

administrative stay beyond the three months expressly provided in section 307(d)(7)(B). All the commenters agreed with the need for such an extension. Two comments discussed some of the specific reasons why it is not practical for the owners and operators of industrial process refrigeration equipment to comply with the requirements originally promulgated under § 82.156(i). The reasons included, but were not limited to:

- the need for a process shutdown in order to complete certain repairs;
- delays stemming from compliance with other applicable federal, state, or local regulations; and
- the inability to receive the necessary parts and/or appropriate replacement refrigerant within the specified times.

In addition, one commenter addressed the need for a stay to ensure that no enforcement action was initiated by EPA or undertaken in response to citizen suits, during the reconsideration of the leak repair requirements. The commenter was particularly concerned with the potential for unfair imposition of penalties during the pendency of the reconsideration. The commenter stated that while compliance personnel may have been advised of the settlement agreement, they are not legally required to refrain from imposing penalties. Penalties stemming from actions undertaken during reconsideration could be substantial.

VI. Response to Comments

EPA agrees with the five commenters concerning the need for a stay. EPA believes that it is essential to continue staying the effectiveness of § 82.156(i) and the applicable compliance dates, as these provisions relate to industrial process refrigeration equipment only. Therefore, through this action, EPA is extending the stay of § 82.156(i) and the applicable compliance dates, for industrial process refrigerant only, until EPA completes reconsideration of these regulations in accordance with the settlement agreement reached between EPA and CMA. This stay will expire when the final action regarding § 82.156(i) and compliance dates, with respect to industrial process refrigeration equipment are completed and effective.

Based on internal Agency review, the regulatory language of this stay has been slightly modified for purposes of clarification.

VII. Effective Date

This action will become effective on December 16, 1994, the date on which the administrative stay expires.

List of Subjects in 40 CFR Part 82

Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Interstate commerce, Nonessential products, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: November 4, 1994.

Carol M. Browner,
Administrator.

Part 82, chapter I, title 40, of the Code of Federal Regulations, is amended to read as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

2. Section 82.156 is amended by revising paragraph (i)(5) to read as follows:

§ 82.156 Required practices.

* * *

(i) * * *

(5) Rules stayed for reconsideration. Notwithstanding any other provisions of this subpart, the effectiveness of the 40 CFR 82.156(i)(1), (i)(3), and (i)(4) as these provisions apply to industrial process refrigeration equipment only is stayed from December 16, 1994, until the EPA takes final action on its reconsideration of these provisions. EPA will publish any such final action in the *Federal Register*.

[FR Doc. 94–28295 Filed 11–16–94; 8:45 am]
BILLING CODE 5560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 52e

RIN 0905–AE25

National Heart, Lung, and Blood Institute Grants for Prevention and Control Projects

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Final rule.

SUMMARY: The National Institutes of Health (NIH) is amending the regulations governing grants awarded by the National Heart, Lung, and Blood Institute (NHLBI) for prevention and control projects in order to conform the

regulations to minor changes made to the NHLBI authority by the NIH Revitalization Act of 1993 and add a reference to the NIH policy on the inclusion of women and minorities as subjects in clinical research.

EFFECTIVE DATE: This amendment is effective on November 17, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Jerry Moore, Regulatory Affairs Officer, National Institutes of Health, Building 31, Room 3B11, 9000 Rockville Pike, Bethesda, Maryland 20892–0001, telephone (301) 496–2832 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 419 of the PHS Act authorizes NHLBI to make prevention and control grants. Section 505 of the NIH Revitalization Act of 1993, which was enacted on June 10, 1993, amended section 419 of the Public Health Service (PHS) Act by making minor changes to the NHLBI Prevention and Control authority. The NIH Revitalization Act of 1993 also added section 492B to the PHS Act which requires the Director of NIH, in conjunction with the Director of the Office of Research on Women's Health and the Director of the Office of Research on Minority Health, to establish guidelines on the inclusion of women and minorities as subjects in clinical research supported by NIH. In a notice published in the *Federal Register* of March 28, 1994 (59 FR 14508), NIH announced the establishment of those guidelines. Additionally, in a notice published in the *Federal Register* of March 7, 1994 (59 FR 10648), the Assistant Secretary for Health enunciated PHS policy concerning the establishment and maintenance of a smoke-free workplace and the promotion of the non-use of tobacco products by recipients of PHS grants. Further, Public Law 103–227, enacted on March 31, 1994, prohibits smoking in certain facilities in which minors will be present. The Department of Health and Human Services is now preparing to implement the provisions of that law. Until those implementation plans are in place, PHS continues to strongly encourage all grant recipients to provide a smoke-free workplace and promote the nonuse of all tobacco products.

We are amending regulations at 42 CFR part 52e governing grants for prevention and control projects to refer to the NIH policy on the inclusion of women and minorities as subjects in clinical research, and to make minor changes in the NHLBI Prevention and Control authority. Specifically, we are amending § 52.8 by adding the word “policies” to the heading and amending the text of § 52e.8 by adding reference

to the new NIH guidelines on the inclusion of women and minorities as subjects in clinical research. We are also revising paragraphs (a)(1) and (b) of § 52e.1 to conform them to amended section 419 of the PHS Act.

Notice, public comment, and delayed effective date procedures are being waived for this amendment based on a finding of good cause. These procedures for ensuring public participation in the rulemaking process and time for compliance are unnecessary because the substantive changes have already been made by the NIH Revitalization Act and this technical amendment changes the regulation to conform with the statutory changes. Similarly, the addition of a reference to a recently issued policy does not impose any new substantive requirements upon applicants.

The following statements are provided for information of the public.

Regulatory Impact Statement

Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, requires us to prepare an analysis for any rule that meets one of the E.O. 12866 criteria for a significant regulatory action; that is, that may—

Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal, governments, or communities;

Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

Materially alter the budgetary impact of grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

In addition, we prepare a regulatory flexibility analysis, in accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. chapter 6), if the rule is expected to have a significant impact on a substantial number of small entities.

For the reasons outlined below, we do not believe this rule is economically significant nor do we believe that it will have a significant impact on a substantial number of small entities. In addition, this rule is not inconsistent with the actions of any other agency.

This rule makes minor changes to conform existing regulations to the current statute and to refer to a recently issued NIH policy. While these grants benefit those segments of the public afflicted by heart, blood vessel, lung, and blood diseases, and community-

based and population-based programs carried out in cooperation with other Federal agencies, with public health agencies of State or local governments, with nonprofit private entities that are community-based health agencies, or with other appropriate public or nonprofit private entities, these grants do not have a significant economic or policy impact on a broad cross-section of the public. Furthermore, this rule would only affect those few institutions interested in obtaining financial assistance to carry out authorized prevention and control projects, subject to the normal accountability requirements for grant funds. No entity is obligated to apply for grant support.

For these same reasons, we certify this rule will not have a significant economic impact on a substantial number of small entities, and that a regulatory flexibility analysis is not required.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbered programs affected by this rule are:

93.837—Heart and Vascular Diseases Research

93.838—Lung Diseases Research

93.839—Blood Diseases and Resources Research

List of Subjects in 42 CFR Part 52e

Grant programs—Health; Health; Medical research.

Dated: October 28, 1994.

Philip R. Lee,

Assistant Secretary for Health.

Approved: November 8, 1994.

Donna E. Shalala,

Secretary.

For the reasons set forth in the preamble, part 52e of title 42 of the Code of Federal Regulations is amended to read as set forth below.

PART 52e—NATIONAL HEART, LUNG, AND BLOOD INSTITUTE GRANTS FOR PREVENTION AND CONTROL PROJECTS

1. The authority citation for part 52e continues to read as follows:

Authority: 42 U.S.C. 216, 285b-1.

2. In § 52e.1 paragraphs (a)(1) and (b) are revised to read as follows:

§ 52e.1 To what programs do these regulations apply?

(a) * * *

(1) Demonstrate and evaluate the effectiveness of new techniques or procedures for the prevention and control of heart, blood vessel, lung, and blood diseases, with special consideration given to the prevention

and control of these diseases in children, and in populations that are at increased risk with respect to such diseases;

(2) * * *

(3) * * *

(b) For purposes of this part, prevention and control projects shall include community-based and population-based programs carried out in cooperation with other Federal agencies, with public health agencies of State or local governments, with nonprofit private entities that are community-based health agencies, or with other appropriate public or nonprofit private entities.

3. Section 52e.8 is amended by adding the words "and policies" to the heading following the word "regulations" and, immediately after the reference to the PHS Policy on Humane Care and Use of Laboratory Animals, by adding as the last item a reference to the NIH Guidelines on the Inclusion of Women and Minorities as Human Subjects in Clinical Research, to read as follows:

§ 52e.8 Other HHS regulations and policies that apply.

* * * * *

59 FR 14508 (as republished March 28, 1994), as may be amended, or its successor—NIH Guidelines on the Inclusion of Women and Minorities as Subjects in Clinical Research.

[FR Doc. 94-28323 Filed 11-16-94; 8:45 am]

BILLING CODE 4140-01-M

Health Care Financing Administration

42 CFR Parts 435 and 436

Medicaid

Administration for Children and Families

45 CFR Part 233

RIN 0970-AA07

Aid to Families With Dependent Children; Extension of Medicaid When Support Collection Results in Termination of Eligibility

AGENCIES: Administration for Children and Families (ACF) and Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: These final rules interpret section 20 of the Child Support Enforcement Amendments of 1984, as amended by section 303(e) of the Family Support Act of 1988, and section 8003 of the Omnibus Budget Reconciliation Act of 1989. The 1984 law extended

Medicaid coverage for a period of four months to certain dependent children and adult relatives who become ineligible for Aid to Families with Dependent Children (AFDC) as a result, wholly or partly, of the collection or increased collection of child or spousal support under title IV-D of the Social Security Act (the Act). The regulations are applicable to the AFDC and Medicaid programs in all jurisdictions. **EFFECTIVE DATE:** November 17, 1994.

FOR FURTHER INFORMATION CONTACT:

AFDC: Mr. Mack Storrs, ACF/OFA 5th Floor, 370 L'Enfant Promenade S.W., Washington, DC 20447, telephone (202) 401-9289.

Medicaid: Mr. Marinos T. Svolos, HCFA Room 323, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207, telephone (410) 966-4451.

SUPPLEMENTARY INFORMATION:

Statutory Authority

Section 20 of the Child Support Enforcement Amendments of 1984 (Public Law 98-378) amended both the AFDC and Medicaid titles of the Act. Title IV-A (AFDC) was amended by adding a new paragraph (h) to section 406 of the Act. This new paragraph provides that: "[e]ach dependent child and each relative with whom such a child is living (including the spouse of such relative as described in subsection (b)), who becomes ineligible for aid to families with dependent children as a result (wholly or partly) of the collection or increased collection of child or spousal support under Part D, and who has received such aid in at least three of the six months immediately preceding the month in which such ineligibility begins, shall be deemed to be a recipient of aid to families with dependent children for purposes of title XIX for an additional four calendar months beginning with the month in which such ineligibility begins."

Section 20 of Public Law 98-378 also amended section 1902(a)(10)(A)(i)(I) to require Medicaid coverage of eligible individuals pursuant to section 406(h) of the Act. Both amendments apply only to those individuals who became ineligible for AFDC on or after August 16, 1984, the date of enactment of Public Law 98-378, and before October 1, 1988, and who received AFDC in at least three of the six months immediately preceding the month of ineligibility.

Section 303(e) of the Family Support Act of 1988 (Public Law 100-485) amended section 20 of the Child Support Enforcement Amendments of

1984 to extend for one year, through September 30, 1989, the authority of this provision. Section 8003 of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101-239) removed the sunset date for this section, thus making it a permanent provision of the Act.

Notice of Proposed Rulemaking (NPRM)

A NPRM was published in the *Federal Register* on November 27, 1992 (57 FR 56294), amending 45 CFR Part 233 and 42 CFR Parts 435 and 436 to set forth the circumstances under which individuals become eligible for the four-month period of extended Medicaid coverage because they have lost AFDC as a result (wholly or partly) of the collection or increased collection of child or spousal support. The proposed rules interpreted the statute to require either the new receipt of, or an increase in, the collection of child or spousal support which renders the family ineligible for AFDC.

As required by statute, the proposed rules provide that individuals must have received AFDC in at least three of the six months immediately preceding the month in which AFDC ineligibility begins in order to qualify for the extended Medicaid coverage. As we pointed out in the preamble to the proposed rules, individuals who do not actually receive an AFDC payment for any month because of the rounding of the payment amount to zero, the recoupment of an overpayment, or the elimination of payments for those who are eligible for amounts less than \$10 are deemed to be AFDC recipients for that month for purposes of determining eligibility for continued Medicaid coverage under this provision.

Also under the proposed rules, continued Medicaid under this provision ends for any individual family member who moves to another State. In the preamble to the proposed rules, we stated that Medicaid ends effective with the month following the month the individual moves to the new State. Although benefits end when an individual moves to another State, eligibility can be reinstated in the State in which he or she was entitled to the extended coverage if the individual re-establishes residence there before the end of the four-month period. It was the Department's view that extended Medicaid benefits are available only in the State in which the family became ineligible for AFDC benefits. For example, if a family moved to another State in March, the first month of the extended period, and moved back in May, the third month of the extended period, they would be eligible for

extended Medicaid benefits for the months of May and June.

