(iv) For a multi-year project, include specific objectives to be met during each annual budget period that can be used to determine the progress of the project toward meeting its intended outcomes (3 points);

(3) The extent to which the plan of management ensures proper and efficient administration of the project (3 points);

(4) The ability of the applicant's plan to use its resources and personnel to achieve each objective and intended outcome during the project period (3 points);

(5) How the applicant will ensure that project participants who otherwise are eligible to participate are selected without regard to race, color, national origin, gender, age, or disabling condition (3 points); and

(6) The adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies (3 points).

(c) *Coordination with a local rape crisis center.* (6 points) The Secretary reviews each application for information that shows the extent to which the project is coordinated with a local rape crisis center, as demonstrated by the center's involvement in—

(1) Identifying the needs to be served by the project;

(2) Developing the application; and

(3) Operating the project.

(d) *Quality of key personnel.* (8 points)

(1) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(i) The qualifications of the project director (if one is used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraph (d)(1) of this section will commit to the project; and

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disabling condition.

(2) In determining the qualifications of key personnel under paragraph (d)(1) of this section, the Secretary considers—

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the quality of the project.

(e) *Budget and cost effectiveness.* (6 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (10 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate to the project;

(2) Will determine how successful the project is in meeting its intended outcomes; and

(3) Are objective and produce data that are quantifiable.

(g) *Extent of impact.* (8 points) The Secretary reviews each application to determine the potential impact of the project. This review includes an examination of both the actual number and percentage of individuals who would be affected by the project.

(h) *Continuation of project.* (5 points) The Secretary reviews each application to determine the extent to which the applicant's plans demonstrate a commitment to continue the project after Federal financial assistance is terminated. The review will include an examination of the support for and the amount of funds, personnel, and other resources committed to the continuation of the project after Federal financial assistance is terminated.

(i) *Dissemination.* (15 points) The Secretary reviews each application to determine the extent to which the applicant has—

(1) An effective and efficient plan for disseminating information about the project, including the results of the project and any specialized materials developed by the project, at the local, State, or national level, as appropriate;

(2) A high quality design for the dissemination plan and procedures for evaluating the effectiveness of the dissemination plan;

(3) A description of the types of materials the applicant plans to make available and the methods for making the materials available;

(4) The capacity to demonstrate the methods and techniques used by the project; and

(5) The capacity to assist others to adopt and successfully implement the project or methods and techniques used by the project.

(Authority: 20 U.S.C. 1145h)

§ 698.23 What additional factors does the Secretary consider?

In addition to the criteria in §§ 698.21 and 698.22, the Secretary, to the extent possible, makes awards that ensure the following conditions:

(a) Equitable participation of private and public IHEs.

(b) Equitable geographic participation of IHEs.

(Authority: 20 U.S.C. 1145h)

§ 698.24 What priorities does the Secretary establish?

(a)(1) Each year, the Secretary may establish as an absolute priority one or more of the activities listed in § 698.3(a) and (b)(1).

(2) The Secretary announces these priorities in a notice published in the **Federal Register**.

(b) The Secretary may award up to 15 additional points to applicants who—

(1) Show the greatest need for the sums requested as determined by—

(i) The adequacy of the applicant's financial resources to implement a campus education program regarding sexual offenses (0 to 5 points); or

(ii) The nature and frequency of sexual offenses on an applicant's campus (0 to 5 points); or

(2) Do not have an established campus education program regarding sexual offenses on campus (5 points).

(c) Each year, the Secretary notifies prospective applicants through a notice in the **Federal Register** of the basis on which the priority points in paragraph (b)(1)(i) and (ii) of this section will be allocated.

(Authority: 20 U.S.C. 1145h)

Subpart D—What Conditions Must Be Met After an Award?

§ 698.30 Must a grantee file an annual performance report?

(a) Each grantee shall, in accordance with 34 CFR 74.82, file an annual performance report with the Secretary explaining the activities carried out under its project together with an assessment of the effectiveness of those activities in achieving the purposes of the Campus Sexual Offenses Education and Prevention Program.

(b) The Secretary suspends funding if an applicant fails to submit an annual performance report pursuant to paragraph (a) of this section.

(Authority: 20 U.S.C. 1145h, 1221e–3(a)(1) and 3474; OMB Circular A–110, 34 CFR part 74)

[FR Doc. 93–19451 Filed 8–13–93; 8:45 am]

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GENERAL SERVICES ADMINISTRATION

41 CFR Part 105–71

Property Management Regulation; Uniform Administrative Requirements for Grants and Cooperative Agreements With State and Local Governments

AGENCY: General Services Administration.

ACTION: Final rule.

SUMMARY: This action adopts common regulations establishing consistency and uniformity among Federal agencies in the administration of grants and cooperative agreements to State, local, and federally recognized Indian tribal governments.

EFFECTIVE DATE: August 16, 1993.

FOR FURTHER INFORMATION CONTACT: John P. Dyer, General Services Administration, Public Buildings Service, Office of Procurement, 18th and F Streets, NW., room 7316, Washington, DC 20405. Telephone: (202) 501–0907 Extension 46.

SUPPLEMENTARY INFORMATION: With this final rule, the General Services Administration adopts rules and regulations governing the administration and use of grants and cooperative agreements with State and local governments. This final rule establishes consistency and uniformity with other Federal agencies in the employment and management of grants and cooperative agreements with State, local and federally recognized Indian tribal governments. There are no deviations or differences between the model regulation promulgated by the Office of Management and Budget, which forms the basis for the March 11, 1988 "common" rule, and these General Services Administration regulations governing the same.

The General Services Administration has determined that this rule is not a major rule for the purpose of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs to consumers or others; or significant adverse effects. The General Services Administration has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined the potential costs; has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

Regulatory Flexibility Act

The General Services Administration has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*).

Editorial Note: For additional information, see related documents published at 49 FR 24958. June 18, 1984, 52 FR 20178, May 29, 1987, and 53 FR 8028, March 11, 1988.

List of Subjects in 41 CFR Part 41 CFR 105–71

Accounting, Administrative practice and procedure, Grant programs, Grants administration, Insurance, Reporting and recordkeeping requirements.

41 CFR Ch. 105 is amended to add Part 105–71 to read as follows:

PART 105–71—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS WITH STATE AND LOCAL GOVERNMENTS

Subpart 105–71.1—General

Sec.

105–71.100 Purpose and scope of this part.
105–71.101 Scope of §§ 105–71.100 through 105–71.105.
105–71.102 Definitions.
105–71.103 Applicability.
105–71.104 Effect on other issuances.
105–71.105 Additions and exceptions.

Subpart 105–71.11—Pre-Award Requirements

105–71.110 Forms for applying for grants.
105–71.111 State plans.
105–71.112 Special grant or subgrant conditions for "high-risk" grantees.

Subpart 105–71.12—Post-Award Requirements/Financial Administration

105–71.120 Standards for financial management systems.
105–71.121 Payment.
105–71.122 Allowable costs.
105–71.123 Period of availability of funds.
105–71.124 Matching or cost sharing.
105–71.125 Program income.
105–71.126 Non-Federal audit.

Subpart 105–71.13—Post-Award Requirements/Changes, Property, and Subawards

105–71.130 Changes.
105–71.131 Real property.
105–71.132 Equipment.
105–71.133 Supplies.
105–71.134 Copyrights.
105–71.135 Subawards to debarred and suspended parties.
105–71.136 Procurement.
105–71.137 Subgrants.

Subpart 105–71.14—Post-Award Requirements/Reports, Records, Retention, and Enforcement

105–71.140 Monitoring and reporting program performance.
105–71.141 Financial reporting.
105–71.142 Retention and access requirements for records.
105–71.143 Enforcement.
105–71.144 Termination for convenience.

