North Dakota Parks and Recreation Department

Recreational Trails Program
Program Manual

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North Dakota Parks and Recreation Department
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Recreational Trails Program
Program Manual

Introduction

The North Dakota Parks and Recreation Department (NDPRD) in cooperation with the North Dakota Division Office of the Federal Highway Administration (FHWA) has prepared this manual to answer questions relating to project application and management.

General Information

Program Overview

The Recreational Trails Program (RTP) is a federal-aid assistance program (CFDA: 20.219) to help states provide and maintain recreational trails for both motorized and non-motorized trail use. The program provides funds for all kinds of recreational trail uses, such as pedestrian uses (hiking, running, and wheelchair use), bicycling, in-line skating, equestrian use, cross-country skiing, snowmobiling, canoe/kayak trails, off-road motorcycling, all-terrain vehicle riding, four-wheel driving, or using other off-road motorized vehicles.

The RTP funds come from the Federal Highway Trust Fund, and represent a portion of the motor fuel excise tax collected from non-highway recreational fuel use: fuel used for off-highway recreation by snowmobiles, all-terrain vehicles, off-highway motorcycles, and off-highway light trucks.

The U.S. Department of Transportation, Federal Highway Administration (USDOT/FHWA) administers the RTP program. The Governor of the state of North Dakota has designated the North Dakota Parks and Recreation Department (NDPRD) as the agency responsible for administering apportionments made to the state. RTP funds represent a portion of the federal gasoline tax attributed to recreation on non-gasoline tax supported roads. The federal government prescribes many of the regulations governing this program.

NDPRD, along with the Recreational Trail Program Advisory Committee (RTPAC), intends that RTP grant funding be used to enhance trail opportunities by achieving results that would not otherwise be possible. RTP grants are for projects that are primarily recreational in nature, rather than serving a more utilitarian transportation function. The following is a list of eligible projects:

- Construction of new recreation trails
- Restoration of existing trails (re-routes)
- Development and rehabilitation of trailside and trailhead facilities and trail linkages
- Purchase and lease of recreational trail construction and maintenance equipment
- Land acquisition/easements

- Trail accessibility assessment

Title VI

Title VI of the Civil Rights Act of 1964 ensures that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination, including sex, age, disability, low-income, or LEP discrimination, under any program or activity for which the Recipient receives Federal financial assistance. The Civil Rights Restoration Act of 1987 clarified the original intent of Congress, with respect to Title VI and other Non-discrimination requirements (The Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973) by restoring the broad, institutional-wide scope and coverage of these non-discrimination statutes and requirements to include all programs and activities of the Recipient, so long as any portion of the program is Federally-assisted.

Sponsors **who are** Title VI compliant may coordinate bidding and procurement on their own. Sponsors must follow the original procurement process for reimbursement. All bidding, procurement and construction must adhere to Title VI requirements. Additional information on the Title VI Program is available on the North Dakota Parks and Recreation Department website at: http://www.parkrec.nd.gov/information/department/title_vi.html.

Sponsors **who are not** Title VI compliant will work with the NDPRD during the bidding and procurement process. Project reimbursement in this manner will require project reimbursement (20%) from sponsor to NDPRD.

RTP Funding

The Recreational Trails Program funds up to 80% of eligible costs for trail projects. At the time of application, the project sponsor must have at least 20% of the total project cost available. The local share may include tax sources (appropriations), bond issues or force account contributions. The donated value of land, cash, labor, equipment and materials may also be used.

Individual grant awards are limited to a **minimum of $10,000 and a maximum of $200,000**. NDPRD and the RTPAC reserve the right to change the minimum/maximum dollar amounts in order to ensure the complete expenditure of RTP funds.

Eligibility

Grants may be awarded to any of the following:

- Non-profit organizations - A qualified non-profit organization is one that meets the following criteria:
    - Registered with the State of North Dakota as a non-profit for a minimum of 5 years.
    - Will name a successor at the time of any change in organizational status (for example, dissolution). A qualified successor is any party that meets the eligibility criteria to apply for RTP funds and is capable of complying with all RTP responsibilities. NDPRD recommends, whenever possible, a government agency

be sought as a successor. A successor organization must agree, in writing, to complete all RTP project responsibilities should the original organization's status change.

- Municipal agencies (cities, towns, counties, school districts, etc.)
- State agencies (North Dakota Parks and Recreation Department, North Dakota Forest Service, North Dakota Game and Fish).
- Federal government agencies (Bureau of Land Management, U.S. Forest Service, National Park Service, etc.)
- Other government entities (regional governments, etc.)