The preamble to the proposed rules recognized that States require collection of support made by absent parents and spouses to be paid directly to the IV-D agency. Nevertheless, AFDC recipients occasionally receive child or spousal support directly. Because current regulations require that these payments must be turned over to the IV-D agency we consider direct payments which are properly turned over to the IV-D agency to be collections of support for the purposes of this provision. Thus, extended Medicaid coverage will be provided when collections of child or spousal support are received by the eligible assistance unit and are turned over to the IV-D agency if these payments result (wholly or partly) in the loss of AFDC.

The proposed rules indicated that section 406(h) of the Act provides certain individuals with extended Medicaid if they lose AFDC eligibility "as a result (wholly or partly) of the collection or increased collection of child or spousal support * * *" (emphasis added). They separately specified the circumstances under which AFDC ineligibility would be considered to be due "wholly" to a collection and when they would be considered to be due "partly" to a support collection. They also discussed at length examples of cases in which the child or spousal support collection "wholly" or "partly" affected the family's AFDC eligibility and made a clear distinction between the "wholly" or "partly" cases.

Our interpretation of Congressional intent as it relates to the term "wholly" or "partly" limits the Medicaid extension under this provision to cases where ineligibility can be attributed, at least partly, to the initiation of or an increase in the amount of a child or spousal support collection. The proposed and final regulations both reflect our position that the collection of support must actually cause or actively contribute to ineligibility for AFDC, even if there are other factors which also contribute to ineligibility or could simultaneously cause it.

The proposed rules provided that extensions of Medicaid eligibility pursuant to expiration of the earnings disregards as set forth in 45 CFR 233.20(a)(14) or pursuant to section 303(a) of the Family Support Act of 1988 (P.L. 100-485) are not affected by this provision. Thus, if a family is entitled to extended Medicaid as a result of earned income under section 303(a) and is also simultaneously entitled to extended Medicaid as a

result of the initiation of or a change in the amount of the child or spousal support collection, the assistance unit would be entitled to the full twelve-month extension of Medicaid available under the section 303(a) transitional provision if it meets the requirements of section 1925 of the Act. However, the periods run concurrently so that one extended period cannot be delayed until the end of the other extended period.

Response to Specific Individual Comments

We received five comments on the proposed rules. Three were from State government agencies, one was from an advocacy group and one was from a health services organization. A discussion of these comments and our responses follows.

Comment: One advocacy group requested that the Department clarify the definition of support collections which would trigger entitlement to extended Medicaid coverage. It recommended that the change must be in the amount of support collected. The advocacy group was concerned that the language in the discussion of the proposed regulations referring to an increase in the "ongoing support payment" may be read as referring to an increase in the amount the absent parent has to pay, rather than an increase in the amount which is collected in a given month.

Response: We have eliminated any reference to an increase in an "ongoing support payment." We believe this will eliminate any confusion between support ordered and support collected. The amount of support ordered is not material when establishing eligibility for extended benefits. This eligibility is based on the amount of support which is collected.

Comment: One State agency recommended a change in the definition of "collection" of child or spousal support to cover situations where collections of child or spousal support contribute to a loss of eligibility but no initiation of or increase in collections occurred. Another State agency believed that the proposed definition is more restrictive than the wording of the statute and that there was no legislative history presented to conclude that Congress intended to define the entitlement as narrowly as proposed.

Response: As a condition of extended Medicaid coverage, the final regulations continue to require that ineligibility for AFDC must result from a change in support collection; that is, either the new receipt of, or an increase in, the amount of a child or spousal support collection. As we stated in the preamble

to the proposed rules, we believe that the Conference Report, H.R. Rep. No. 925, 98th Cong., 2d Sess. (1984), contemplates a change in the amount of the child or spousal support collection. In describing the House bill, the Conference Report states that "[i]f a family loses AFDC eligibility as the result (wholly or partly) of increased collection of support payments * * *, the State must continue to provide Medicaid benefits * * *." *Id.* at 55 (emphasis added). The Conference Agreement followed the House bill, but with an amendment limiting the application of the provision to families who become ineligible for AFDC before October 1, 1988.

Similarly, the Report of the Committee on Ways and Means, H.R. Rep. No. 527, 98th Cong., 1st Sess. at pages 11, 23, 52, and 56 refers repeatedly to either an "increase in child support payments" or to "a change in child support levels."

Comment: Two State agencies believed that the definition of "collection" was convoluted, unnecessarily complex, and difficult to administer. One agency believed the definition would make automation more difficult and expensive.

Response: We believe that any difficulty in the proposed definition stemmed from our attempt to interpret the law broadly. The interpretation requires States to compare the different possible causes for the loss of AFDC, but was designed to allow continued eligibility under a number of different circumstances.

We could have interpreted section 406(h) to mean that continued eligibility is available only when changes in support collections alone lead to a loss of AFDC. Extended coverage would not have been available if any other factors contributed to or caused ineligibility. We instead chose to cover individuals who lose AFDC under any circumstances in which the change in support either causes or contributes to the loss of AFDC. This interpretation, by its nature, has increased the complexity of the rule.

We have attempted in the final regulation to express these concepts more simply and concisely. We have done so by removing the emphasis in the proposed regulation on the distinction between the loss of AFDC which results "wholly" instead of "partly" from support collections. Instead, we have placed the emphasis on extended Medicaid whenever a support collection has either caused or actively contributed to the loss of AFDC. As in the proposed regulation, a family can qualify for extended Medicaid when

the support collection alone causes ineligibility for AFDC or when the support collection, in conjunction with other changes in income or family circumstances, contributes to ineligibility. The following examples demonstrate these concepts, as we have revised them. They are keyed to the regulations at §§ 435.115(h)(1), 436.114(h)(1) and 233.20(a)(15)(iii)(A).

An example of how the final rule would apply in §§ 435.115(h)(1)(i), 436.114(h)(1)(i) and 233.20(a)(15)(iii)(A)(1) is an assistance unit which receives \$250 in countable child support collections monthly. The applicable standard of need is \$375. In the next month the countable child support collection increases to \$400. In this example, the resulting ineligibility is due to the collection of child support, and the Medicaid extension would apply.

Another illustration includes a situation which conforms to §§ 435.115(h)(1)(i), 436.114(h)(1)(i) and 233.20(a)(15)(iii)(A)(1) of the final regulations. An assistance unit receives \$200 in countable child support collections and \$100 in title II benefits monthly. The applicable standard of need is \$325. In the next month both the child support collection and title II increase by \$75, for a total increase of \$150 a month. Here, the resulting ineligibility is due to the child support collection because the change in support by itself, when added to the unchanged title II benefit, would cause ineligibility. Thus, the Medicaid extension would apply.

An example of how the definition of "collection" applies in combination with other changes in family circumstances, as indicated in §§ 435.115(h)(1)(ii), 436.114(h)(1)(ii) and 233.20(a)(15)(iii)(A)(2), would be as follows. An assistance unit received \$275 in countable child support collections and the applicable standard of assistance was \$375. In the next month, the countable child support collection increased to \$325 and at the same time one of the older children left home. As a result, the applicable standard of assistance was reduced to \$300. The countable child support collection of \$325 exceeded the new standard of \$300 and resulted in the assistance unit's ineligibility.

Under the clarified definition of "collection" in the final regulation, the family would be eligible for extended Medicaid, since the collection of child support increased and contributed to the ineligibility. In this instance, the reduction in the standard of assistance worked in combination with the increased collection of support to cause

the ineligibility. It thus contributed to the family's ineligibility. Neither change would have caused ineligibility by itself.

However, suppose that in this example the \$275 received by the assistance unit was raised to \$325 and the \$375 standard of assistance was reduced to \$250. In this case, the increase in child support would have no effect on eligibility for AFDC. That is because the change in the standard of assistance would have caused ineligibility even before the child support collection was raised from \$275 to \$325. Because the change in the support collection neither caused nor contributed to ineligibility for AFDC, the family would not be eligible for extended Medicaid.

Thus, under the definition included in the final rule, other changes affecting eligibility and occurring in conjunction with a change in the amount of the support collection would not negate the family's entitlement to extended Medicaid, as long as the support collection contributes to ineligibility for AFDC.

Comment: One State questioned the discussion of payments made by absent parents directly to the AFDC recipient. The State asserted that if these payments are turned in as required, the money flows through the child support mechanism as would money collected by the State directly from the absent parent. As such it represents a "collection" under title IV-D. If the money is not forwarded to the State agency, it is budgeted accordingly (as income to the family), and penalties (for non-cooperation) are imposed as appropriate. The regulations are silent on the issue of monies not forwarded so the State assumes there is no intent to provide the extension when the support causes ineligibility when budgeted, since to provide such an extension in this case would be contrary to the statute.

Response: There is no intent to provide the extension in such situations. The State is correct that monies not forwarded to the State agency would not constitute a "collection" under title IV-D, as required by the statute. Such monies would be budgeted as income to the family in a IV-A income State, with sanctions for non-cooperation imposed as appropriate. In a IV-D recovery State, the IV-D agency must recover all such payments. The IV-D agency would enter into a repayment agreement with the custodial parent in accordance with 45 CFR 303.80. We have revised the regulation in several places in order to make it clear that support collections

must be child or spousal support collected under title IV-D.

Comment: One State agency commented that, given the erratic nature of child support payments, the proposed policy could result in disparate treatment for clients with equal amounts of child support. Another State agency expressed concern that the application of the proposed regulations may provide an incentive for an absent parent not to pay child support when a child is approaching the age of majority or some other income change is expected to occur.

Response: Because of the sporadic nature of the receipt of support payments and other changes in family circumstances, it would be difficult to determine when such a situation might occur. Nevertheless, it is true that, in some cases, an increase in support collection would coincide with other circumstances affecting AFDC eligibility. The statute places no special requirements on the circumstances which resulted in the increased support collection which, in turn, triggered the four-month period. If a family receives a change in support payments which in some way causes that family to lose AFDC, regardless of the circumstances, then that family is entitled to four extra months of Medicaid coverage. The statute places no relevance on the regularity or timing of payments.

Comment: Two commenters suggested that extended Medicaid should be continued when a family or individual moves out of the State and is no longer a resident of the State. One commenter suggested that the State where the individual was originally eligible for extended Medicaid should be responsible for providing any remaining months of extended Medicaid, particularly where the individual was enrolled in a managed care organization. The other commenter suggested that the new State should be automatically responsible for paying for the remaining months of the extended period.

Response: In the preamble to the notice of proposed rulemaking, HCFA took the position that "[c]ontinued Medicaid under this provision ends for any individual who moves to another State." The preamble further provided, however, that eligibility could be reinstated if the individual returns to the State and the individual would be entitled to any remaining months of extended benefits. We believe that it is reasonable to allow States to terminate families who become residents of other States during the extended Medicaid period.

Nothing in section 406(h) explicitly requires a State to continue extended

benefits for an individual who has moved to another State. In addition, our interpretation of this provision conforms with the longstanding policy that States are only required to provide Medicaid to their own residents. The Medicaid statute establishes a framework of cooperative federalism in which each state develops a plan for providing medical assistance for its residents. The statute establishes a general framework for the State's Medicaid program; however, States have some flexibility to tailor the program to meet the particular needs of their residents. As a result, each State plan is different.

From the outset of the Medicaid program, State residency has been an important aspect of Medicaid eligibility. Section 1902(b)(2), 42 U.S.C. section 1396a(b)(2), prohibits the Secretary from approving a plan which imposes any residency requirement which excludes individuals who reside in the State, regardless of whether or not the residence is maintained permanently or at a fixed address. On the other hand, there has never been any general statutory requirement that a State cover individuals who are not its residents or continue to cover those who are no longer its residents. Indeed, section 1902(b)(2) implicitly recognizes that States may limit Medicaid coverage to their own residents.

Moreover, the statute requires the State plan to include provisions for furnishing medical assistance under the plan "to individuals who are residents of the State but are absent therefrom" (section 1902(a)(16); 42 U.S.C. section 1396a(a)(16)). This provision recognizes a State's continued responsibility for its Medicaid eligible residents during temporary periods of absence in another jurisdiction, but only as long as they remain residents. In light of these rules, we have for many years taken the position that the Secretary is permitted to approve a plan which limits eligibility to all State residents and consequently denies medical assistance to individuals who do not reside in the State. It is our understanding that most States expressly require individuals to be residents of the State in order to receive medical assistance under the State plan, although they could choose to cover non-residents.

The right to continued receipt of Medicaid normally ends when an individual establishes residency in a new State. If an individual seeks medical assistance in the new State, eligibility is determined based on the State plan of the new State. If Congress had intended in section 406(h) a major departure from this traditional role of

States under the Medicaid statute, we believe this would have been clear from either the statute or legislative history. Our review of the statute and the legislative history for section 406(h) does not reflect that Congress intended this result.

