the estimated value of the timber outstanding on tree measurement sales, included in those terminated or expired contracts exceeds $100,000, and

(3) Unpaid damages claimed by the Government remain outstanding prior to award of the new sale at issue and corrective action has not been taken to avoid future deficient performance.

(f) A subsequent final determination by the Contracting Officer or by a court of competent jurisdiction that a contract was improperly classified under the criteria in paragraph (e) of this section will result in the refund or credit of any unobligated portion of the amount of downpayment exceeding that required by paragraphs (c) and (d) and the limitations of paragraph (h) on application of downpayment shall no longer apply.

(g) Notwithstanding the provisions of paragraphs (c) and (d) of this section, a purchaser meeting the criteria of paragraph (e) of this section must make a minimum downpayment equal to 20 percent of the total advertised value of that sale, plus 40 percent of the total bid premium. This higher downpayment requirement applies throughout the National Forest System, except in those areas where the Chief of the Forest Service determines, before advertisement of the sale, that another downpayment rate is necessary to achieve the management objectives of the National Forest System.

(1) In calculating bid premiums for the downpayment requirement, the Forest Service shall not include the portion of the bid premium that offsets ineffective purchaser credit.

(2) To determine the amount of the downpayment due on a sale where the timber is measured in units other than board feet, the Forest Service shall convert the measure to board feet, using appropriate conversion factors with any necessary adjustments.

(h) A purchaser subject to the additional downpayment requirements of paragraph (g) of this section cannot apply the amount deposited as a downpayment to other uses until:

(1) *On scaled sales,* the estimated value of the unscaled timber is equal to or less than the amount of the downpayment; or

(2) *On tree measurement sales,* the estimated value remaining to be cut and removed as shown on the timber sale statement of account is equal to or less than the amount of the downpayment.

(i) For the purpose of releasing funds deposited as downpayment by a purchaser subject to paragraph (f) of this section, the Forest Service shall compute the estimated value of timber as follows:

(1) *On scaled sales,* the estimated value of the unscaled timber is the sum of the products obtained by multiplying the current contract rate for each species by the difference between the advertised volume and the volume that has been scaled of that species.

(2) *On tree measurement sales,* the estimated value of the timber outstanding (that not shown on the timber sale statement of account as cut and removed) is the sum of the products obtained by multiplying the current contract rate for each species by the difference between the advertised volume and the volume that has been shown on the timber sale statement to have been cut and removed of the species. The current contract rate for each species is that specified in each Forest Service timber sale contract.

3. Revise the introductory text and paragraph (c) of § 223.100 to read as follows:

§ 223.100 Award to highest bidder.

The sale of advertised timber shall be awarded to the responsible bidder submitting the highest bid that conforms to the conditions of the sale as stated in the prospectus unless:

* * * * *

(c) The highest bidder is notoriously or habitually careless with fire.

* * * * *

§§ 223.101 and 223.102 [Redesignated as §§ 223.102 and 223.103]

§ 223.103 [Removed]

4. Remove § 223.103, redesignate §§ 223.101 and 223.102 as §§ 223.102 and 223.103 respectively, and add a new § 223.101 to read as follows:

§ 223.101 Determination of purchaser responsibility.

(a) A Contracting Officer shall not award a timber sale contract unless that officer makes an affirmative determination of purchaser responsibility. In the absence of information clearly indicating that the prospective purchaser is responsible, the Contracting Officer shall conclude that the prospective purchaser does not qualify as a responsible purchaser.

(b) To determine a purchaser to be responsible, a Contracting Officer must find that:

(1) The purchaser has adequate financial resources to perform the contract or the ability to obtain them;

(2) The purchaser is able to perform the contract within the contract term taking into consideration all existing commercial and governmental business commitments;

(3) The purchaser has a satisfactory performance record on timber sale contracts. A prospective purchaser that is or recently has been seriously deficient in contract performance shall be presumed not to be responsible, unless the Contracting Officer determines that the circumstances were beyond the purchaser's control and were not created through improper actions by the purchaser or affiliate, or that the purchaser has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably under a contract is strong evidence that a purchaser is not a responsible contractor. The Contracting Officer shall consider the number of contracts involved and extent of deficiency of each in making this evaluation;

(4) The purchaser has a satisfactory record of integrity and business ethics;

(5) The purchaser has or is able to obtain equipment and supplies suitable for logging the timber and for meeting the resource protection provisions of the contract;

(6) The purchaser is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(c) If the prospective purchaser is a small business concern and the Contracting Officer determines that the purchaser does not qualify as a responsible purchaser on an otherwise acceptable bid, the Contracting Officer shall refer the matter to the Small Business Administration which will decide whether or not to issue a Certificate of Competency.

(d) Affiliated concerns, as defined in § 223.49(a)(5) of this subpart are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the Contracting Officer shall consider an affiliate's past performance and integrity when they may adversely affect the prospective purchaser's responsibility.

Date: August 23, 1988.

Peter C. Myers,

Deputy Secretary of Agriculture.

[FR Doc. 88-19703 Filed 8-29-88; 8:45 am]

BILLING CODE 3410-11-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6805]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If FEMA receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the **Federal Register.**

EFFECTIVE DATES: The third date ("Susp.") listed in the third column.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646-2717, Federal Center Plaza, 500 C Street, Southwest, Room 416, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022), prohibits flood insurance coverage as authorized under the National Flood Insurance Program (42 U.S.C. 4001-4128) unless an appropriate public body shall have adopted adequate floodplain management measures with effective enforcement measures. The communities listed in this notice no longer meet that statutory requirement for compliance with program regulations (44 CFR Part 59 et. seq.). Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register.** In the interim, if you wish to determine if a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office of the NFIP servicing contractor.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Disaster Relief Act of 1974 not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas. (Section 202(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Administrator finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified. Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. For the same reasons, this final rule may take effect within less than 30 days.

Pursuant to the provision of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, FEMA, hereby certifies that this rule if promulgated will not have a significant economic impact on a substantial number of small entities. As stated in section 2 of the Flood Disaster Protection Act of 1973, the establishment of local floodplain management together with the availability of flood insurance decreases the economic impact of future flood losses to both the particular community and the nation as a whole. This rule in and of itself does not have a significant economic impact. Any economic impact results from the community's decision not to (adopt) (enforce) adequate floodplain management, thus placing itself in noncompliance of the Federal standards required for community participation. In each entry, a complete chronology of effective dates appears for each listed community.

List of Subjects in 44 CFR Part 64

Flood insurance—floodplains.

1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et. seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

§ 64.6 List of eligible communities.

State and location	Community	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Region II—Minimal Conversions				
New York:				
Carlisle, Town of, Schoharie County	361193	Sept. 26, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp.	9-1-88	Sept. 1, 1988.
Seward, Town of, Schoharie County	361199	Oct. 3, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp.	9-1-88	Do.