Subpart 105–71.15—After-the-Grant Requirements

105–71.150 Closeout.
105–71.151 Later disallowances and adjustments.
105–71.152 Collection of amounts due.

Subpart 105–71.16—Entitlements [Reserved]

Authority: Sec. 205(c), 63 Stat. 390, (40 U.S.C. 486(c)).

Subpart 105–71.1—General

§ 105–71.100 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 105–71.101 Scope of §§ 105–71.100 through 105–71.105.

This section contains general rules pertaining to this part and procedures for control of exceptions from this subpart.

§ 105–71.102 Definitions.

As used in this part: *Accrued expenditures* mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash constributions.

Contract means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For non-construction grants, the SF–269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF–271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of the third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of grant in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than equipment as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O.

12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee.

Termination does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 105–71.103 Applicability.

(a) *General.* Sections 105–71.100 through 105–71.152 of this subpart apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 105–71.105 or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I–III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV–A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV–D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV–E of the Act);

(iv) Aid to the Aged, Blind, Disabled (Titles I, X, XIV, and XVI–AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medical Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act);

(ii) Commodity Assistance (section 6 of the Act);

(iii) Special Meal Assistance (section 11 of the Act);

(iv) Summer Food Service for Children (section 13 of the Act); and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) . (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 105–71.103(a)(3) through (8) are subject to Subpart—Entitlement.

§ 105–71.104 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 105–71.105.

§ 105–71.105 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the **Federal Register**.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

Subpart 105–71.11—Pre-Award Requirements

§ 105–71.110 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants

for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 105–71.111 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 105–71.112 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible, and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

Subpart 105–71.12—Post-Award Requirements/Financial Administration

§ 105–71.120 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial result of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability and allocability of costs.

(6) *Source documentation.* Accounting records must be supported

by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 105–71.121 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital the awarding agency may provide cash or a working capital, advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award conditions, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 105–71.143(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§ 105–71.122 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles:

For the costs of a—	Use the principles in—
State, local or Indian tribal government..	OMB Circular A–87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular.	OMB Circular A–122.

For the costs of a—	Use the principles in—
Educational institutions.	OMB Circular A–21
For-profit organization other than a hospital and an organization named in OMB Circular A–122 as not subject to that circular.	48 CFR part 31, Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 105–71.123 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover or unobligated balances are permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§ 105–71.124 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements apply.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 105–71.125, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 105–71.125(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect cost. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of contributions.

(iii) A third party in-kind contribution to a fixed price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and the title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is

to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2)(i) and (ii) of this section apply.

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 105–71.122, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in the building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 105–71.125 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Government revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 105–71.134.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of § 105–71.131 and § 105–71.132.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 105–71.126 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501–7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, "Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations" have met the audit requirement. Commercial contractors (private for profit and private and

governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure the appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 105–71.136 shall be followed.

Subpart 105–71.13—Post-Award Requirements/Changes, Property, and Subawards

§105–71.130 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 105–71.122) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*— (1) *Non-construction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a non-construction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and non-construction projects.* When a grant or subgrant provides funding for both construction and non-construction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from non-construction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under non-construction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 105–71.136 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget format the grantee used in its application and shall be accomplished by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 105–71.122) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§105–71.131 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purpose, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives.

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from the sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall

be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 105–71.132 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 105–71.125(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds the title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the data of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage or theft of the property. Any loss, damage or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third party named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 105–71.132(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 105–71.133 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 105–71.134 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 105–71.135 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award

(subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension".

§105–71.136 Procurement.

(a) *States.* When procuring property and services under a grant, a State will allow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agent will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantees and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protests to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 105–71.136. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or

administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 105–71.136(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of the price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for preaward review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 105–71.122). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed $25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed $25,000, specifies a "brand name" product; or

(iv) The proposed award over $25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than $25,000.

(3) A grantee or subgrantee will be exempt from the preaward review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding $100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penaltites as may be appropriate (Contracts other than small purchases).

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement (All contracts in excess of $10,000).

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR part 60) (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees).

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3) (All contracts and subgrants for construction or repair).

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) as supplemented by Department of Labor regulations (29 CFR part 5) (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation).

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audits, examinations, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15) (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163).

§ 105–71.137 Subgrants.

(a) *States.* States shall follow State law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 105–71.142 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 105–71.110;

(2) Section 105–71.111;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 105–71.121; and

(4) Section 105–71.150.

Subpart 105–71.14—Post-Award Requirements/Reports, Records, Retention, and Enforcement

§ 105–71.140 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Non-construction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semiannual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semiannual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 105–71.141 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decision making purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date on any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all non-construction grants and for construction grants when required in accordance with paragraph (e)(2)(iii) of this section.

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through an analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter of credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272A, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriated when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under non-construction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 105–71.141(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 105–71.141(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 105–71.141(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 105–71.141(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 105–71.141(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 105–71.141(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 105–71.141(b)(2).

§ 105–71.142 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees of subgrantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 105–71.136(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rates at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computations are not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records. Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 105–71.143 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporary withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Without further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in case of a termination, are noncancellable, and,

(2) The cost would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see §105–71.135).

§105–71.144 Termination for convenience.

Except as provided in § 105–71.143 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 105–71.143 or paragraph (a) of this section.

Subpart 105–71.15—After-The-Grant Requirements

§105–71.150 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.

(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable).

(3) Final request for payment (SF–270) (if applicable).

(4) Invention disclosure (if applicable).

(5) Federally-owned property report: In accordance with § 105–71.132(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§105–71.151 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 105–71.142;

(d) Property management requirements in § 105–71.131 and § 105–71.132; and

(e) Audit requirements in § 105–71.126.

§105–71.152 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursement,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch.II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart 105–71.16—Entitlements [Reserved]

Dated: July 13, 1993.

Roger W. Johnson,

Administrator of General Services.

[FR Doc. 93–19572 Filed 8–13–93; 8:45 am]

BILLING CODE 6820–23–M

DEPARTMENT OF DEFENSE

48 CFR Parts 249 and 252

Defense Federal Acquisition Regulation Supplement; Notification of Proposed Program Termination or Reduction

AGENCY: Department of Defense (DOD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement to establish a contractor notification requirement in the event of a potential termination or substantial reduction in a defense program.

DATES: *Effective Date:* August 9, 1993.

Comment Date: Comments on the interim rule should be submitted in writing at the address shown below on

or before September 15, 1993, to be considered in the formulation of the final rule. Please cite DFARS Case 92–D363 in all correspondence.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, ATTN: Mr. Eric Mens, OUSD(A)DP, IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telefax number (703) 697–9845.

FOR FURTHER INFORMATION CONTACT: Mr. Eric Mens, (703) 697–7266.

SUPPLEMENTARY INFORMATION:

A. Background

Section 4471 of the National Defense Authorization Act for Fiscal Year 1993 (Pub. L. 102–484), requires the Secretary of Defense to determine which defense programs are likely to be terminated or substantially reduced as a result of the submission of the President's budget or enactment of an appropriations act, within 30 days of such submission or enactment; provide notice of the proposed termination or substantial reduction to each contractor and subcontractor that has a contract of $500,000 or more under a program which will be adversely affected by the termination of, or substantial reduction in, such program; and withdraw the notice initially provided if an appropriations act subsequently restores sufficient funding. Section 4471 also requires that contractors, not later than two weeks after receiving the Government's notice of a potential termination or reduction in a program, provide similar notice to each employee or employee representative, as well as to certain public officials. The notices are intended to help employees of adversely affected contractors and subcontractors to receive benefits under the Job Training Partnership Act (29 U.S.C. 1661).