We also do not believe that section 406(h) requires an individual's new State of residence to provide continued Medicaid coverage. This provision simply deems an individual to be an AFDC recipient for Medicaid purposes for an additional four calendar months; that is, as an add-on to the period of coverage the individual has already received under the State plan of his or her original State. HCFA does not regard section 406(h) as creating a portable status that entitles the individual to different Medicaid coverage in a different State.

The fact that an individual is an AFDC recipient in State A does not get that individual Medicaid benefits in State B. Similarly, the fact that an individual is deemed to be an AFDC recipient in State A would not necessarily get that individual Medicaid benefits in State B (unless State B chooses to cover the individual or has an interstate agreement which does so). If the individual is deemed to be an AFDC recipient for Medicaid purposes for an additional four months, the individual should therefore receive extended Medicaid only in the State in which he or she lost AFDC status and was granted the four months of extended coverage.

One commenter also raised the question of whether our policy has constitutional implications because the commenter believes that it violates an individual's right to interstate travel. The commenter points out that other residents in the new State would be eligible for extended benefits while the newly arrived individuals with exactly the same circumstances would not be eligible. We believe that the commenter is incorrect in assuming that the individual who has moved is equally situated with other residents of the new State who are receiving the additional four months of Medicaid. The individual's former State may well have had a higher AFDC eligibility standard than the new State, which enabled the individual to get Medicaid in the old State before he or she lost AFDC because of a support payment. In the new State, the individual may never have been eligible for AFDC even without the increased collection.

We do not believe the residency requirement for extended Medicaid has any significant effect on managed care. Ordinarily, an HMO will lose an

enrollee when he or she has moved to another State, because HMOs have defined service areas and provider networks. In most cases, when a recipient enrolled in an HMO moves to another State, he or she would no longer be in the service area of the HMO. As such, the recipient would no longer be qualified to remain in the HMO, regardless of the residency requirement. In addition, the effect of the residency requirement on recipients of extended Medicaid is no different from the effect of the residency requirement on any Medicaid eligible HMO recipient who moves from the State.

Regulatory Procedures

Executive Impact Analysis

These regulations have been reviewed pursuant to Executive Order 12866 to ensure their consistency with the priorities and principles set forth in that Executive Order. An assessment of the costs and benefits of available regulatory alternatives (including not regulating) demonstrated that the approach taken in the regulation is the most cost-effective and least burdensome while achieving the regulatory objectives.

Paperwork Reduction Act

There will be no reporting or record keeping requirements imposed on the public or States which would require clearance by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. 96-354) requires the Federal government to anticipate and reduce the impact of regulations and paperwork requirements on small businesses. The primary impact of these final rules is on State governments and individuals. Therefore, we certify that these rules will not have a significant economic impact on a substantial number of small entities because they affect benefits to individuals and payments to States. Thus, a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act (RFA), is not required.

Section 1102(b) of the Social Security Act requires the Secretary to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital which is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

We are not preparing a rural impact statement since we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on the operations of a substantial number of small rural hospitals.

List of Subjects

42 CFR Part 435

Aid to Families with Dependent Children, Grant programs—health, Medicaid, reporting and record keeping, Supplemental Security Income (SSI), Wages.

42 CFR Part 436

Aid to Families with Dependent Children, Grant programs—health, Guam, Medicaid, Puerto Rico, Supplemental Security Income (SSI), Virgin Islands.

45 CFR Part 233

Aliens, Grant programs—social programs, Public assistance programs, Reporting and record keeping requirements.

(Catalog of Federal Domestic Assistance Program No. 13.714, Medical Assistance Program; 13.780, Assistance Payments Maintenance Assistance.)

Dated: April 4, 1994.

Mary Jo Bane,

Assistant Secretary for Children and Families.

Dated: April 24, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Approved: November 4, 1994.

Donna E. Shalala,

Secretary of Health and Human Services.

For the reasons set forth in the preamble, parts 435 and 436 of chapter IV, title 42 and part 233 of chapter II, title 45, Code of Federal Regulations, are amended as set forth below:

Health Care Financing Administration

42 CFR Chapter IV

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

1. The authority citation for Part 435 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 435.115 is amended by adding new paragraphs (f), (g), and (h) to read as follows:

§ 435.115 Individuals deemed to be receiving AFDC.

* * * * *

(f) The State must deem an individual to be receiving AFDC if a new collection or increased collection of child or spousal support under title IV-D of the Social Security Act results in the termination of AFDC eligibility in accordance with section 406(h) of the Social Security Act. States must continue to provide Medicaid for four consecutive calendar months, beginning with the first month of AFDC ineligibility, to each dependent child and each relative with whom such a child is living (including the eligible spouse of such relative as described in section 406(b) of the Social Security Act) who:

(1) Becomes ineligible for AFDC on or after August 16, 1984; and

(2) Has received AFDC for at least three of the six months immediately preceding the month in which the individual becomes ineligible for AFDC; and

(3) Becomes ineligible for AFDC wholly or partly as a result of the initiation of or an increase in the amount of the child or spousal support collection under title IV-D.

(g)(1) Except as provided in paragraph (g)(2) of this section, individuals who are eligible for extended Medicaid lose this coverage if they move to another State during the 4-month period. However, if they move back to and reestablish residence in the State in which they have extended coverage, they are eligible for any of the months remaining in the 4-month period in which they are residents of the State.

(2) If a State has chosen in its State plan to provide Medicaid to non-residents, the State may continue to provide the 4-month extended benefits to individuals who have moved to another State.

(h) For purposes of paragraph (f) of this section:

(1) The new collection or increased collection of child or spousal support results in the termination of AFDC eligibility when it actively causes or contributes to the termination. This occurs when:

(i) The change in support collection in and of itself is sufficient to cause ineligibility. This rule applies even if the support collection must be added to other, stable income. It also applies even if other independent factors, alone or in combination with each other, might simultaneously cause ineligibility; or

(ii) The change in support contributes to ineligibility but does not by itself cause ineligibility. Ineligibility must result when the change in support is combined with other changes in income or changes in other circumstances and the other changes in income or

circumstances cannot alone or in combination result in termination without the change in support.

(2) In cases of increases in the amounts of both support collections and earned income, eligibility under this section does not preclude eligibility under 45 CFR 233.20(a)(14) or section 1925 of the Social Security Act (which was added by section 303(a) of the Family Support Act of 1988 (42 U.S.C. 1396r-6)). Extended periods resulting from both an increase in the amount of the support collection and from an increase in earned income must run concurrently.

PART 436—ELIGIBILITY IN GUAM, PUERTO RICO, AND THE VIRGIN ISLANDS

1. The authority citation for Part 436 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 436.114 is amended by adding new paragraphs (f), (g), and (h) to read as follows:

§ 436.114 Individuals deemed to be receiving AFDC.

(f) The State must deem an individual to be receiving AFDC if a new collection or increased collection of child or spousal support under title IV-D of the Social Security Act results in the termination of AFDC eligibility in accordance with section 406(h) of the Social Security Act. States must continue to provide Medicaid for four consecutive calendar months, beginning with the first month of AFDC ineligibility, to each dependent child and each relative with whom such a child is living (including the eligible spouse of such relative as described in section 406(b) of the Social Security Act) who:

(1) Becomes ineligible for AFDC on or after August 16, 1984; and

(2) Has received AFDC for at least three of the six months immediately preceding the month in which the individual becomes ineligible for AFDC; and

(3) Becomes ineligible for AFDC wholly or partly as a result of the initiation of or an increase in the amount of a child or spousal support collection under title IV-D.

(g)(1) Except as provided in paragraph (g)(2) of this section, individuals who are eligible for extended Medicaid lose this coverage if they move to another State during the 4-month period. However, if they move back to and reestablish residence in the State in which they have extended coverage,

they are eligible for any of the months remaining in the 4-month period in which they are residents of the State.

(2) If a State has chosen in its State plan to provide Medicaid to non-residents, the State may continue to provide the 4-month extended benefits to individuals who have moved to another State.

(h) For purposes of paragraph (f) of this section:

(1) The new collection or increased collection of child or spousal support results in the termination of AFDC eligibility when it actively causes or contributes to the termination. This occurs when:

(i) The change in support collection in and of itself is sufficient to cause ineligibility. This rule applies even if the support collection must be added to other, stable income. It also applies even if other independent factors, alone or in combination with each other, might simultaneously cause ineligibility; or

(ii) The change in support contributes to ineligibility but does not by itself cause ineligibility. Ineligibility must result when the change in support is combined with other changes in income or changes in other circumstances and the other changes in income or circumstances cannot alone or in combination result in termination without the change in support.

(2) In cases of increases in the amounts of both the support collections and earned income, eligibility under this section does not preclude eligibility under 45 CFR 233.20(a)(14) or section 1925 of the Social Security Act (which was added by section 303(a) of the Family Support Act of 1988 (42 U.S.C. 1396r-6)). Extended periods resulting from both an increase in the amount of the support collection and from an increase in earned income must run concurrently.

Administration for Children and Families

45 CFR Chapter II

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

1. The authority citation for Part 233 continues to read as follows:

Authority: 42 U.S.C. 301, 602, 606, 606 note, 607, 1202, 1302, 1352 and 1382 note; sec. 6 of Pub. L. 94-114, 89 Stat. 579; Part XXIII of Pub. L. 97-35, 95 Stat. 843; Pub. L. 97-248, 96 Stat. 324; Pub. L. 99-603, 100 Stat. 3359; and sec. 1883 of Pub. L. 99-514, 100 Stat. 2916.

2. Section 233.20 is amended by adding a new paragraph (a)(15) to read as follows:

§ 233.20 Need and amount of assistance.

(a) * * *

(15) For Medicaid eligibility only, pursuant to section 406(h) of the Act:

(i) Each dependent child and each relative with whom such a child is living (including the eligible spouse of such relative pursuant to section 237.50(b) of this chapter) who becomes ineligible for AFDC wholly or partly because of the initiation of or an increase in the amount of a child or spousal support collection under title IV-D will be deemed to be receiving AFDC, but only for purposes of this paragraph (a)(15), for a period of four consecutive calendar months beginning with the first month of AFDC ineligibility. To be eligible for extended Medicaid coverage pursuant to this paragraph (a)(15), each dependent child and relative must meet the following conditions:

(A) The individual must have become ineligible for AFDC on or after August 16, 1984; and

(B) The individual must have received AFDC in at least three of the six months immediately preceding the month in which the individual becomes ineligible for AFDC; and

(C) The individual must have become ineligible for AFDC wholly or partly as a result of the initiation of or an increase in the amount of a child or spousal support collection under title IV-D.

(ii)(A) Except as provided in paragraph (a)(15)(ii)(B) of this section, individuals who are eligible for extended Medicaid lose this coverage if they move to another State during the 4-month period. However, if they move back to and reestablish residence in the State in which they have extended coverage, they are eligible for any of the months remaining in the 4-month period in which they are residents of the State.

(B) If a State has chosen in its State plan to provide Medicaid to non-residents, the State may continue to provide the 4-month extended benefits to individuals who have moved to another State.

(iii) For purposes of paragraph (i) of this section:

(A) The new collection or increased collection of child or spousal support results in the termination of AFDC eligibility when it actively causes or contributes to the termination. This occurs when:

(1) the change in support collection in and of itself is sufficient to cause ineligibility. This rule applies even if the support collection must be added to other, stable income. It also applies even if other independent factors, alone or in

combination with each other, might simultaneously cause ineligibility; or

(2) The change in support contributes to ineligibility but does not by itself cause ineligibility. Ineligibility must result when the change in support is combined with other changes in income or changes in other circumstances and the other changes in income or circumstances cannot alone or in combination result in termination without the change in support.

(B) In cases of increases in the amounts of both the support collections and earned income, eligibility under this section does not preclude eligibility under paragraph (a)(14) of this section or section 1925 of the Social Security Act (which was added by section 303(a) of the Family Support Act of 1988 (42 U.S.C. 139r-6)). Extended periods result from both an increase in the amount of the support collection and from an increase in earned income must run concurrently.

* * *

[FR Doc. 94-28317 Filed 11-16-94; 8:45 am]
BILLING CODE 4184-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**48 CFR Part 1871****Modification of Test of MidRange Procurement Procedures**

AGENCY: Office of Procurement, NASA.
ACTION: Temporary rule.

SUMMARY: The Office of Federal Procurement Policy approved a test of NASA's MidRange Procurement Procedures in 1993. This modification of the procedures is a result of OFPP's approval to expand the test to all NASA centers and addresses other editorial and substantive changes.

EFFECTIVE DATES: This regulation is effective November 17, 1994, and expires June 30, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. T. Deback, (202) 358-0431.

SUPPLEMENTARY INFORMATION: The MidRange Procurement Procedures were published in 58 FR 54300, October 21, 1993.

Comments on the test procedure had been requested in 57 FR 57845, December 7, 1992. The following substantive changes are being made to the MidRange Procurement Procedures: (1) Authority to utilize these procedures at all NASA centers is provided, (2) construction and A&E contracts may now be done under MidRange, (3) the Best Value Selection procedures have

been simplified to limit the value characteristics, and (4) the Electronic Bulletin Board aspects of MidRange have been clarified since we will be using Internet in lieu of a separate bulletin board. The use of the Electronic Bulletin Board was approved as part of the Federal Acquisition Streamlining Act. NASA is in the process of developing the Bulletin Board and will provide industry notice of its use through the Commerce Business Daily. NASA will continue publishing synopses in the Commerce Business Daily until that notice is provided.

List of Subjects in 48 CFR Part 1871**Government Procurement.**

Thomas S. Luedtke,
Deputy Associate Administrator for Procurement.

Accordingly, under the authority of 42 U.S.C. 2473(c)(1), 48 CFR ch. 18 is amended by revising part 1871 to read as follows:

PART 1871—MIDRANGE PROCUREMENT PROCEDURES**1871.000 Scope of part.****Subpart 1871.1—General**

- 1871.101 Purpose.
- 1871.102 Authority.
- 1871.103 Applicability.
- 1871.104 Definitions.
- 1871.105 Policy.

Subpart 1871.2—Planning and Requirements Process

- 1871.201 Use of buying team.
- 1871.202 Organizational responsibilities.
- 1871.202-1 Requiring organization.
- 1871.202-2 Procurement organization.
- 1871.202-3 Supporting organizations.
- 1871.202-4 Center management.
- 1871.203 Buying team responsibilities.
- 1871.204 Small business set-asides.

Subpart 1871.3—Publicizing of Solicitation

- 1871.301 Publicizing policy.
- 1871.302 Publicizing procedure.

Subpart 1871.4—Request for Offer (RFO)

- 1871.401 Types of RFO's.
- 1871.401-1 Sealed offers.
- 1871.401-2 Two-step competitive procurement.
- 1871.401-3 Competitive negotiated procurement not using qualitative criteria.
- 1871.401-4 Competitive negotiation using qualitative criteria.
- 1871.401-5 Noncompetitive negotiations.
- 1871.402 Preparation of the RFO.
- 1871.403 Offer preparation period and limitations.
- 1871.404 Protection of offers.
- 1871.405 Model contract.
- 1871.406 RFO by electronic bulletin board.
- 1871.406-1 Methods of disseminating information.
- 1871.406-2 Special situations.
- 1871.406-3 Publicizing and response time.

1871.406-4 Method of soliciting offers.

Subpart 1871.5—Award

1871.501 Representations and certifications.

1871.502 Determination of responsible contractor.

1871.503 Negotiation documentation.

1871.504 Award documents.

1871.505 Notifications to unsuccessful offerors.

1871.506 Publication of award.

1871.507 Debriefing of unsuccessful offerors.

Subpart 1871.6—"Best Value Selection"

1871.601 General.

1871.602 Specifications for MidRange procurements.

1871.603 Establishment of evaluation criteria.

1871.604 Evaluation phases.

1871.604-1 Initial Evaluation.

1871.604-2 Determination of "Finalists".

1871.604-3 Discussions with "Finalists".

1871.604-4 Selection of "Best Value" Offer.

1871.605 Negotiation methods and procedures.

1871.606 Debriefings.

Authority: 42 U.S.C. 2473(c)(1).

PART 1871—MIDRANGE PROCUREMENT PROCEDURES

1871.000 Scope of part.

This part prescribes policies and procedures for the acquisition of supplies and services from commercial sources as a pilot test procurement program.

Subpart 1871.1—General

1871.101 Purpose.

The purpose of this part is to establish policies and procedures that implement the MidRange procurement process. This will be a pilot test program at the National Aeronautics and Space Administration (NASA).

1871.102 Authority.

The Office of Federal Procurement Policy has provided authority for NASA to conduct a pilot test of a new procurement process within the scope of this part.

1871.103 Applicability.

(a) This part applies to all acquisitions, as described in 1871.103(b), conducted at NASA installations.

(b) This part applies to all contract actions, the aggregate amount of which is greater than the small purchase limitation ((FAR) 48 CFR Part 13) and not more than \$500,000 in basic value. For service contracts (exclusive of R&D and construction for which options are not permitted), up to four annual options of not more than \$500,000 each are permitted where the option

requirements are substantially the same as the basic requirement. For supply contracts, four options of not more than \$500,000 each are permitted when not more than \$500,000 in funding is to be required in any fiscal year. The total amount of the basic award plus options may not exceed \$2,500,000 in either the case of supplies or services except as provided in paragraph (c) of this section.

(c) When the Government estimate for the basic award amount or any option amount, if any, exceeds the limits of 1871.103(b), the procurement will be processed under FAR and NFS procurement procedures applicable to large procurements (see (FAR) 48 CFR Parts 14 and 15). When the estimate is within the range of 1871.103(b) and the procurement was started using these procedures but the offered prices/costs exceed the MidRange ceiling, the procurement may continue under MidRange procedures, provided that:

(1) The price/cost can be determined to be fair and reasonable,

(2) The successful offeror accepts incorporation of required FAR and NFS clauses applicable to large procurements, and

(3) The procurement does not exceed \$750,000 for the basic requirement (and each option, if any) or \$3,750,000 for the total requirement.

1871.104 Definitions.

The following terms are used throughout part 1871 as defined in this subpart.

(a) *NASA Acquisition Bulletin Board* or *NABB* means an electronic bulletin board; i.e., a computer system through which users may access documents available in electronic format.

(b) *MidRange procurement procedure* means a set of procedures within the authority of 1871.102 and the applicability of 1871.103.

(c) *Pilot test* means a test of MidRange procurement procedures conducted within the authority of 1871.102 and applicability of 1871.103.

(d) *Request for Offer (RFO)* means the solicitation used to request offers for all authorized MidRange procurements.

(e) *Clarification and Discussion* are used as defined in (FAR) 48 CFR 15.601.

(f) *Negotiation* is used as defined in (FAR) 48 CFR 15.101 and includes bargaining as described in (FAR) 48 CFR 15.102.

1871.105 Policy.

(a) The procedures in this part shall be used for all procurements within the scope of part 1871 at NASA installations.

(b) Under MidRange procedures, cost or pricing data and certification thereof

shall be in accordance with (FAR) 48 CFR 15.804.

(c) Procurements conducted under part 1871, unless otherwise properly restricted under the provisions of (FAR) 48 CFR part 6, are considered to be full and open competition after exclusion of sources in accordance with (FAR) 48 CFR 6.203. Set-asides for small business and labor surplus area concerns, or full and open competition in accordance with (FAR) 48 CFR part 6, subpart 6.1.

(d) Options may be included in the acquisition provided they conform to 1871.103(b) or do not exceed \$500,000 for the total requirement, options included.

(e) The appropriate part 1871 post-selection processes (negotiation, award, and publication of award) may be used to the extent applicable for Small Business Innovation Research (SBIR), broad agency announcements, unsolicited proposals, and Small Business Administration 8(a) procurement actions within the applicability of 1871.103(b). Notwithstanding the threshold requirements set forth in 1871.103(b), SBIR Phase II contracts may be awarded in amounts not exceeding \$750,000.

(f) The NABB will be used to the maximum extent practicable to disseminate advance procurement information and conduct part 1871 procurements.

(g) Use of locally generated forms is encouraged where their use will contribute to the efficiency and economy of the process. NASA Forms 1667, Request for Offer, and 1668, Contract, or computer generated versions of these forms shall be used as the solicitation and contract cover sheets, respectively. Contractor generated forms or formats for solicitation response should be allowed whenever possible. There is no requirement for uniform formats (see (FAR) 48 CFR 15.406).

Subpart 1871.2—Planning and Requirements Process

1871.201 Use of buying team.

MidRange procedures are based on the use of a buying team to conduct the procurement. The concept is to designate individuals who are competent in their respective functional areas, provide those individuals with the basic authority to conduct the procurement and hold them accountable for the results. The buying team will normally consist of one technical member and one procurement member, but may be augmented with additional members as necessary. Personnel providing normal functional assistance

to the team (e.g., legal, financial) will not be considered a part of the team unless so designated. To function properly, the team should be given the maximum decision authority in matters related to the procurement. When higher level management approvals remain essential, it will be incumbent upon the functional team member to obtain such approvals. The team may accept, as final, the decision of the responsible buying team member.

1871.202 Organizational responsibilities.

1871.202-1 Requiring organization.

The requirements organization shall appoint, by name, the technical member of the buying team. This individual will normally be an end user or the one most familiar with the technical aspects of the requirement. The individual appointed, whatever the relationship with the procured item, is expected to totally fulfill the responsibilities to the buying team. If the requiring organization elects not to appoint a technical member to the buying team, standard interfaces and authorities applicable to large procurements will be used. The procedures in this part will be used to the extent practical; however, priority will be afforded to procurements fully using buying teams.

1871.202-2 Procurement organization.

The procurement organization shall appoint the procurement member of the buying team. This individual shall be a warranted contracting officer or a contract specialist with broad latitude to act for the contracting officer. The procurement member shall be the team leader with the ultimate responsibility to conduct the procurement.

1871.202-3 Supporting organizations.

Buying team members may require additional team members to perform specialized functions or to assist in the evaluation of offers. Requests for supporting members shall be made by the organization identifying the need for the support and directed to the appropriate management level in the supporting organization. Supporting team members, once designated for the team, shall fulfill all applicable responsibilities to the team as other members.

1871.202-4 Center management.

Center managers shall, to the maximum extent practical and consistent with their responsibilities to manage the Center mission, convey sufficient authority to members of the buying team to conduct the procurement. Administrative or technical approvals should be

minimized, and where deemed essential, facilitated to the maximum extent practicable. Center managers should lend their full support to the buying team should problems arise from the procurement.

1871.203 Buying team responsibilities.

(a) The buying team shall conduct the procurement in a manner that best satisfies the user requirements and meets the norms expected of a Government procurement. Team members should develop open communications, rely on decisions of other responsible functional team members and meet their obligations to the team. The team will typically—

- (1) Refine the final specifications for the solicitation;
- (2) Decide the most appropriate solicitation method;
- (3) Establish milestones for the procurement;
- (4) Finalize the evaluation criteria;
- (5) Develop the RFO and model contract; and
- (6) Evaluate offers and determine the awardee.

(b) The procurement member of the buying team shall lead clarifications, discussions, and negotiations; shall be the source selection official; and shall conduct debriefings.

1871.204 Small business set-asides.

(a) Except as provided in paragraphs (b) through (e) of this section, each MidRange acquisition of supplies and services shall be reserved exclusively for small business concerns.

(b) The requirement for small business MidRange set-asides does not relieve the buying office of its responsibility to procure from required sources of supply, such as Federal Prison Industries, Industries for the Blind and Other Severely Handicapped, and mandatory multiple award Federal Supply Schedule contracts.

(c) Procurement not conducted as small business set-asides and under less than full and open competition require a Justification for Other than Full and Open Competition pursuant to (FAR) 48 CFR part 6.

(d) If the buying team procurement member determines there is no reasonable expectation of obtaining offers from two or more responsible small business concerns that will be competitive in terms of market price, quality, and delivery, the buying team need not proceed with the small business set-aside and may purchase on an unrestricted basis utilizing MidRange procedures. The buying team procurement member shall document the contract file with the reason for the unrestricted procurement.

(e) If the buying team proceeds with the small business MidRange set-aside and receives an offer from only one responsible small business concern at a reasonable price, the contracting officer will normally make an award to that concern. However, if the buying team does not receive a reasonable offer from a responsible small business concern, the buying team procurement member may cancel the small business set-aside and complete the procurement on an unrestricted basis utilizing MidRange procedures. The buying team procurement members shall document in the file the reason for the unrestricted purchase.

(f) Each model contract under a small business MidRange set-aside shall contain the clause at (FAR) 48 CFR 52.219-6, Notice of Total Small Business Set-Aside.

Subpart 1871.3—Publicizing of Solicitation

1871.301 Publicizing policy.

Use of the MidRange procedure is intended to streamline and expedite the acquisition process. Presolicitation publication requirements are streamlined; however, it is in the Government's interest to provide as much advance notice as possible of a pending acquisition in order for the Government to obtain maximum competition. As soon as practicable after a requirement has been finalized and before the RFO is ready for release, a presolicitation notice of the procurement action shall be published on the NABB.

1871.302 Publicizing procedure.

(a) Synopses are not to be sent or published in the Commerce Business Daily.

(b) A separate pre-solicitation notice for each requirement shall be published on the NABB. The pre-solicitation notice shall be published prior to the actual release of the solicitation.

(c) The presolicitation notice will comply with the requirements set forth in (FAR) 48 CFR 5.207(b).

(1) Include a statement that the solicitation will be released via the NABB, that potential offerors will be responsible for downloading their own copy of the solicitation, and that hard copies of the solicitation shall be made available on request, but the closing date will be the same as that required for the NABB released solicitation; and

(2) State the projected solicitation release date, provide notice that it is the offeror's responsibility to monitor the NABB for solicitation release as the solicitation will be released as soon as

permissible whether prior or subsequent to the projected date, and identify the name, telephone number, and e-mail address of a point of contact. The presolicitation notice shall be updated to reflect significant changes to the original notice.