The interim rule amends DFARS 249 and 252 to establish the statutory notification requirements and set forth contractor responsibilities in a new clause 252.249–7002, Notification of Proposed Program Termination or Reduction. The clause identifies the statutorily-defined recipients of the contractor's notice and requires the contractor to also provide notice to affected subcontractors.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, applies but the magnitude of the expected impact on small entities as a result of the rule is unknown and impossible to estimate. An Initial Regulatory Flexibility Analysis (IRFA) has been performed and a copy has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. The IRFA states that it is impossible to accurately estimate the number of small business that may be impacted because it is impossible to estimate the number of small entities who currently hold, or prospectively will hold, defense contracts or subcontracts of $500,000 or more and who may be adversely impacted when such contracts or subcontracts are modified or terminated as a result of cutbacks or terminations of the programs which those contracts or subcontracts support. A copy of the IRFA may be obtained from Mr. Eric Mens, telephone number (703) 697–7266. Comments from small entities concerning the affected DFARS subpart will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 610 (DFARS Case 92–D363) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) does not apply because the interim rule does not constitute a "collection of information" requiring the approval of OMB under 44 U.S.C. 3501 *et seq.* The notices required by the rule do not constitute a "collection of information" under the Paperwork Reduction Act, as the term is defined in 5 CFR 1320.7(c)(2). Paragraph (c)(2) states that the public disclosure of information originally supplied by the Government to the recipient for purposes of disclosure to the public does not fit into the definition of a "collection of information."

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense to issue this rule as an interim rule. Urgent and compelling reasons exist to promulgate this rule before affording the public an opportunity to comment. The first DoD notifications to contractors were required to be made by May 8, 1993. The second set of notices should be released to contractors 30 days after enactment of the DoD Appropriations Act which is expected to be enacted in October 1993. Therefore, it is essential that guidance be issued as expeditiously as possible.

List of Subjects in 48 CFR Parts 249 and 252

Government procurement.

Claudia L. Naugle,

Deputy Director, Defense Acquisition, Regulations Council.

Therefore, 48 CFR parts 249 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 249 and 252 is revised to read as follows:

Authority: 41 U.S.C. 421 and FAR Subpart 1.3.

PART 249—TERMINATION OF CONTRACTS

2. Section 249.7003 is added to read as follows:

§ 249.7003 Notification of proposed program termination or reduction.

(a) Section 4471 of Public Law 102–484 is intended to help establish benefit eligibility under the Job Training Partnership Act (29 U.S.C. 1661) for employees of DoD contractors and subcontractors adversely affected by program terminations or substantial reductions.

(b) Each military department or defense agency is responsible for establishing procedures to:

(1) Determine which defense programs are likely to be terminated or substantially reduced as a result of the submission of the President's budget or enactment of an appropriations act.

(2) Within 30 days of such submission or enactment, provide notice, substantially as follows, of the proposed termination or reduction to each contractor that has a contract of $500,000 or more under a program identified as likely to be terminated or reduced by at least 25 percent.

"In accordance with section 4471 of Public Law 102–484, you are hereby notified that the (insert program name) has been (contracting officer to insert either (1) or (2) below)—

(1) Identified as likely to be (insert "terminated" or "substantially reduced") by the Fiscal Year (insert fiscal year) President's budget; or

(2) (insert "terminated" or "substantially reduced") by the Fiscal Year (insert fiscal year) "Defense Appropriations Act").

Your responsibilities upon receipt of this notice are set forth in the "Notification of Proposed Program Termination or Reduction" clause in your contract (insert contract number). This is not a notice of termination under the Termination for Convenience or Default clauses of your contract.

You will be notified in the event that appropriations are subsequently restored, at which time you must comply with the requirements of paragraph (c) of the "Notification of Proposed Program Termination or Reduction" clause."

(3) Withdraw the notice provided under Section 249.7003(b)(2) if an appropriations act subsequently restores sufficient funding.

(c) Use the clause at section 252.249–7002, Notification of Proposed Program Termination or Reduction, in all contracts of $500,000 or more.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 252.249–7002 is added to read as follows:

252.249–7002 Notification of proposed program termination or reduction.

As prescribed in section 249.7003(c), use the following clause:

Notification of Proposed Program Termination or Reduction (Aug. 1993)

(a) Within two weeks after the Government notifies the Contractor that this contract may be adversely affected by a program termination or reduction, the Contractor shall provide notice of such proposed termination or reduction to—

(1) Each representative of the Contractor's employees whose work is directly related to the contract; or

(2) If there is no such representative at that time, each such employee;

(3) The State dislocated worker unit or office described in section 311(b)(2) of the Job Training Partnership Act (29 U.S.C. 1661(b)(2)) and the chief elected official of the unit of general local government within which the adverse effect may occur; and

(4) Each affected subcontractor.

(b) If the proposed program termination or reduction is likely to result in plant closure or mass layoff, the notice provided an employee under paragraph (a) of this clause shall have the same effect as a notice of termination to the employee for the purposes of determining whether such employee is eligible for training, adjustment assistance, and employment services under section 325 or 325A of the Job Training Partnership Act. If the Contractor has specified that the proposed program termination or reduction is not likely to result in plant closure or mass layoff, the employee shall only be eligible to receive services under section 314(b) and paragraphs (1) through (14), (16), and (18) of section 314(c) of the Job Training Partnership Act.

(c) If the Government subsequently withdraws a notice issued in accordance with paragraph (a) of this clause, the Contractor, within two weeks after receipt of the withdrawal notice shall provide notice of the withdrawal to—

(1) The representatives, employees, offices, officials, and subcontractors specified in paragraph (a) of this clause; and

(2) Each grantee under section 325(a) or 325A(a) of the Job Training Partnership Act, as the case may be, providing training, adjustment assistance, and employment services to each employee described in this paragraph.

(d) An employee who receives notice of withdrawal shall not be eligible for training adjustment assistance, and employment services under section 325 of the Job Training Partnership Act, or section 325A of such Act, as the case may be, beginning on the date the employee receives such notice.

(e) The Contractor shall insert the substance of this clause in all subcontracts of $500,000 or more.

(End of clause)

[FR Doc. 93–19508 Filed 8–13–93; 8:45 am]
BILLING CODE 3810–01–M

DEPARTMENT OF ENERGY

48 CFR Parts 952 and 970

Acquisition Regulation; Facilities Management and Arbitration; Correction

AGENCY: Department of Energy (DOE).

ACTION: Correction of final regulations.

SUMMARY: This document contains corrections to the final rules which were published on June 30, 1993, at 58 FR 34924 and July 6, 1993, at 58 FR 36149. The regulations involve the facilities management and arbitration rules.

EFFECTIVE DATES: August 30, 1993, for the facility management rule (published on June 30, 1993) and August 5, 1993, for the arbitration rule (published on July 6, 1993).

FOR FURTHER INFORMATION CONTACT: Richard B. Langston, Office of Procurement and Assistance Management (PR–121), Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–8247.

SUPPLEMENTARY INFORMATION:

Background

The corrections revise an erroneous cross reference, and insert missing dates on clause titles.

Correction of Publication

1. The regulation published June 30, 1993, at 58 FR 34924, is corrected as follows:

970.5204–60 [Corrected]

On page 34926, first column, the reference in paragraph (a) to DOE Directive "4300.1C" is changed to read "4320.1B."

2. The regulation published July 6, 1993, at 58 FR 36149, is corrected as follows:

952.237–70 [Corrected]

On page 36152, first column, the date beside the clause title is changed from "(XXX 1992)" to "(AUG 1993)".