Subpart 1871.4—Request for Offer (RFO)

In MidRange procedures, solicitation of sources shall be accomplished by use of an RFO. The RFO will be solely a solicitation document incorporating only those elements of information required to solicit the offer. Offers will be provided on a model contract furnished with the RFO.

1871.401 Types of RFO'S.

The RFO may be used for all types of procurements to which MidRange is applicable. The distinguishing difference will be the evaluation and award criteria specified in the RFO. This, in turn, will be driven by the buying team's decisions on the extent of discussion required, the amount of non-price factors that will influence the award and the amount of competition available. If the conditions in (FAR) 48 CFR 6.401(a) are met, the RFO's described in 1871.401-1 and 1871.401-2 shall be used; otherwise, RFO's described in 1871.401-3, 1871.401-4, or 1871.401-5 may be used. Once the evaluation and award criteria have been specified in the RFO, the procurement must conform to the procedures applicable to these criteria, unless changed by formal amendment to the RFO.

1871.401-1 Sealed Offers.

(a) *Policy.* RFO's may specify that award will be made to the low, responsive, responsible offeror providing the most advantageous offer considering only price and price-related factors. This method shall be used when (1) time permits the solicitation, submission, and evaluation of sealed offers; (2) award will be made on the basis of price and other price-related factors; (3) conducting discussions with the offerors is not necessary; and (4) a reasonable expectation of receiving more than one offer exists. The RFO shall be in compliance with the requirements of (FAR) 48 CFR part 14 relating to Sealed Bidding.

(b) *Procedures.* (1) The RFO shall request offerors to provide both a technical and price offer by the closing date specified.

(2) In accordance with (FAR) 48 CFR Part 14, offers (whether received by facsimile or sealed envelope delivery) shall be publicly opened at the

designated time and place. Interested members of the public will be permitted to attend the opening. Offers shall be abstracted pursuant to (FAR) 48 CFR part 14 and be available for public inspection. For unclassified acquisitions, a summary abstract, containing offerors, prices and any essential information specific to that procurement shall be posted on the NABB. The abstract shall be included in the contract file.

(3) All offers shall be examined for mistakes in accordance with (FAR) 48 CFR 14.406. The buying team shall determine that a prospective contractor is responsible and that the prices offered are reasonable (see (FAR) 48 CFR 14.407-2).

(4) The Government will award a contract to the low, responsive, responsible offeror, whose offer conforms to the RFO and will be most advantageous to the Government, considering only price and the price-related factors included in the solicitation

1871.401-2 Two-Step competitive procurement.

(a) *Policy.* (1) RFO's may specify that evaluation and award may be conducted in two distinct steps, similar in concept to "Two Step Sealed Bidding." The MidRange Two Step process should be used when it is desirable to award to the lowest, responsive, responsible offeror after determining that the initial technical offer, or the revised technical offer, is acceptable.

(2) The procedures of (FAR) 48 CFR 14.503-2(a) shall be used once Step two of this process begins.

(b) *Procedures.* (1) The RFO shall request offerors to provide both a technical and a price offer by the closing date specified. Price offers are requested to ensure that they are accomplished in a timely manner and to reduce the time required for Step Two.

(2) *Step One.* The technical offer will be evaluated to determine if the product or service offered is acceptable. The buying team may proceed directly to Step Two if there are sufficient acceptable offers to ensure adequate price competition, and if further time, effort and delay to make additional offers acceptable and thereby increase competition would not be in the Government's interest. If this is not the case, the buying team procurement member shall enter into discussions and request offeror(s) whose offer(s) is susceptible to being made acceptable to submit additional clarifying or supplementing information to make it acceptable (see (FAR) 48 CFR 14.503-1). It is expected that these discussions will

be conducted on an informal basis. After completion of discussions, the buying team shall proceed to Step Two.

(3) *Step Two.* The buying team shall afford all offerors who have submitted acceptable offers and those offers with whom discussions were conducted, an opportunity, by a common date, to revise their price offers. No changes to technical offers will be permitted during this process. A reasonable amount of time (normally less than 5 working days) will be afforded for the revision. The amount of time given shall be the same for each offeror. The procedures at 1871.401-1(b)(2) and (3) shall then be followed.

(4) The Government will award a contract to the low, responsive, responsible offeror, whose offer conforms to the RFO and will be most advantageous to the Government, considering only price and the price-related factors included in the solicitation.

1871.401-3 Competitive negotiated procurement not using qualitative criteria.

(a) *Policy.* (1) RFO's may provide for discussion of all aspects of the offer but award is based on the lowest priced (or most probable cost) technically acceptable offer. This method should be used when qualitative factors are not material in the award decision, but it is important to assure that technical offers and contract terms are fully compliant with the Government's needs. This method also permits direct discussion of price with offerors and is particularly appropriate when different approaches can be offered to satisfy the Government's need.

(2) The RFO should reserve the right to award without discussion based on the initial offers submitted. (FAR) 48 CFR 52.215-16, Alternate III will be included in all RFO's for competitive negotiated procurements not using qualitative criteria.

(b) *Procedures.* (1) The RFO shall request offerors to provide both a technical and a price offer by the closing date specified.

(2) *Initial evaluation.* The offer shall be reviewed to determine if all required information has been provided. No further evaluation shall be made of any offer that is deemed unacceptable because it does not meet the technical requirements of the RFO and is not reasonably susceptible to being made so. Offerors may be contacted for clarification purposes only during the initial evaluation. Offerors determined not to be acceptable shall be notified of their rejection and the reasons therefor and excluded from further consideration. Documentation for such

rejection should consist of one or more succinct statements of fact that show the offer is not acceptable. No documentation is required if all offers are deemed to be acceptable or reasonably susceptible to being made so.

(3) *Determination of finalists.* From among the acceptable offers and those susceptible to being made acceptable, the buying team shall rank the offers based on price (or most probable cost) and exclude any whose price/most probable cost precludes any reasonable chance of being selected for final award. The remaining offers constitute the "finalists" for the contract. Only in exceptional cases will this number be less than two offers. The procurement buying team member shall succinctly record the basis for the decision.

(4) *Discussions.* Discussions may be used if it is necessary to request the offeror to submit additional clarifying or supplementing information to make an offer acceptable. The procurement buying team member shall lead discussions with each finalist. The discussions are intended to assist the buying team in fully understanding each finalist's offer and to assure that all finalists are competing equally on the basis intended. Care must be exercised to ensure these discussions adhere, to the extent applicable, to the guidelines set forth in 1815.613-71(b)(5) for the applicable contract type. Technical transference, technical leveling, and auction techniques are prohibited. It is expected that discussions will be conducted on an informal basis with each finalist. After completion of discussions, each finalist shall be afforded an opportunity to revise its offer to support and clarify its offer. A reasonable amount of time (normally less than 5 working days) will be afforded for the revision. The amount of time given shall be the same for each finalist. Such discussions are not required if there are sufficient acceptable offers to ensure adequate price competition, and if further time, effort and delay to make additional proposals acceptable and thereby increase competition, would not be in the Government's interest.

(5) The buying team may choose to conduct parallel negotiations with all acceptable offerors without a determination of finalists. This could particularly apply when few offers were received.

(6) *Selection.* The procurement team member shall be the source selection official. The source selection official may elect to make selection in lieu of determining finalists provided that it can be demonstrated that (i) selection of an initial offer(s) will result in the

lowest price/cost to the Government and (ii) discussions with other acceptable offerors are not anticipated to change the outcome of the initial evaluation relative to evaluated price/cost. It is expected that the source selection statement will not ordinarily exceed one page and that the basis for the decision will be apparent upon review of the informal worksheets used in the evaluation process. These informal worksheets shall be included in the contract file.

(7) The names of offerors determined to be finalists, selected for parallel negotiations, or selected for negotiations and/or final contract award will be electronically transmitted to the offerors. This will serve as notification to those offers that were not selected for further evaluation (see 1871.505).

(8) *Negotiation methods and procedures.* The buying team may choose to conduct parallel negotiations of complete contracts with those offerors determined to be finalists or with all acceptable offerors, including offers susceptible to being made acceptable. The buying team may discuss any aspect of the offer during parallel negotiations. The objective of the negotiations should be to achieve revisions to the offer, consistent with the RFO, that are more favorable to the Government. Technical transference, technical leveling, and auction techniques are prohibited. Upon conclusion of negotiations with each offeror, the offeror shall be asked to submit a revised offer (in full or amended) reflecting the results of negotiations, and including the offeror's signature on the negotiated contract. A reasonable amount of time (normally less than 5 working days) will be afforded for the revision. Award will be made to the lowest priced (or most probable cost), technically acceptable offer.

1871.401-4 Competitive negotiations using qualitative criteria.

(a) *Policy.* (1) MidRange procurements shall normally use the BVS source selection method, prescribed in 48 CFR part 1871, subpart 1871.6 when it is desirable to base evaluation and award on a combination of price and non-price qualitative criteria.

(2) The RFO should reserve the right to award without discussion based on the initial offers submitted. (FAR) 48 CFR 52.215-16, Alternate III will be included in all RFO's for competitive negotiated procurements using qualitative criteria.

(3) In exceptionally complex procurements where it is desirable to use a highly structured approach and

multiple evaluators, a source selection method following the principles specified in NASA Source Evaluation Board Handbook, 48 CFR 1870.303, Appendix I, may be more appropriate than BVS. This may be appropriate in cases in which the following factors cannot be accommodated within the MidRange/BVS selection methodology:

(i) The ability to predefine the value characteristics that will constitute the discriminators among the offers;

(ii) The complexity of the interrelationships that must be evaluated;

(iii) The number of evaluators required to address the disciplines that will be involved in the offers; or

(iv) The impact that the procurement may have on higher level mission management (level of selection official) or future procurements.

(4) A source selection process combining the mid-range and the NASA Source Evaluation Board Handbook (48 CFR 1870.303, Appendix I) approaches shall not be used.

(b) *Procedures.* (1) The buying team will determine which of the source selection methodologies is most appropriate to the specific procurement.

(2) The team shall record its rationale for selecting the SEB methodology rather than BVS. Once this decision is made, the team shall no longer function as a MidRange buying team, but shall follow the instructions prescribed in the local procedures for the source selection method.

1871.401-5 Noncompetitive negotiations.

(a) *Policy.* (1) The RFO may be used as the solicitation method for noncompetitive procurements.

(2) MidRange procedures may be used in noncompetitive acquisitions to the extent they are applicable.

(b) *Procedures.* (1) Posting a presolicitation notice on the NABB meets the requirement of (FAR) 48 CFR 5.201 and complies with the notice required by the Competition in Contracting Act. A presolicitation notice is not required if one of the exceptions of (FAR) 48 CFR 5.202 is met.

(2) The buying team shall require submission of certified cost and pricing data in accordance with (FAR) 48 CFR 15.804-2.

(3) The technical member of the buying team shall provide technical assistance to the procurement member during evaluation and negotiation of the contractor's offer.

1871.402 Preparation of the RFO.

(a) The RFO shall provide all standard information required for the offeror to submit an offer.

(b) The RFO shall contain space for all necessary additional instructions to offerors. As a minimum, the RFO shall contain the following:

(1) Incorporation by reference of all required standard provisions.

(2) A provision notifying offerors that standard Representations and Certifications will be required from the successful offeror, or from all offerors selected for parallel negotiations, prior to award of the contract.

(3) Evaluation and award criteria.

(4) A provision requiring offerors to submit offers on an attached model contract.

(c) Requirements for the content and format of the offer should be the minimum required to provide for proper evaluation. Offerors' formats should be allowed to the maximum extent possible.

(d) Facsimile offers, defined by Federal Acquisition Regulation 48 CFR 14.202-7 and 15.402(i), shall normally be authorized for MidRange procurements. In special circumstances, the buying team may elect to require only original offers.

1871.403 Offer preparation period and limitations.

The buying team should establish deadlines for receipt of offers based on an assessment of the minimum amount of time required to respond to the solicitation. The time required will depend on the complexity of the requirement and amount of cost and technical information required to be submitted. The information required shall be limited to the amount required to conduct a proper evaluation. The offer preparation period established in the RFO shall not be less than 15 calendar days unless the procurement is urgent and the reasons for urgency are documented in the contract file.

1871.404 Protection of offers.

A facsimile machine(s) shall be dedicated for receipt of offers and placed in a secure location where offers received on it can be safeguarded. All offers submitted shall be recorded, sealed in an envelope marked with the RFO number and taken to the buying team procurement member. Facsimile attendants shall make a good faith effort to inspect the document for completeness and legibility. If the attendant believes there are missing or illegible pages, the document will be promptly referred to the buying team procurement member for notification to the offeror that it should resubmit the offer. The Government shall not assume responsibility for proper transmission.

1871.405 Model contract.

MidRange procedures use a simplified contract format. The simplified contract format may be used with any type of contract, as long as the clauses and provisions appropriate to the contract type are included.

1871.406 RFO by electronic bulletin board.

1871.406-1 Methods of disseminating information.

(a) In accordance with 1871.302, presolicitation notices of solicitations for MidRange procurements shall be posted on the NABB. The presolicitation notice shall include the information required by 1871.302(c).