970.5204–63 [Corrected]

On page 36152, second column, the date beside the clause title is changed from "(XXX 1992)" to "(AUG 1993)".

Issued in Washington, DC on August 10, 1993.

G.L. Allen,

Acting Deputy Assistant Secretary for Procurement and Assistance Management.

[FR Doc. 93–19559 Filed 8–13–93; 8:45 am]
BILLING CODE 6450–01–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 218

[FRA Docket Number RSOR–11, Notice No. 3]

RIN 2130—AA77

Protection of Utility Employees

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA regulations prescribe minimum requirements for certain railroad operating rules and practices, including blue signal protection of railroad employees engaged in the inspection, testing, repair, and servicing of rolling equipment. Such activities may require employees to work on, under, or between such equipment and subject them to the danger of personal injury posed by any movement of such equipment. Train and yard crews are excluded from blue signal protection, unless assigned to perform such work on railroad rolling equipment that is not part of the train or yard movement they have been called to operate. FRA is revising the exclusionary language to allow augmentation of a crew with a "utility" employee, and creating alternate safety procedures to prevent injury to these employees.

EFFECTIVE DATE: These rules will become effective 30 days after the date of publication.

ADDRESSES: Any petition for reconsideration should be submitted to the Docket Clerk, Office of Chief Counsel, RCC–30, Federal Railroad Administration, Department of Transportation, 400 Seventh Street SW., room 8201, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: James T. Schultz, Office of Safety, FRA, RRS–11, Washington, DC 20590 (telephone: 202–366–9252), or Kyle M. Mulhall, Office of Chief Counsel, FRA, Washington, DC 20590 (telephone: 202–366–0443).

SUPPLEMENTARY INFORMATION:

Background

The "blue signal" provisions of FRA's railroad operating practices regulation (49 CFR part 218, subpart B) were promulgated to prescribe minimum requirements for the protection of railroad employees engaged in the inspection, testing, repair, and servicing of rolling equipment whose activities require them to work on, under, or between such equipment and subjects them to the danger of personal injury posed by any movement of such equipment. Examples of activities requiring blue signal protection include, but are not limited to, the following: Breaking or making steam and air hose connections (including connection by coupling irons), connecting or disconnecting electric control cables between equipment, replacing broken coach windows, making repairs beneath the car to blower motors or steam regulators, making electric pantograph inspections, repairing or replacing a rear end marker or telemetry device, and conducting initial terminal air brake tests when employees are required to go on, under, or between rolling equipment.

A person requiring blue signal protection is referred to as a "workman." 49 CFR 218.5(a). Train and yard crews are excluded from blue signal requirements except when assigned to perform such work on railroad rolling equipment that is not part of the train or yard movement they have been called to operate. The rationale for this exclusion is that the crew, working with their assigned engineer in control of the locomotive, has complete control and can prevent the unanticipated movement of the equipment on which crew members are working.

Since promulgation of the regulation, the size of train and yard crews has been significantly reduced through the collective bargaining process and increased operating efficiencies. Implementation of the recommendations of Presidential Emergency Board No. 219 ("PEB 219") (see Pub. L. No. 102–29, 1991) is greatly accelerating this process of change. Through this and prior processes, crews that once consisted of a locomotive engineer, fireman, conductor, and two trainmen, have in many cases been reduced to a locomotive engineer and conductor only.

Role of the Utility Employee

Before and after the PEB 219 process, railroads have used utility employees to assist the train or yard crew on a temporary basis. A recent FRA investigation indicated that at least seven Class I railroads and three regional railroads are experimenting with the use of utility employees to supplement train and yard assignments. This practice has involved at least two hundred employees from the train service ranks at more than sixty-five locations. The following are examples of functions that are being performed by utility employees:

- Operating manual switches in yard or terminal areas or at industrial sidings and sending or receiving hand or radio communications with respect to such switching movements;
- Working with the regular train or yard crew to assemble trains from pre-tested and pre-inspected blocks of cars by preparing couplings between rail cars, coupling air hoses, and assisting switching movements;
- Participating in power brake inspections at initial terminals or intermediate terminals (49 CFR 232.12, 232.13);
- Participating in Freight Car Safety Standards inspections at initial terminals or elsewhere when cars are placed in a train (49 CFR 215.13); and
- Installing, testing, or replacing rear end marking devices (and/or telemetry devices) (see 49 CFR 221.16).

The blue signal regulations have, in the view of the railroads, constituted an impediment to the efficient use of these additional employees. The conflict between regulatory requirements and efficient utilization of personnel reached a critical level which prompted FRA to propose a new rule. In proposing this rule, FRA believed that there might be conditions under which train and yard crews could be temporarily augmented without a diminution of safety.

The Final Rule

The final rule defines the appropriate safeguards under which a utility employee may safely function as a "part of the train or yard movement" for a limited period. This rule is based on the premise that the utility employee should be able to work under essentially the same conditions as other yard or train crew members of the crew with which that employee is associated, provided appropriate communication is established and maintained. It remains essential that any employee who is not assigned to a train or yard crew, but who inspects, tests, repairs, or services rolling equipment and is on, under, or between that equipment, continues to be a "worker" requiring blue signal protection.

Current regulations require blue signal protection when workers other than train and engine crews are required to go on, under, or between moving equipment. It was determined that train and yard crews could safely perform their tasks without blue signal protection because the characteristics of their activity provide alternative protection for the crew members. They work as a team and maintain communication with each other. The engineer at the controls of the locomotive is aware of other crew members working on the train and can prevent movement of the equipment while any of the crew are in a danger zone. The engineer also is in contact with other trains in the vicinity and can prevent unexpected couplings while crew members are in jeopardy.

Under the present regulation, however, the train and yard crew exclusion does not extend to utility employees. Many railroads believed that the exclusion did cover utility employees working with train and yard crews. FRA evaluated the position of those railroads and disagreed. The utility employee is not covered in the exclusion principally because he or she is not called for a tour of duty as a member of the cohesive working unit, but joins the unit for a brief period and then leaves, or is left by the work unit when the joint activity is completed. In other words, the utility employee is not called to operate the railroad rolling equipment assigned to the cohesive work unit known as the train or yard crew. Utility employees are required to establish full blue signal protection prior to performing any work on, under, or between the equipment. To avoid that necessity, the railroad can instead assign a brakeman to a crew for an entire tour of duty, even though that person's services are only required for a small portion of the duty tour. These assignments, however, thwart railroad efforts to efficiently deploy personnel.

Where the utility employee is working independently of the crew, the requirement for full blue signal protection is justified, since that employee lacks those characteristics that afford alternative protection. However, when the utility employee actually becomes an integral part of the crew, even temporarily, it is difficult from a safety perspective to justify the different regulatory treatment of that employee from other crew members. FRA therefore published a notice of proposed rulemaking (NPRM) to allow utility employees to be excluded from blue signal protection when working as a member of a train or yard crew.

Response to the NPRM

Need for Regulatory Change

A number of commenters took issue with the need for this rule change. Railroad management took the position that the current rule does not preclude utility employees from taking advantage of the exclusion from blue signal protection. Representatives of rail labor objected, generally, that the rule expanded the exclusion at the cost of reduced safety for utility employees, and that the current blue signal rule does not provide adequate protection for train and yard crews.

As noted earlier, FRA disagrees with the railroads concerning the applicability of the current rule. Conversely, FRA believes that the current blue signal rule, in this aspect, is restrictive without benefiting safety. As it now exists, the rule unduly impedes the railroad industry's efforts to improve the efficiency of its operations. As to the concerns expressed by rail labor, FRA does not believe that according a utility employee the same level of protection historically provided to the train and yard crews constitutes a significant diminution of the utility employee's safety. As discussed below, FRA's accident data do not support the view that train crews are currently experiencing repeated injuries ascribable to unexpected train movement. Therefore, while there may be a theoretical cost to safety due to the absence of blue signal protection, FRA does not believe any real safety compromise will occur. Accordingly, FRA is amending the regulation to allow a utility employee to become a member of a train or yard crew (and thus entitled to the exclusion from blue signal requirements) under circumstances where safety will not be compromised.

The rule establishes the appropriate safeguards under which a utility employee may safely function as a "part of the train or yard movement" for a limited period. The rule is founded on the belief that the utility employee can work under the same conditions as the members of the yard or train crew to which the employee is assigned, provided appropriate communication is established and maintained. It remains essential that any employee who is not assigned to a train or yard crew, but who inspects, tests, repairs, or services rolling equipment and is on, under, or between that equipment, continues to be a "workman" (or "worker," as provided under the gender-neutral amendment that would be made by this proposal) requiring blue signal protection.

NPRM Restrictions

Several commenters from the railroad industry objected to the notice of proposed rulemaking because they believed the procedures for a utility employee to join a crew were too burdensome. The principal objection from both rail labor and rail management was designation of the locomotive engineer as the point of contact for the utility employee with the crew, which increased the burden of responsibility on the engineer. FRA response to this concern is contained below in the section-by-section analysis.

These commenters were also concerned that the communication requirements of the rule would add to radio congestion in major terminals. The reason for the blue signal exclusion for train and yard crews is that the very nature of their work requires a near constant communication with other crew members. As a result, crew members are kept so aware of each others activities that the notice provided by blue signals is redundant. This level of communication is essential to safety, and normally should not cause more communication than occurred when large train crews performed these tasks. FRA believes the resulting burden from these procedural requirements is minor when compared to the need to safeguard the level of communication necessary for the safety of the crew and the utility employee.

Safety Concerns

Some commenters urgently argued that unexpected movement of equipment due to the actions of other train crews could pose serious hazards for utility employees. If this is the case one would expect to find such injuries occurring today among regular brakemen and conductors working in the same environment. To examine this issue, FRA conducted a review of accident/incident records for the past five years concerning fatal and nonfatal injuries incurred by train and yard crews, including any utility employees, that could have resulted from faulty communication between working units (*i.e.*, caused by unexpected equipment movement). Potential incidents were identified from our data base, and then each incident was assigned to an FRA inspector for investigation. FRA was able to identify only two incidents of employees suffering injury as a result of other members of the injured employee's crew causing unexpected movement of the equipment they were called to operate. FRA was not able to identify any case that involved employee injury caused by another crew unexpectedly moving the equipment.

FRA also investigated a 1992 incident in which a brakeman was fatally injured during switching activities of another crew involved in assembling rail cars for his train. Evidence indicates that the brakeman was between rail cars during switching operations without adequate notice to the other crew. This unfortunate incident was avoidable had the brakeman communicated his intentions to the other crew, or fully understood the activities of the other crew.

Considering this information, and the anecdotal testimony provided by the commenters, FRA believes it is clear that a risk does exist if proper communication is not established and maintained between the train and yard crews and utility employees assisting those crews. FRA believes there is adequate justification in the record to propose future rulemaking to establish minimum safety standards for the protection of all train and yard crew members and utility employees from actions of other crews. FRA's review of the limited safety data available also serves to show, however, that there is no substantial injury record for utility employees when working with train or yard crews after establishing adequate communication and understanding of the work assignments, nor is there any crisis with respect to the much larger number of train and yard crew members who are potentially affected by the actions of other crews, such that utility employees would be exposed to unusual risk under the conditions specified in this final rule.

Craft Lines

Comments from rail labor argued that this rule would result in an expansion of train and yard crew functions at the cost of car repair employees. Rail management argued that no such change is planned or would occur. FRA has traditionally viewed the blue signal requirements as addressing functional rather than craft distinctions, with the exception of train and yard crews. For instance, if supervisors perform duties that constitute inspecting, testing, repairing, or servicing, and that cause them to go on, under, or between the equipment, they are not excused from blue signal requirements by virtue of their supervisory occupation, unless that person was a member of a crew. Moreover, it must be noted that Congress, in excluding train and yard crews from blue signal requirements, took into consideration the types of duties traditionally performed by those crews and employed craft-based

language to exclude train and yard crew work from the statutory requirement for blue signal protection.

FRA does not intend that this rule cause a material expansion of the tasks performed by train and yard crews without blue signal protection that would decrease the level of safety, particularly for repair and servicing activities. As further discussed below, the final rule addresses these concerns in express language to the effect that only train and yard service duties may be performed without blue signal protection. FRA does not believe that the final rule will materially affect the type of work normally assigned to train or yard crews. Accordingly, it is unlikely to have a major impact on the availability of maintenance of equipment personnel across the national rail system. Any incidental impact can properly be addressed within the scope of other rulemaking activities, if necessary for safety.

FRA believes that many of the comments received in response to this NPRM were beyond the scope of the notice of this rulemaking. As a result, FRA cannot address them in this rule.

In addition, FRA received several late filed comments which were added to the docket. These comments came from rail labor and management. Some commenters urged adoption of the NPRM, withdrawing earlier objections, and one renewed its opposition. FRA considered these comments as much as was possible in such a late stage of the rulemaking process.

Section-by-Section Analysis

Section 218.5 (Definitions) is amended to reorder the existing definitions alphabetically, add new definitions of "controlling locomotive," "ranking crew member," "train and yard crew," "utility employee," and "worker" (in lieu of "workman," in order to make the rule gender-neutral). Under the definition, a "ranking crew member" is an individual responsible for overall supervision of a railroad operating crew and for coordinating the work the crew performs. The ranking crew member is normally specified in the railroad's operating rules, and is typically identified as a Conductor, Yard Engine Foreman, or Locomotive Engineer. If a railroad does not designate who is the ranking crew member, the rule assigns that role to the locomotive engineer since the engineer will have immediate control over movement of the assigned equipment.

Commenters representing rail labor have raised the issue that this rule may encourage the transfer of work from "workers," who require blue signal protection, to "train or yard crews" who do not require such protection. In the final rule, a definition for "train or yard crew" is added. A train or yard crew, a term used in the 1976 amendment to federal railroad safety laws, 45 U.S.C. 431(g)(1), is being defined in order to clarify which railroad employees may be excluded from blue signal protection. FRA has highlighted the limits of the class of employees, the equipment they may be called to operate, and the nature of work that can be safely performed under the exclusion provided in this section. FRA considers the work that was normally performed by train and yard crews under the craft boundaries which existed at the time that the first blue signal regulation was adopted in 1970 to be work excluded from blue signal protection. Generally, train or yard crew members were permitted to work on, under, or between railroad rolling equipment without blue signal protection in order to set or release hand brakes; couple or uncouple air hoses and other electrical or mechanical connections; prepare rail car couplers for coupling; set wheel blocks or wheel chains; conduct air brake tests to include cutting air brake components in or out and positioning retaining valves; and, permit a locomotive engineer to conduct daily visual inspections of the locomotive consist for which he or she was called to operate. Additionally, train or yard crews may inspect, test, install, remove or replace a rear end marking device or end of train device without blue signal protection on their equipment. FRA has long held the belief that any other inspections, tests, services or repairs would be conducted under blue signal protection, even when performed by train or yard service employees. FRA received a number of conflicting comments on this issue. Since these comments were beyond the scope of the notice of the NPRM, FRA believes it will be necessary to revisit this topic in a future rulemaking.