(b) Solicitations for MidRange Procurements shall be made available on the NABB. Paper copies shall be mailed within 5 working days from the date the RFO is posted on the NABB or receipt of the request, whichever is later.

(c) Solicitations available on the NABB are exempt from the requirement in (FAR) 48 CFR 14.203-1 that delivery of the solicitations be made pursuant to (FAR) 48 CFR 14.205.

(d) For the purposes of (FAR) 48 CFR 15.402(a), a solicitation posted on the NABB is a written solicitation.

(e) Solicitations posted on the NABB in accordance with these regulations are exempt from the requirement in (FAR) 48 CFR 15.408(a) to issue solicitations using the procedures in (FAR) 48 CFR Part 5.

1871.406-2 Special situations.

Notices for special situations as described in (FAR) 48 CFR 5.205 involving MidRange Procurements must be published in the Commerce Business Daily. Such special situations include R&D sources sought, intent to sponsor or change the mission of an Federally Funded Research and Development Center, effort to locate commercial sources under OMB Circular No. A-76, and Section 8(a) competitive national buy acquisitions.

1871.406-3 Publicizing and response time.

In accordance with 18.403, contracting activities shall allow at least 15 calendar days response time for receipt of offers from the date of posting of the solicitation on the NABB. Contracting activities shall check the NABB immediately after uploading a solicitation to assure that the solicitation is properly posted.

1871.406-4 Method of soliciting offers.

(a) Solicitations and solicitation amendments for MidRange procurements shall be generated in, or converted to, electronic files and

uploaded to the NABB. Each contracting activity will designate two or more individuals to perform the upload and check the uploaded files to assure that the data was not corrupted during transmission.

(b) Amendments to a solicitation posted on the NABB shall be uploaded to the NABB, and the solicitation and amendment number shall be added to the index of amended solicitations.

Subpart 1871.5—Award

1871.501 Representations and certifications.

Upon determination of the successful offeror, or all offerors selected for parallel negotiations, the buying team procurement member will determine if the offeror has on file valid Representations and Certifications. If the offeror has not completed the required forms, or they have expired, the offeror will be requested to provide the forms promptly. Should the offeror fail to provide the required Representations and Certifications or fail to meet a required condition, the buying team may reject the offer and proceed to the next highest ranked offeror who is responsive and responsible.

1871.502 Determination of responsible contractor.

Contractor responsibility shall be determined in accordance with (FAR) 48 CFR Part 9.

1871.503 Negotiation documentation.

The prenegotiation memorandum, if required, and the results of negotiation will be in abbreviated form and will be approved by the buying team.

1871.504 Award documents.

Contract award shall be accomplished by Contracting Officer execution of the contract document and providing a paper copy to the successful offeror. If facsimile documents were used in the evaluation process, the successful offeror may be required to execute original copies of the contract to facilitate legibility during the administration phase of the contract.

1871.505 Notifications to unsuccessful offerors.

For solicitations that were posted on the NABB, a preaward notice shall be electronically transmitted to the offerors. This notice meets the requirements of (FAR) 48 CFR 15.1001. However, the preaward notice in a small business set-aside must allow unsuccessful offerors 5 working days to challenge the small business status of the successful offeror. The procedures of

(FAR) 48 CFR 15.1001(c)(2) shall be followed for procurements subject to the Trade Agreements Act.

1871.506 Publication of award.

An award notice shall be posted on the NABB for seven (7) calendar days after posting, if the contract offers subcontracting opportunities or if it is subject to the Trade Agreement Act. The information required by (FAR) 48 CFR 5.207 shall be included in the award notice in abbreviated form.

1871.507 Debriefing of unsuccessful offerors.

If the procurement method used provides for a debriefing of unsuccessful offerors, the procedures applicable to that selection process shall be used in the debriefing. The procurement buying team member shall conduct debriefings.

Subpart 1871.6—"Best Value Selection"

1871.601 General.

(a) Best Value Selection (BVS) seeks to select an offer based on the best combination of price and qualitative merit of the offers submitted and reduce the administrative burden on the offerors and the Government.

(b) BVS takes advantage of the lower complexity of MidRange procurements and predefines the value characteristics which will serve as the discriminators among offers. It eliminates the use of area evaluation factors and the highly structured scoring.

1871.602 Specifications for MidRange procurements.

BVS refines the traditional approach to preparing specifications. BVS envisions that the specification will focus on the end result that is to be achieved and will serve as a statement of the Government's baseline requirements. The offeror will be guided in meeting the Government's needs by a separate set of value characteristics which establish what the Government considers to be valuable in an offer. These value characteristics will be performance based and will permit the selection of the offer which provides better results for a reasonable marginal increase in price.

1871.603 Establishment of evaluation criteria.

(a) The requiring organization will provide, along with the specification, a list of value characteristics against which the offers will be judged. There is no limit to the number or the type of characteristics that may be specified. The only standard will be whether the characteristic is rationally related to the

need specified in the specification. Characteristics may include such factors as improved reliability, innovativeness of ideas, speed of service, demonstrated delivery performance, higher speeds, ease of use, qualifications of personnel, solutions to operating problems, level of service provided on previous similar contracts, or any of numerous other characteristics that may be of value to the Government in satisfying its needs.

(b) Cost and technical will be considered equal in importance. The value characteristics will not be assigned weights.

(c) All subsequent evaluations will consider these characteristics when determining the finalists or making the final selection for award. Additional characteristics, not listed in the RFO, shall not be used as a basis for discriminating among proposals.

1871.604 Evaluation phases.

1871.604-1 Initial evaluation.

(a) Offers will be reviewed to determine if all required information has been provided and the offeror has made a reasonable attempt to present an acceptable offer. Offerors may be contacted only for clarification purposes during the initial evaluation. No further evaluation shall be made of any offer that is deemed unacceptable because:

(1) It does not represent a reasonable effort to address itself to the essential requirements of the RFO or clearly demonstrates that the offeror does not understand the requirements of the RFO;

(2) It contains major technical or business deficiencies or omissions or out-of-line costs which discussions with the offeror could not reasonably be expected to cure; or

(3) In R&D procurement, a substantial design drawback is evident in the offer and sufficient correction or improvement to consider the offer acceptable would require virtually an entirely new offer.

(b) Offerors determined not to be acceptable shall be notified of their rejection and the reasons therefor and excluded from further consideration.

(c) *Documentation.* If it is concluded that all offers are acceptable, then no documentation is required and evaluation proceeds. If one or more offers are not acceptable, the procurement member of the team will notify the offeror of the rejection and the reasons therefor. The documentation should consist of one or more succinct statements of fact that show the offer is not acceptable.

1871.604-2 Determination of "Finalists".

(a) All acceptable offers will be evaluated against the specifications and the value characteristics. Based on this evaluation, the team will identify the finalists from among the offers submitted. Finalists will include all offers having a reasonable chance of being selected for final award, as prescribed in 1815.613-71(b)(4)(i) for competitive range. Generally, finalists will include the offer having the best price (or lowest most probable cost) and the offer having the highest qualitative merit, plus those determined to have the best combination of price and merit. Offers not qualifying as finalists will be excluded from the balance of the evaluation process.

(b) Whenever possible, the buying team will conduct parallel negotiations of complete contracts with all finalists as discussed in 1871.605. This approach, which provide for the negotiation of definitive contracts prior to selection, serves to maintain the competitive environment among offerors throughout the acquisition cycle.

(c) In some cases, the buying team may choose to conduct discussions with the finalists as opposed to conducting parallel negotiations of complete contracts. This may be appropriate when: (1) Certain aspects of offers are unclear and clarifying the offers could determine that a finalist actually has no reasonable chance of being selected for final award; or (2) the finalists are so numerous that negotiating complete contracts with all finalists is not practical considering the time and resources available. Discussions shall be conducted in accordance with 1871.604-3.

(d) The buying team may choose to conduct parallel negotiations with all acceptable offerors without a determination of finalists. This could particularly apply where few offers were received.

(e) The selection official may elect to make selection in lieu of determining finalists, provided it can be clearly demonstrated that (1) selection of an initial offer(s) will result in the best value for the Government, considering both price and non-price qualitative criteria; and (2) discussions with other acceptable offerors are not anticipated to change the outcome of the initial evaluation relative to the best value offer(s).

(f) *Documentation.* If finalists are identified as discussed in paragraph (a) of this section, the documentation expected and required to result from this phase of evaluation is approximately one-quarter of a page for

each finalist. The documentation shall succinctly describe how the value characteristics in the RFO were provided by the offeror and cost/price considerations that caused the offer to qualify as a finalist. The evaluator(s) shall not be required to justify why other offers provided less qualitative merit. It is expected that, should the decision be challenged, the documented reason for selection, when compared with the non-selected offer, shall clearly demonstrate the difference that resulted in non-selection. It is expected and recommended that all informal worksheets used in the evaluation process be included in the contract file for use in any debriefings requested. When selection of the successful offeror(s) is made, the buying team shall document the selection in accordance with 1871.604-4(c).

(g) The names of offerors determined to be finalists, selected for parallel negotiations, or selected for negotiations or final contract award will be electronically transmitted to the offerors. This will serve as notification to those offerors that were not selected for further evaluation (see 1871.505).

1871.604-3 Discussions with "Finalists".

(a) The procurement team member shall lead discussions with each finalist. The discussions are intended to assist the buying team in fully understanding each finalist's offer and to assure that the meanings and points of emphasis of the RFO have been adequately conveyed to the finalists so that all are competing equally on the basis intended. Care must be exercised to ensure these discussions adhere, to the extent applicable, to the guidelines set forth in 1815.613-71(b)(5) for the applicable contract type. Technical transference, technical leveling, and auction techniques are prohibited. It is expected that these discussions will be conducted on an informal basis with each finalist.

(b) After completion of discussions, each finalist shall be afforded an opportunity to revise its offer to support and clarify its offer. A reasonable amount of time (normally less than 5 working days) will be afforded for the revision. The amount of time given shall be the same for each finalist.

1871.604-4 Selection of "Best Value" Offer.

(a) The procurement team member shall be the source selection official.

(b) The BVS source selection is based on the premise that, if all offers are of approximately equal qualitative merit, award will be made to the offer with the lowest evaluated price (fixed-price contracts) or the Government-

determined most probable cost (cost type contracts). However, the Government will consider awarding to an offeror with higher qualitative merit if the difference in price is commensurate with added value. Conversely, the Government will consider making award to an offeror whose offer has lower qualitative merit if the price (or cost) differential between it and other offers warrant doing so.

(c) *Documentation.* Rationale for selection of the successful offeror shall be recorded in a selection statement which succinctly records the value characteristics upon which selection was made. The statement need not and should not reveal details of the successful offer that are proprietary or business sensitive. Since the value characteristics are expressed in performance terms, the reasons for selection can focus on results to be achieved, rather than the detailed approach the offeror will use. The statement shall also comment on the rationale used to equate cost and qualitative merit. Little or no comment would be required when the selected offeror possessed the highest merit and lowest price. When a marginal analysis is made between value characteristics and price (or cost)—in most cases this will be a subjective, integrated assessment of all pertinent factors—specific rationale should be provided to the extent possible. It is expected that the statement will not ordinarily exceed one page. Where the procurement is closely contested, it would be prudent to expand on the rationale provided in the statement.

(d) The name of the offeror(s) selected for award and the selection statement shall be electronically transmitted to the offerors which will serve as a notification to those offerors that were not selected (see 1871.505).

1871.605 Negotiation methods and procedures.

(a) *Policy.* (1) The buying team may choose to conduct parallel negotiations of complete contracts with those offerors determined to be finalists or with all acceptable offerors. Parallel negotiation may also be used where more than one offeror is selected for negotiations after discussions. Use of parallel negotiations takes advantage of the competitive atmosphere and the responsiveness of offerors in completing negotiations. It also provides the selection official a higher confidence in the offer, since only the contracting officer's signature is required to make the offer a binding contract.

(2) When the selection official has chosen to make selection in lieu of

conducting parallel negotiations, negotiations may be conducted with the successful offeror(s) to resolve any open issues necessary to effect a binding contract(s). This may be typical of R&D and service contracts where the Government desires to negotiate changes in emphasis or orientation in an otherwise superior offer(s).

(b) *Procedure.* (1) Upon conclusion of parallel negotiations with each offeror, the offeror shall be asked to submit a revised offer (in full or amended) reflecting the results of the negotiations, and including the offeror's signature on the negotiated contract. A reasonable amount of time (normally less than 5 working days) will be afforded for the revision. The amount of time given shall be the same for each offeror. Upon receipt of all offers, the procurement member of the buying team shall make selection and document as required in 1871.604-4(c). Upon selection, the contracting officer shall execute the selected contract.

(2) If negotiation is conducted after selection, the buying team shall first select the offer and document as required in 1871.604-4(c), then negotiate the terms of the contract. The offeror shall be asked to submit a revised offer reflecting the results of negotiation, and including the offeror's signature on the negotiated contract. A reasonable amount of time (normally less than 5 working days) will be afforded for the revision. After receipt of the revised offer, the contracting officer shall execute the contract.