Under the definition, a "utility employee" is an individual assigned to and functioning as a part of a train or yard crew who is subject to both the railroad's operating rules, the Hours of Service Act, and federal drug and alcohol regulations. These defining elements are necessary to ensure that the utility employee is legitimately engaged in service subject to the statutory exclusion and understands and can function safely in the operating environment.

Section 218.22 (Utility employee protection) is a new revised provision which defines the circumstances under which the utility employee may be permitted to function as a member of a train or yard crew without the benefit of the protection provided by the blue signal regulations. It is not anticipated that this section will affect activity within locomotive servicing or car shop areas. FRA requested comments as to whether latitude should have been extended to such areas, but none were received.

Section (a) requires that before a utility employee becomes a temporary member of a train or yard crew, that employee must be subject to the same program of instruction for train and yard crews, and the requirements of §§ 217.9 and 217.11 of this chapter, the drug and alcohol control requirements of part 219, the Hours of Service Act, and the hours of service recording requirements.

Section 217.11 requires that railroads periodically instruct employees on the railroad's operating rules in accordance with its program. FRA expects railroads to amend their programs, if necessary, to ensure that utility employees are thoroughly trained in applicable operating rules. In addition, § 217.9 requires that railroads periodically conduct operational tests and inspections (efficiency tests) to determine the extent of compliance with its code of operating rules, timetables, and timetable special instructions in accordance with its program. FRA expects the railroads to amend their programs, if necessary, to ensure that utility employees are included in the required testing and inspections.

A utility employee who is assigned to a train or yard crew is considered to be involved in the movement of a train for hours of service purposes under section 2 of the Hours of Service Act. The "commingled service" provision would of course be applicable if the utility employee engages in any other service for the railroad. Utility employees performing service covered by the Hours of Service Act are also considered to be in safety sensitive service and subject to FRA drug and alcohol control regulations.

In subsection (b), FRA limits the assignment of the utility employee to only one crew at a time. This is necessary to prevent confusion as to the location and duties of that employee, and to ensure that the employee is, in reality, a member of the crew to which he or she is assigned for the duration of the assignment. For example, if an employee is assigned as a train crew member to one train for an entire tour of duty, that employee may not, while awaiting departure from the yard, be temporarily assigned to a second train crew to help them prepare to depart. On the other hand, a member of an inbound train crew at a crew change point,

whose assignment to the train is essentially completed, could then be assigned as a utility employee to the outbound crew to assist in preparation for departure of the train (assuming, of course, that hours of service limitations are not exceeded). Furthermore, an employee could not simultaneously perform duties on two different trains. For the exclusion to apply, a utility employee would have to be indistinguishable in duties and location from any other train crew member.

Subsections (c) and (e) establish the procedures for the utility employee to join a train or yard crew. FRA requires that the crew's locomotive engineer will have taken control of the assigned locomotive before a utility employee performs duties with the crew which will place him in the zone of danger. The presence and vigilance of the engineer at the controls (or, at the very least, in the cab) of the controlling locomotive is essential. Not only can the engineer, by his presence, prevent another employee from moving the equipment, but he or she can further guard against failure of the equipment (e.g., the air brakes) that may lead to unexpected movement, and can also guard against dangers posed by oncoming equipment. The presence of the engineer at the controls was a central factor in FRA's decision that train and yard crews can be safely excluded from blue signal protection.

Notwithstanding FRA's views, several comments were received regarding the presence of the engineer in the cab. These comments follow conflicting themes: first, that the engineer's presence was not essential to protection of the crew; and second, that the engineer's presence provides insufficient protection for the crew. Should the engineer leave the cab, that protection is lost. FRA recognizes that operational expediency may require the locomotive engineer to leave the cab. FRA believes the temporary replacement of the locomotive engineer by a member of his or her own crew provides an equivalent level of safety for any utility employee assigned to the crew.

A single locomotive engineer in helper service, or a single hostler may not take advantage of the exclusion from blue signal protection unless joined by a utility employee. Absent a crew member to monitor the locomotive, blue signal protection is required. The contribution to safety provided by the presence of a crew member in the cab, together with the other requirements of this rule, provide sufficient protection for train and yard crews and utility employees. FRA also limits the utility employee's exclusion from blue signal protection to activities historically excluded when performed by train and yard service employees.

FRA recognizes that communication and coordination among the entire crew, including the utility employee, is crucial to the safety of the utility employee. When assigned to a train or yard crew and on arriving at the place where work is to be performed, the utility employee must establish personal contact with the ranking crew member. The utility employee must be made fully aware of the tasks to be performed while assigned as a member of that crew. While the assignment of a utility employee to a train or yard crew could be made by oral or written communication initiated by railroad supervision, the utility employee would be required to establish personal contact with the ranking crew member by a face-to-face discussion, telephone, radio or other telecommunication. The ranking crew member is required to inform all crew members about the addition of the utility employee; and communication must be established in the manner normally used by the operating crew. Communication of the identity of the utility employee is necessary to prevent confusion, particularly in the event more than one utility employee is assigned to a particular crew or more than one crew is working in the vicinity.

In subsections (d) and (e) FRA requires that the release of the utility employee cannot occur before all crew members are informed that the utility employee has ceased work with the crew. The notice to the crew members must be conveyed in the same manner as when the utility employee joined the crew. If these procedures are not strictly followed, the potential for misunderstanding and failure to properly account for all employees within the zone of danger would be unacceptably high. When fulfilling the proposed communication requirements by radio, strict adherence to proper procedures under 49 CFR part 220 is essential.

FRA received comments from railroad management questioning the necessity of establishing the maximum number of utility employees assigned to a particular train and the corresponding affect on maximum crew size. FRA believes the level of safety provided by the above communication requirements might be compromised in some circumstances if more than three utility employees were concurrently assigned to a crew. As the number of utility employees increases, the ability of the ranking crew member or locomotive engineer to monitor the location and activity of each crew member would diminish. After considering these opinions, FRA determined that the addition of three utility employees to a post-PEB 219 crew would not compromise safety and still permit an adequate number of employees to accomplish the normal work assignment. Industry practice observed by FRA, shows that five is a manageable number of crew members (a locomotive engineer, a conductor or yard foreman, and three brakemen or switchmen). Under subsection (f), therefore, FRA anticipates that a railroad would rarely need to assign more than two utility employees to a crew in order to create an effective work unit. Adding more than three employees could tax unit cohesion at a risk to safety.

In subsection (g) FRA clearly emphasizes that the exclusion for train or yard crew members is only extended to include utility employees who have met the requirements of this rule. Furthermore, the exclusion for train and yard crews continues to apply only to railroad employees who are assigned to a crew and working on, under, or between rolling equipment they have been called or assigned to operate.

In subsection (h) FRA has clarified that this final rule does not change the provisions of § 221.16. FRA received comments concerning the requirements of § 221.16, but found the issue beyond the scope of the notice provided by the NPRM.

Regulatory Impact Analysis

This rule has been evaluated in accordance with existing policies and procedures and is considered to be major under Executive Order 12291 and significant under DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). FRA has prepared and placed in the rulemaking docket a regulatory evaluation addressing the economic impact of this rule. It may be inspected and copied in room 8201, 400 Seventh Street, SW., Washington, DC 20590. Copies may be obtained by submitting written request to the FRA Docket Clerk at that same address. FRA estimates that the rule will yield a total of approximately $600 million in discounted benefits over 10 years. The potential benefits are about $183 million a year. FRA expects the industry to realize only 30 percent of that amount in the first year and 75 percent of the potential annual benefit in the tenth year.

FRA does not believe this rule will have any direct, adverse economic impact. It is possible that some indirect costs may be associated with the final

rule. FRA estimates that railroads may elect to purchase radio equipment costing $130,000 in discounted costs over ten years. This cost is not imposed by the rule, but railroads may make the expenditure in order to take advantage of the rule.

The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et. seq.*) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. FRA believes that this final rule will have a beneficial economic impact on a substantial number of small entities, and did not receive comments proposing this impact be adjusted. A Regulatory Flexibility Analysis has been placed in the docket and copies may be obtained by contacting the FRA Docket Clerk. FRA's analysis found that the rule will allow railroads to operate more efficiently because of increased flexibility in assigning employees. For example, railroads will not have to employ additional crew members for an entire shift if those employees are only needed for yard operations. The reduced time needed to place and remove end-of-train markers should also produce a benefit.

Federalism Implications

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, FRA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism assessment.

Paperwork Reduction Act

There are no new information collection requirements in these FRA regulations. Consequently, no estimate of a public reporting burden is required.

Environmental Impact

These rule revisions will not have any identifiable environmental impact.

The Rule

In consideration of the foregoing, FRA amends part 218 of title 49, Code of Federal Regulations as follows:

PART 218—[AMENDED]

1. The authority for part 218 continues to read as follows:

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100–342; and 49 CFR 1.49(m).

2. Amend the part by removing the term "workman" wherever it appears and by inserting in its place "worker," and by removing the term "workmen" wherever it appears and by inserting in its place "workers."

3. Revise § 218.5 to read as follows:

§ 218.5 Definitions.

Absolute block means a block in which no train is permitted to enter while it is occupied by another train.

Blue signal means a clearly distinguishable blue flag or blue light by day and a blue light at night. When attached to the operating controls of a locomotive, it need not be lighted if the inside of the cab area of the locomotive is sufficiently lighted so as to make the blue signal clearly distinguishable.

Camp car means any on-track vehicle, including outfit, camp, or bunk cars or modular homes mounted on flat cars used to house rail employees. It does not include wreck trains.

Car shop repair track area means one or more tracks within an area in which the testing, servicing, repair, inspection, or rebuilding of railroad rolling equipment is under the exclusive control of mechanical department personnel.

Controlling Locomotive means a locomotive arranged as having the only controls over all electrical, mechanical and pneumatic functions for one or more locomotives, including controls transmitted by radio signals if so equipped. It does not include two or more locomotives coupled in multiple which can be moved from more than one set of locomotive controls.

Effective locking device when used in relation to a manually operated switch or a derail means one which is:

(1) Vandal resistant;

(2) Tamper resistant; and

(3) Capable of being locked and unlocked only by the class, craft or group of employees for whom the protection is being provided.

Flagman's signals means a red flag by day and a white light at night, and a specified number of torpedoes and fusees as prescribed in the railroad's operating rules.

Group of workers means two or more workers of the same or different crafts assigned to work together as a unit under a common authority and who are in communication with each other while the work is being done.

Interlocking limits means the tracks between the opposing home signals of an interlocking.

Locomotive means a self-propelled unit of equipment designed for moving other railroad rolling equipment in revenue service including a self-propelled unit designed to carry freight or passenger traffic, or both, and may consist of one or more units operated from a single control.

Main track means a track, other than an auxiliary track, extending through yards or between stations, upon which trains are operated by timetable or train order or both, or the use of which is governed by a signal system.

Ranking crew member means an individual in whom the general charge of the train or yard crew is vested in accordance with the railroad's operating rules. Unless otherwise designated by the railroad, the ranking crew member will be the assigned locomotive engineer.

Rolling equipment includes locomotives, railroad cars, and one or more locomotives coupled to one or more cars.

Switch providing access means a switch which if traversed by rolling equipment could permit that rolling equipment to couple to the equipment being protected.

Train or yard crew means one or more railroad employees assigned a controlling locomotive, under the charge and control of one crew member; called to perform service covered by Section 2 of the Hours of Service Act; involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew; reporting and working together as a unit that remains in close contact if more than one employee; and subject to the railroad operating rules and program of operational tests and inspections required in §§ 217.9 and 217.11 of this chapter.

Utility employee means a railroad employee assigned to and functioning as a temporary member of a train or yard crew whose primary function is to assist the train or yard crew in the assembly, disassembly or classification of rail cars, or operation of trains (subject to the conditions set forth in § 218.22 of this chapter).

Worker means any railroad employee assigned to inspect, test, repair, or service railroad rolling equipment, or their components, including brake systems. Members of train and yard crews are excluded except when assigned such work on railroad rolling equipment that is not part of the train or yard movement they have been called to operate (or been assigned to as "utility employees"). Utility employees assigned to and functioning as temporary members of a specific train or yard crew (subject to the conditions set forth in § 218.22 of this chapter), are excluded only when so assigned and functioning.

Note: Servicing does not include supplying cabooses, locomotives, or passenger cars with items such as ice, drinking water, tools, sanitary supplies, stationery, or flagging equipment.

Testing does not include (i) visual observations made by an employee positioned on or alongside a caboose, locomotive, or passenger car; or (ii) marker inspections made in accordance with the provisions of § 221.16(b) of this chapter.

4. Add a new § 218.22 to read as follows:

§ 218.22 Utility employee.

(a) A utility employee shall be subject to the Hours of Service Act, and the requirements for training and testing, control of alcohol and drug use, and hours of service record keeping provided for in parts 217, 219, and 228 of this chapter.

(b) A utility employee shall perform service as a member of only one train or yard crew at any given time. Service with more than one crew may be sequential, but not concurrent.

(c) A utility employee may be assigned to and serve as a member of a train or yard crew without the protection otherwise required by subpart D of part 218 of this chapter only under the following conditions:

(1) The train or yard crew is assigned a controlling locomotive that is under the actual control of the assigned locomotive engineer of that crew;

(2) The locomotive engineer is in the cab of the controlling locomotive, or, while the locomotive is stationary be replaced in the cab by another member of the same crew;

(3) The utility employee established communication with the crew by contacting the ranking crew member on arriving at the train (as defined for the purpose of this section as one or more locomotives coupled, with or without cars) and before commencing any duties with the crew.

(4) Before each utility employee commences duties, the ranking crew member shall provide notice to each crew member of the presence and identity of the utility employee. Once all crew members have acknowledged this notice, the ranking crew member shall advise the utility employee that he or she is authorized to work as part of the crew. Thereafter, communication shall be maintained in such a manner that each member of the train or yard crew understands the duties to be performed and whether those duties will cause any crew member to go on, under, or between the rolling equipment; and

(5) The utility employee is performing one or more of the following functions: set or release hand brakes; couple or uncouple air hoses and other electrical or mechanical connections; prepare rail cars for coupling; set wheel blocks or wheel chains; conduct air brake tests to include cutting air brake components in or out and position retaining valves; inspect, test, install, remove or replace a rear end marking device or end of train device. Under all other circumstances a utility employee working on, under, or between railroad rolling equipment must be provided with blue signal protection in accordance with §§ 218.23 through 218.30 of this part.

(d) When the utility employee has ceased all work in connection with that train and is no longer on, under, or between the equipment, the utility employee shall notify the ranking crew member. The ranking crew member shall then provide notice to each crew member that the utility employee is being released from the crew. Once each crew member has acknowledged the notice, the ranking crew member shall then notify the utility employee that he is released from the train or yard crew.

(e) Communications required by § 218.22(c)(4) and (d) shall be conducted between the utility employee and the ranking crew member. This communications shall be conducted either through direct verbal contact, by radio in compliance with part 220 of this chapter, or by oral telecommunication of equivalent integrity.