1871.606 Debriefings.

In addition to electronically transmitting the selection statement to the offerors, a debriefing, a debriefing will be provided by the buying team procurement member to any offeror submitting a written request. The debriefing will concentrate on the reasons why the successful offeror was selected. If the contract is unclassified, the debriefer may reveal any aspect of the contract and how it relates to the merits used to select the successful offer. If the successful offer had value characteristics which are proprietary or business sensitive, and had an impact on the selection, the debriefer should so state and summarize the results which are expected to accrue to the Government. The debriefer shall not divulge the details of the proprietary or business sensitive information.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 391

[FHWA Docket No. MC-91-1]

Qualification of Drivers; Vision Deficiencies; Waivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Final Determination and change in research plan.

SUMMARY: The FHWA announces its Final Determination which validates waivers issued to certain drivers of commercial motor vehicles (CMV) from the date of this notice until March 31, 1996. This action is directed solely at those drivers who had been granted temporary waivers to participate in the previously authorized vision waiver study, who numbered 2,399 as of November 5, 1994. This action follows, and is consistent with, the decision of the U.S. Court of Appeals for the D.C. Circuit in the case captioned *Advocates for Highway and Auto Safety v. Federal Highway Administration*, 28 F.3d 1288, D.C. Cir. 1994, which vacated the rule authorizing the temporary waivers and remanded the matter to the agency for further action not inconsistent with the Court's ruling. This notice also announces a basic change in the purpose for which data on the waived drivers are being collected and the intention of the FHWA to develop criteria for the imposition of additional conditions for maintaining the waivers and to improve monitoring of the performance of the waived drivers to identify and exclude those drivers who do not meet these conditions.

DATES: This final determination is effective on November 8, 1994.

FOR FURTHER INFORMATION CONTACT: The FHWA has established a special telephone number to receive inquiries regarding this notice. The number is 1-800-832-5660. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal Federal holidays.

SUPPLEMENTARY INFORMATION: Section 206(f) of the Motor Carrier Safety Act of 1984, (MCSA) Pub. L. No. 98-554, 98 Stat. 2832 (codified at 49 U.S.C. 31136(e), formerly 49 U.S.C. app. 2505(f)), allows the Secretary of Transportation to grant waivers from the Federal Motor Carrier Safety Regulations only after a determination that such waivers are not contrary to the public interest and are consistent with the safe operation of CMVs. Historically,

except for a limb-handicap waiver program established in 1979 (49 CFR 391.49), the agency granted no individual waivers to drivers who did not meet the physical qualification requirements set forth at 49 CFR 391.41.

Vision Waiver Study

The FHWA announced its vision waiver study in a Notice of Intent to accept applications for waivers on March 25, 1992, (57 FR 10295). This vision waiver study was initiated as part of an overall regulatory review of the medical qualification standards applicable to interstate CMV drivers. For a complete description of the waiver program, see the FHWA's October 6, 1994, Notice of Determination; request for comments, at 59 FR 50887.

Court Decision

The Advocates for Highway and Auto Safety (hereinafter Advocates or AHAS) filed suit in the United States Court of Appeals for the D.C. Circuit, requesting a review of the FHWA's notice of final disposition granting waivers to individuals who otherwise did not meet the Federal vision standard required for the qualification of CMV drivers in interstate commerce. The Court found that the FHWA's notices of the program did provide for meaningful opportunity for comment and that the comments received were given due consideration. The Court also held that the FHWA's approach, given the conflicting policy demands, was reasonable, and therefore not arbitrary and capricious. The Court observed, however, that the FHWA "initiated a program to issue temporary waivers to visually impaired drivers in order to procure the hard evidence needed to determine the effect of visual deficiencies on safety. Yet, before it may grant a waiver, the Safety Act required the agency to determine that such waiver * * * is consistent with the safe operation of commercial motor vehicles." 28 F.3d at 1294. The Court found that the agency's "determination that the waiver program will not adversely affect the safe operation of CMVs is devoid of empirical support in the record," 28 F.3d at 1294, and that "the FHWA has failed to meet the exacting requirements of section 2505(f) [now 49 U.S.C. 31136(e)]." 28 F.3d at 1294. Consequently, the Court concluded that the FHWA's adoption of the waiver program was contrary to law, and vacated and remanded the rule to the agency.

Proceedings after the Court Decision

On October 6, 1994, the FHWA published a Notice of Determination, request for comments in the Federal

Register (59 FR 50887), extending the validity of the vision waivers for a thirty-day period. The Notice also provided for a 15-day comment period to consider whether the agency had sufficient empirical evidence to allow the waiver program to continue until March 31, 1996. On the same day, the Advocates filed an emergency motion requesting that the Court issue and enforce a mandate in this case that would, in effect, halt the waiver program. The Court issued a mandate on October 21, 1994. That mandate simply restated that the rule authorizing the vision waivers is vacated and remanded the case to the agency. On October 24, 1994, the Court denied the Advocates' emergency motion.

Comments

The FHWA received 19 comments to the docket in response to the October 6 Notice of Determination. Fourteen commenters favored continuing the vision waiver program, while five commenters asserted that the program should be discontinued. Commenters in favor of continuing the program include the National Private Truck Council, the International Brotherhood of Electrical Workers, the Association for the Advancement of Automotive Medicine, the Tennessee Public Service Commission, the Owner-Operator Independent Drivers Association (OOIDA), John Murphy (a driver participating in the waiver program), Thomas Breth and James Strickland (drivers not participating in the waiver program), Altim, Inc., Mixson Oil Company, the State of Indiana Department of Motor Vehicles, Daily Express, Inc., and the American Optometric Association.

Commenters urging the agency to discontinue the vision waivers are the Advocates (two separate comments), the Insurance Institute for Highway Safety (IIHS), the American Movers Conference, the American Trucking Association (ATA), and Dr. Arthur M. Keeney, Dean Emeritus, University of Louisville. Their comments addressed the study design, the lack of a control group, the use of interim data, and other factors which, they contend, require the study's termination, or at a minimum, a restructuring of the method for conducting research.

These comments are more fully discussed below.

Discussion of the Comments

A. In favor:
The State of Indiana Department of Motor Vehicles emphasizes the importance of the vision waiver as a tool to accurately assess the vision standards

for commercial drivers, specifically addressing the condition known as amblyopia, or "lazy eye." The State acknowledges that persons with less than perfect vision often develop scanning techniques to compensate for their disability, and that such techniques may actually increase their awareness of traffic and other conditions. The Tennessee Public Service Commission commented that it has grandfathered vision impaired CMV drivers and found no increase in incidents or accidents as a result.

OOIDA, a national trade association representing the interests of a large number of independent owner-operators at both the Federal and State level, urged the FHWA to revalidate the waivers of the affected drivers because delay and uncertainty cause them significant harm. OOIDA believes that the FHWA's proposal "strikes a careful balance between safety * * * and the federal policies underlying the Americans with Disabilities Act and the Rehabilitation Act."

The American Optometric Association (AOA) supports the FHWA effort to study the performance of visually impaired drivers. The AOA believes "it is virtually impossible to unequivocally delineate a visual standard," and therefore, contends that a waiver system is needed.

Daily Express, Inc., Mixson Oil Company, Inc. and Altin, Inc. offer the performance of their employees with waivers as examples of the ability of drivers to compensate for their disability and remain safe operators of CMVs. These companies express concern over replacing waived drivers with known safety records with other drivers whose safety record is not of the same high caliber.

The National Private Truck Council (NPTC) also expressed support for the continuation of the vision waivers. The NPTC stresses the need for the type of data being collected from the waived drivers, as no such information currently exists. The NPTC believes that the FHWA's qualifying conditions for drivers, as well as the post-waiver conditions, ensure that those drivers holding waivers are safe operators of CMVs. The Association for the Advancement of Automotive Medicine also expresses the need for the data being gathered, although it has some reservations regarding the agency's study methodology.

Individual drivers Thomas Breth, James Strickland and John M. Murphy also commented favorably to the October 6 notice. The latter commented on his own behalf and on behalf of a freightline company he owns and

operates with his brothers. Mr. Breth, who petitioned the U.S. Court of Appeals for the Eighth Circuit because he was excluded from the vision waiver study because he did not timely file, submitted extensive records relating to that litigation. Although he supports the waivers, he opposes limiting them to those drivers originally granted the waivers under the determination that was invalidated by the D.C. Circuit in *AHAS*, *supra*.

The International Brotherhood of Electrical Workers supports the 30-day extension of the waivers, but does not comment on the extension of the waivers through March 31, 1996.

B. In opposition:

The Insurance Institute for Highway Safety accurately portrays the FHWA's premise for its "consistent with safety" determination as being that drivers with relatively clean driving records are at a lower risk for future accidents and that this is borne out in the crash experience of drivers in the waiver group as compared with the general commercial driver population. It concedes that the studies cited by the FHWA and other studies¹ referred to in the IIHS comments "(r)epeatedly * * * have shown that prior citations and crashes can be used as predictors of future crash risk (citations omitted)," and acknowledges that such research "amply justifies driver control policies based on driver records, such as point systems, suspensions, and revocations."

The IIHS, however, goes on to contend that these justifications are specious. It cites several studies which show that many drivers with clean driving records are involved in accidents, and that many drivers with poor driving records over a three-year period experience accident-free periods of equal length. A 1994 California report is cited which "did find that crash risk increases as a function of the number of crashes and citations on a drivers prior record. Of the two, prior citations is a slightly better indicator of subsequent crash risk, but subsequent crash risk can be more accurately predicted from a combination of prior crash and prior citation information than from either

alone." Significantly, it is this combination that the FHWA relied upon to reach its "consistent with safety" determination. The IIHS contends that none of the findings in the California report support the proposition that "the absence of citations or crashes can be used to predict a crash-free future."

It is apparent from its comments that the IIHS believes that the FHWA, in order to reach a "consistent with safety" determination, was bound to predict with some certainty that the waived drivers would be accident-free. The FHWA rejects this contention. The FHWA's determination is based on a reasonable expectation, supported by the studies cited both in the October 6 notice and in the IIHS comments, that the waived drivers with relatively clean driving records, as a group, would present less of a risk to public safety than a representative group of drivers, meeting existing standards, to be used in place of the waived drivers.

The IIHS also faults the FHWA for ignoring the data gathered to date on fatal crash involvement of the waived group. Because of reporting errors by the drivers, which were detected and corrected through the FHWA back-up monitoring systems, much of the information on fatal accident involvement was not available by the time "The Third Interim Monitoring Report on the Drivers of Commercial Motor Vehicles Who Receive Vision Waivers" was completed on June 27, 1994. That report analyzes data collected from July, 1992, through February, 1994. The Fourth Interim Monitoring Report, which has been placed in the docket, includes both the fatal and non-fatal accident rates resulting from all data accumulated through June 30, 1994. The fatal accident rate for the waived group of drivers is indeed slightly higher than the general truck driving population. However, in none of the fatal accidents was the waived driver issued a citation or found by the reporting police officer to have been at fault.

Finally, the IIHS is critical of the study methodology and faults the FHWA for its failure to use a control group as originally planned. The FHWA will more fully address this in the methodology to be developed to establish parameters for a performance-based vision standard.

The American Trucking Associations, Inc., a national trade association of the trucking industry, also commented in opposition to the FHWA proposal. The ATA had participated in the D.C. Circuit case, *AHAS v. FHWA*, *supra*, by filing an *amicus curiae* brief in support of the petitioner's challenge to the waiver

¹ Gebers and Peck, 1994, An Inventory of California Driver Accident Risk Factors. Sacramento, CA: California Dept. of Motor Vehicles, "the California study"; Gebers and Peck, 1987, "Basic California Traffic Conviction and Accident Record Facts. Sacramento, CA, California Dept. of Motor Vehicles; Lund, 1984, Driver Records and Crash Prediction, Arlington, VA: Insurance Institute for Highway Safety; California Department of Motor Vehicles, 1981, California Driver Fact Book, Sacramento, CA: Dept. of Motor Vehicles; IIHS, 1988, Drivers' Crash, Violations Records Predict Future Crash Involvement, Advisory No. 6, Arlington, VA: Insurance Institute for Highway Safety.

study. The ATA contends that the decision of the Court of Appeals in *AHAS* was broad enough to preclude the FHWA's present proposal. The FHWA disagrees for the reasons stated herein and in its filings with the D.C. Circuit in opposition to the *AHAS* motion for issuance and enforcement of a mandate, which the court dismissed. The filings in that matter are recorded in the docket.

The ATA suggests that pooling of the waived drivers may mask poor performance by individual members of the pool, and that comparisons with general populations are faulty because the waived group contains only experienced drivers. The ATA then significantly concedes that "(a) pool of experienced drivers will also appear to be safer than the national pool which includes new drivers and drivers with various driving experience." That is precisely the point. The FHWA's "consistent with safety" determination is based on the premise. The waived drivers had all been operating commercial motor vehicles on the highways when the waivers were issued to them. If they were required to stop driving they would have to be replaced by drivers drawn from the general population of truck drivers or new drivers. This is particularly true in this era of driver shortages which the ATA has publicly and repeatedly proclaimed. (See, e.g., *Transport Topics*, No. 3050, January 17, 1994, p. 12; and No. 3083, September 5, 1994, p. 42 and p. 49.)