(f) No more than three utility employees may be attached to one train or yard crew at any given time.

(g) Any railroad employee who is not assigned to a train or yard crew, or authorized to work with a crew under the conditions set forth by paragraph (b) of this section, is a worker required to be provided blue signal protection in accordance with §§ 218.23 through 218.30 of this part.

(h) Nothing in this section shall affect the alternative form of protection specified in § 221.16 of this chapter with respect to inspection of rear end marking devices.

5. In Appendix A to Part 218—Schedule of Civil Penalties, a new section is added in numerical order to the penalty schedule as follows:

Appendix A to Part 218—Schedule of Civil Penalties

Section	Violation	Willful violation
Subpart B—Blue Signal Protection of workers:		
218.22 Utility employees:		
(a) Employee qualifications	$5,000	$7,500
(b) Concurrent service	$5,000	$7,500
(c) Assignment conditions.		
(1) No controlling locomotive	$5,000	$7,500
(2) Empty cab	$5,000	$7,500
(3)(4) Improper communication	$5,000	$7,500
(5) Performing functions not listed	$2,000	$4,000
(d) Improper release of utility employee	$2,000	$4,000
(f) More than three utility employees with one crew	$2,000	$4,000

* * * * *

Appendix C [Redesignated from Appendix B]

6. Appendix B to part 218 is redesignated as Appendix C, and the title is revised to read as follows: "Statement of Agency Enforcement Policy on Tampering".

7. A new appendix B to part 218 is added to read as follows:

Appendix B to part 281—Statement of Agency Enforcement Policy on Blue Signal Protection for Utility Employees

The following examples of the application of the train or yard crew exclusion from required blue signal protection for utility employees are provided to clarify FRA's enforcement policy. In the first four examples, the utility employee is properly attached to and functioning as member of a train or yard crew and is excluded from blue signal protection, provided all the conditions specified in § 218.22 are met:

Example 1: A utility employee assists a train crew by adding or reducing railroad cars to or from the train. The utility employee may perform any duties which would normally be conducted by members of the train crew, i.e., setting or releasing handbrakes, coupling air hoses and other connections, prepare rail cars for coupling, and perform air brake tests.

Example 2: A utility employee is assigned to assist a yard crew for the purpose of classifying and assembling railroad cars. The yard crew onboard their locomotive arrives at the location in the yard where the work is to be performed. At that time, the utility employee may attach himself to the yard crew and commence duties as a member of that yard crew.

Example 3: A utility employee is assigned to inspect, test, remove and replace if necessary, a combination rear end marking device/end of train device on a through freight train. The utility employee attaches himself to the train crew after the arrival of the train and its crew at the location where this work is to be conducted. He may then perform duties as a member of that crew.

Example 4: A railroad manager who properly attaches himself as a utility employee to a train or yard crew, in accordance with § 218.22, may then function as a member of the train or yard crew under the exclusion provided for train and yard crews.

Note: In the last four examples, any railroad employee, including regularly assigned crew members, would need blue signal protection to perform the described function.

Example 5: Prior to the arrival of a through freight train, a utility employee installs an end-of-train device on one end of a block of railroad cars that are scheduled to be picked up by the freight train.

Example 6: A railroad employee attaches himself to a train or yard crew while the crew is in the ready room preparing to take charge of their train. Prior to the train crew leaving the ready room and taking charge of the equipment, the employee couples air hoses and other connections between the locomotives.

Example 7: A railroad employee is attached to a train crew after the train crew has taken charge of the train. It is necessary for the employee to perform a repair on a rail car, such as replacing a brake shoe, in addition to those duties normally performed by train or yard crew members.

Example 8: A train or yard crew, supplemented by three utility employees, has an assigned locomotive and train. The regular crew, including the engineer, has left the train to eat lunch. The utility employees have remained with the train and are coupling air hoses between rail cars in the train.

Issued in Washington, DC, on August 5, 1993.

S. Mark Lindsey,

Acting Federal Railroad Administrator.

[FR Doc. 93-19484 Filed 8-13-93; 8:45 am]

BILLING CODE 4910-06-P

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1002

[Ex Parte No. 246 (Sub-No. 11)]

Regulations Governing Fees for Services Performed in Connection With Licensing and Related Services—1993 Update

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts the 1993 User Fee Update and revises its fee schedule in compliance with the regulatory requirement that its fees be updated annually.

EFFECTIVE DATE: This rule is effective on October 1, 1993.

FOR FURTHER INFORMATION CONTACT: Kathleen M. King, 202-927-5493, [TDD for hearing impaired: (202) 927-5721].

SUPPLEMENTARY INFORMATION: The update formula produces increases for most fees because all cost factors increased this year. Fees for two of the most frequently made filings will increase as follows: Fee Item (1) for motor carrier applications will increase to $300 and Fee Item (74) for tariff filings will increase to $10. The Commission is deferring any increases in the fees for rail finance, abandonment, and exemption proceedings and complaints and complaint-type declaratory order proceedings until next year because a cost study is being conducted.

The fee increases involved here result only from the mechanical application of the update formula at 49 CFR 1002.3(d), adopted through notice and comment procedure in Regulations Governing Fees For Services—1987 Update, 4 I.C.C.2d 137 (1987). Therefore, the Commission believes that good cause exists for finding that notice and comment are unnecessary for this proceeding under 5 U.S.C. 553(b)(3)(B). See Regulations Governing Fees For Services—1990 Update, 7 I.C.C.2d 3 (1990), and Regulations Governing Fees For Services—1991 Update, 8 I.C.C.2d 13 (1991).

The Commission concludes that these fee increases will not have a significant economic impact on a substantial number of small entities because the Commission's regulations provide for waiver of filing fees for those entities which can make the required showing of financial hardship.

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write, call, or pick up in person from Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359 (Assistance for the hearing impaired is available through TDD services (202) 927-5721).

List of Subjects in 49 CFR Part 1002

Administrative practice and procedure, Common carriers, Freedom of information, User fees.

Decided: August 4, 1993.

By the Commission, Chairman McDonald, Vice Chairman Simmons, Commissioners Phillips, Philbin, and Walden.

Sidney L. Strickland, Jr.,

Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1002, of the Code of Federal Regulations is amended as follows:

PART 1002—FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A), 5 U.S.C. 553, 31 U.S.C. 9701, and 49 U.S.C. 10321.

2. Section 1002.1 is amended by revising paragraphs (b), (c), and (e)(1) and the chart in paragraph (f)(6) to read as follows:

§ 1002.1 Fees for records search, review, copying, certification, and related services.

* * * * *

(b) Service involved in examination of tariffs or schedules for preparation of certified copies of tariffs or schedules or extracts therefrom at the rate of $22.00 per hour.

(c) Service involved in checking records to be certified to determine authenticity, including clerical work, *etc.*, incidental thereto, at the rate of $15.00 per hour.

* * * * *

(e) * * *

(1) A fee of $38.00 per hour for professional staff time will be charged when it is required to fulfill a request for ADP data.

* * * * *

(f) * * *

(6) * * *

Grade	Rate	Grade	Rate
GS-1	$6.46	GS-9	$15.09
GS-2	7.04	GS-10	16.62
GS-3	7.93	GS-11	18.26
GS-4	8.90	GS-12	21.88
GS-5	9.96	GS-13	26.02
GS-6	11.10	GS-14	30.75
GS-7	12.34	GS-15 and over.	36.17
GS-8	13.66		

* * * * *

3. Section 1002.2 is amended by revising paragraph (f) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) *Schedule of filing fees.*