The ATA also faults the study design because it will never be probative of "the ability of visually impaired drivers, in general, to operate CMVs safely." The ATA states that this is because "the study is limited to the experiences of these apparently better-than-average drivers." Once again, the ATA makes the FHWA's point. The "consistent with safety" determination relates to the issuance of the waivers, and not to the design or conclusions to be drawn from the study. The FHWA recognizes that the study as presently fashioned has some problems, which the FHWA is taking steps to correct. The FHWA also recognizes that its group of waived drivers may include some subpar performers who individually may present an unacceptable risk to safety. The FHWA is taking steps to identify and exclude such drivers, while at the same time maintaining the integrity of the overall waiver program.

Finally, the ATA contends that the FHWA proposal is an attempt to give retroactive effect to its previous waiver rule, and that this is violative of the Administrative Procedure Act, citing *Georgetown University Hosp. v. Bowen*,

821 F.2d 750 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988). The *Georgetown* case involved a rule issued by the Department of Health and Human Services (HHS) that affected the formula under which hospitals were to be reimbursed for the provision of certain health services. After the rule was invalidated because it was issued without opportunity for public comment, the HHS issued a new rule retroactive to an earlier date. On the basis of this new rule, the HHS then sought reimbursement from the hospitals for payments made before the date of the new rule which were greater than would be allowable under the new formula.

The FHWA's decision allowing waived drivers to operate in interstate commerce until March 31, 1996, has no retroactive effect whatsoever. It speaks only prospectively. On September 30, the FHWA validated the waivers for a 30-day period and requested comments.

Moreover, the rule in this instance was not vacated for procedural error, as it was in the *Georgetown* case. In this instance, the rule was vacated after the court determined that the agency did not have the necessary empirical evidence in the record to support its assertion that the waivers were consistent with the safe operation of CMVs. The Notice published on October 6 provided the necessary empirical evidence for the future effect of the waivers, including data on the driving performance of the waived group of drivers as a whole, which clearly indicates that allowing this group to continue operating in interstate commerce is consistent with the safe operation of CMVs. (See 59 FR 50887 at 50889, 50890, October 6, 1994). In providing the necessary empirical evidence, the agency cured the defect and now validates the waivers through March 31, 1996. Consequently, this action is entirely consistent with the APA.

The comments of the American Movers Conference merely voice its support for the position taken by the ATA.

Arthur H. Keeney, M.D., D.Sc., a Distinguished Professor of Ophthalmology and Dean Emeritus of the University of Louisville Department of Ophthalmology urged the FHWA to hold to its previously established physiologic standards without further reduction. Dr. Keeney suggested that the FHWA might grandfather the remaining waived drivers into the system as a means of proceeding away from the agency's current course, but recommended against enrolling any more "monocular blind or "visually

deficient drivers' who may be interpreted as otherwise qualified to meet occupational requirements." Dr. Keeney also submitted a recently prepared but thus far unpublished paper entitled "The Monocular Quandary" which includes an extensive bibliography. The paper supports the current standard and explores operational problems, particularly associated with individuals with no vision in one eye. The FHWA believes the comments and the research paper of Dr. Keeney will be useful in its pursuit of performance-based vision standards.

Strong opposition to the FHWA proposal was also received from the Advocates for Highway and Auto Safety (AHAS), the petitioner in the D.C. Circuit case referred to throughout this notice. The AHAS reargues its position in the court proceeding both before and after judgment and urges a broader interpretation of the court's decision.

The Advocates also believe that the waived drivers could have been "grandfathered" into a qualified status, and, indeed, that such an alternative is still available to the FHWA. It is unclear how the effect of this approach would differ in any significant degree from that of the route chosen by the FHWA. The Advocates contend that the FHWA misused the data from the vision waiver study, ignoring the advice of its own experts in the process. We believe the AHAS is confusing the basis for a "consistent with safety" determination to justify the issuance of the waivers in order to conduct the study with prejudging the outcome of the study. As mentioned above, the FHWA concedes that the study, as currently designed, will not produce, by itself, sufficient evidence upon which to develop a new vision standard, and the FHWA has never claimed that the study was intended to create a standard, per se, for issuing waivers.

Finally, the AHAS criticized the FHWA for not being candid with the data it has obtained during the course of the vision waiver study. It claims that the FHWA has underreported fatalities. The FHWA has made every attempt to be forthcoming regarding the data and accident information compiled. In fact, the State police and accident reports referred to in comments by the Advocates were provided promptly and directly to the AHAS by the agency. This issue, however, has convinced the agency to take steps to improve its monitoring systems.

The Fourth Interim Report has been completed by the contractor and covers cumulative activities and mileage through June 30, 1994. Since the June 30 date, another waived driver has been

involved in a fatal accident. As of June 30, the fatal accident rate for waived drivers is 0.034 per million vehicle miles travelled (VMT) as compared to the national rate computed from GES data of 0.026. The total accident rate for drivers in the waived group is 1.636 per million VMT compared with the rate of 2.531 per million VMT computed from GES data. Given the small number of fatal accidents that have occurred, these rates can represent only approximate estimates of what may actually be expected to occur on the highways. Therefore, conclusions drawn solely from them must be cautiously interpreted.

Additionally, the fatal accidents that have occurred were not necessarily related to the drivers' vision impairments. The most recent fatality, which was promptly reported by the waived driver involved, occurred when an automobile collided with the rear end of the truck operated by the waived driver. The police accident report indicated there was no fault on the part of the truck driver. A review of the police accident reports of the previous 6 fatal accidents in which waived drivers were involved also reveals that none of the waived drivers was found to be at fault by the reporting police officer.

Status of the Waived Drivers

The FHWA has reviewed all the comments carefully, conferred with its contractor administering the agency's vision waiver program and conducted peer reviews regarding the studies and other evidence submitted by the commenters. The FHWA believes that continuing to allow those drivers operating commercial motor vehicles in interstate commerce while holding Federal vision waivers is consistent with the two-pronged test set forth in the Motor Carrier Safety Act of 1984 (49 U.S.C. 31136(e) (1994)).

As discussed above, even the comments opposing the vision waivers did not refute the premise upon which the "consistent with safety" determination articulated in the October 6 notice was based. The studies referred to by the FHWA to support the proposition that a group of experienced drivers with clean driving records over a 3-year period will present less of a risk than a group of drivers selected from the general truck driving population to replace them over a similar 3-year period were not contradicted. In fact, studies referred to by some of the commenters opposing the vision waivers bolstered this position. The opposing commenters did, however, point out some weaknesses in

monitoring the performance of the waived drivers which can be corrected to assure the continued safety of these drivers.

To correct these and assure the continued safety of the drivers, the FHWA will, within the next 60 days, undertake a close review of the data gathered thus far and develop additional criteria which the waived drivers will be required to meet as conditions of retaining the waiver. These conditions will be communicated directly to the waived drivers. In those 60 days, the FHWA will also improve its monitoring systems to enable the agency to more promptly identify subpar performers among the waived group to ensure that safety is maintained.

Determination

The FHWA has determined that the issuance of waivers to the 2,399 drivers remaining in the study group is consistent with the public interest and the safe operation of commercial motor vehicles. This determination is based on studies referred to herein and data gathered during the course of the last two years which support the proposition that a group of experienced drivers of commercial motor vehicles with clean driving records, including both accident and citation records over the previous three years, will present a lower risk to safety over the following 3 years than a group of the same size comprised of drivers representing the general truck driving population, including new drivers, over the same 3-year period. The statistics that have been gathered from the waived drivers to date indicate that this class of drivers has performed and continues to perform more safely than those drivers in the general population of commercial drivers.

The waivers were issued to these drivers following an individual determination of each driver's capability to operate a commercial motor vehicle (CMV) safely. This individual determination consisted of a review of each individual's vital statistics, employment history, status of driving privilege as recorded on the licensing State's MVR and the license status for the past three years, and expert medical opinion by an ophthalmologist or optometrist attesting to the visual acuity of each driver and its effect on his or her ability to perform the driving task safely. Once a driver was granted a waiver, he or she was, and is, required to submit monthly driving reports and be examined annually by an ophthalmologist or optometrist and submit the results of that examination to the FHWA. Failure to report timely as

required will result in the initiation of a process to revoke the waiver.

Moreover, the FHWA's contractor periodically verifies the waived drivers reported accidents and citations through each driver's State motor vehicle record (MVR). Medical reports are also verified. The drivers holding waivers from the Federal vision standards, as is true of all drivers in the general population, are not immune from State or Federal enforcement or licensing sanctions by virtue of their participation in the waiver study, and are subject to the penalty provisions of the commercial drivers' license regulations (49 CFR Part 383), State and local licensing sanctions, as well as the penalty provisions set forth as conditions of the waiver.

In addition, the FHWA believes that the continued employment of individuals with proven safe driving records is in the public interest. The comments to the docket reflect several instances where companies employing waived drivers rely heavily upon their waived drivers because these drivers are consistently safe operators of CMVs. Permitting waived drivers to continue operating in interstate commerce is also consistent with the public interest policy of employing persons with disabilities, which is evidenced in both the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

Status of the Study

The agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit. In addition, several experts reviewed the studies and data upon which the FHWA based its "consistent with safety" determination and were unanimous in finding (1) the waived drivers as a group would be expected to perform as well as or better than a group of equal size drawn at random from the general truck driving population because of the preselection criteria and conditions; and (2) the data developed by the study will never answer the question as to what the standards should be. Consequently, the FHWA has decided to develop and implement, with the input of these commenters and others, a new research method that will address the concerns of these commenters.

The FHWA will undertake comprehensive research to develop parameters for performance-based visual standards for all commercial drivers. The agency anticipates that any new vision standards will consider at least three critical aspects of visual performance: static acuity, dynamic acuity, and useful field of view. The

vision standard found at 49 CFR § 391.41(b)(10) will remain in effect until the completion of this research and the implementation of any new standard. The agency's ultimate goal is to adopt driver physical qualification standards that are performance-based; that is, they will reflect the actual physical requirements that fosters safe operation of commercial vehicles.

Development of standards will begin with an analysis of the existing body of knowledge, including knowledge gained from this project when completed, and from analogous applications of visual standards in other environments (e.g., Department of Defense, Federal Aviation Administration, and National Aeronautical and Space Administration). The final standards will be developed in careful consideration of the practical constraints of driver vision testing, cost, examiner training, testing time, and requirements for development of new testing equipment, all of which will be balanced against projected safety improvements.

The FHWA will proceed within the following framework:

- FHWA will develop a sound methodology, based on accepted experimental and statistical practices, for developing visual standards.
- The development process will include consideration of the collected accident experience of commercial vehicle operators, including the drivers holding vision waivers.
- Before a final method and design for developing standards is determined, FHWA will announce its proposed method and design for discussion at a

public meeting to be held in the Spring of 1995. The proposed method will be open to public scrutiny. The final methodology will be published in the **Federal Register**.

- The FHWA will announce the results of the study, the proposed standards and a proposed plan for implementing the standards at the completion of this study.

Public Hearing on Vision Standard and Waiver Program

As mentioned earlier, the FHWA intends to announce its proposed revisions to the research method at a public hearing to be held in Spring 1995. The FHWA is eager to gain a broader perspective of the public's viewpoint concerning other studies, data and experiences which will enhance the agency's knowledge on the subject of a performance-based vision standard. The FHWA is also interested in sharing its data with other researchers and agencies which may undertake useful analyses and initiate studies leading to new approaches in establishing future physical qualification standards, standards that are both necessary and valid to increasing opportunities in the truck-driving profession while ensuring that society's high expectations of CMV safety are realized. Notice of the hearing will be published in the **Federal Register** and will contain further questions to which the agency seeks responses, as well as directions on how to obtain information about the data collected during the vision waiver study.

Conclusion

Based upon the comments to the docket and the empirical evidence gathered to date, the FHWA will allow those drivers currently holding waivers from the Federal vision standard to continue to operate in interstate commerce until March 31, 1996. This permission is conditioned upon each driver's continued compliance with the reporting requirements outlined in the **Federal Register** on July 16, 1992 (57 FR 31458) and again on October 6, 1994 (59 FR 50887) and such further conditions and monitoring as may be imposed by the FHWA in the interest of safety. Waived drivers also remain subject to State or Federal enforcement or licensing sanctions. Additionally, the FHWA will concurrently undertake research to develop comprehensive, performance-based visual standards for all commercial drivers. This proposed analysis and research method will be presented at a public hearing to be held in Spring 1995, and the public will be invited to comment on the research method. And finally, the FHWA, within the next 60 days, will complete a review of the performance data on the waived drivers to develop criteria which will form the basis for further conditions which will be imposed directly on the waiver holders and will further reduce the safety risks to these drivers and highway users.

Issued on: November 9, 1994.

Rodney E. Slater,

Federal Highway Administrator.

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