Potential project sponsors with active or previously awarded grants through NDPRD must be in full compliance with federal and state programs to be eligible for funding.

"40-30-30" Requirement

RTP Legislation (23 U.S.C. 206) requires that States use 40 percent of their funds in a fiscal year for diverse recreational trail use; 30 percent for motorized recreation; and 30 percent for non-motorized recreation. The diverse, motorized, and non-motorized percentages are minimum requirements that must be met. A project for diverse motorized use (such as snowmobile and off-road motorcycle use) may satisfy the 40 percent diverse use requirement and the 30 percent motorized use requirement simultaneously. A project for diverse non-motorized use (such as pedestrian and bicycle use) may satisfy the 40 percent diverse use requirement and the 30 percent non-motorized use requirement simultaneously.

To provide more flexibility in RTP project selection, FHWA established five categories to account for the 40-30-30 requirements:

1) <u>Non-motorized project for a single use</u>: A project primarily intended to benefit only one mode of non-motorized recreational trail use, such as pedestrian use only, water trails (canoe/kayak), or equestrian use only. RTP projects serving various pedestrian uses (such as walking, hiking, wheelchair use, running, bird-watching, nature interpretation, backpacking, etc.) constitute a single use for the purposes of this category. A project serving various non-motorized human-powered snow uses (such as skiing, snowshoeing, etc.) constitutes single use for this category.
2) <u>Non-motorized diverse use project</u>: A project primarily intended to benefit more than one mode of non-motorized recreational use such as: walking, bicycling, and skating; both pedestrian and equestrian use; and pedestrian use in summer and cross-country ski use in winter.
3) <u>Diverse use project including both motorized and non-motorized uses</u>: A project intended to benefit both non-motorized recreational trail use and motorized recreational trail use. This category includes projects where motorized use is permitted, but is not the predominant beneficiary. This category includes RTP projects where motorized and non-motorized uses are separated by season, such as equestrian use in summer and snowmobile use in winter.
4) <u>Motorized single use project</u>: A project primarily intended to benefit only one mode of motorized recreational use, such as snowmobile trail grooming. A project may be

classified in this category if the project also benefits some non-motorized uses (it is not necessary to exclude non-motorized uses), but the primary intent must be for the benefit of motorized use.

5) Motorized diverse use project: A project primarily intended to benefit more than one mode of motorized recreational use, such as: motorcycle and ATV use; or ATV use in summer and snowmobile use in winter. A project may be classified in this category if the project also benefits some non-motorized uses (it is not necessary to exclude non-motorized uses), but the primary intent must be for the benefit of motorized use.

Projects in categories 1 and 2 apply towards the 30 percent non-motorized use requirement. Projects in categories 2, 3, and 5 apply towards the 40 percent diverse trail use requirement. Projects in categories 4 and 5 apply towards the 30 percent motorized use requirement.

Project Timeline

When applying for project funding, the project sponsor must be ready to begin construction upon grant approval. This requirement includes having all local match available and all project planning complete. Once the project sponsors are notified of their project approval and funding level, they have 18 months to complete the project.

Eligible Projects/Expenses

Projects will be ranked based on the categories below.

1. Construction of new recreation trails: For projects on federal land, the most important requirement is that the federal agency land manager must approve of the project in accordance with other applicable federal laws and regulations. This category may include construction of new trail bridges, or providing appropriate signage along a trail.
2. Restoration of existing trails: Restoration may be interpreted broadly to include any kind of non-deferred trail maintenance, restoration, rehabilitation, or relocation. This category may include maintenance and restoration of trail bridges, or providing appropriate signage along a trail.
3. Development and rehabilitation of trailside and trailhead facilities and trail linkages: This may be interpreted broadly to include development or rehabilitation of any trailside and trailhead facility. The definition of "rehabilitation" means extensive trail repair needed to bring a facility up to standards suitable for public use due to natural disasters or acts of nature. Trailside and trailhead facilities must have a **direct relationship** with a recreational trail.
4. Purchase and lease of recreational trail construction and maintenance equipment: Purchase and lease of any trail construction and maintenance equipment, provided the equipment is used primarily to construct and maintain recreational trails. This provision does not include purchase of equipment which may be used for purposes unrelated to recreational trails. For example, a lawn mower purchased under this program must be used primarily for trail and trailside maintenance, not to maintain open lawn areas or sport fields. *(**Please note equipment projects,** only federal, state and municipal agencies qualify for funding; a use agreement will need to be signed by the project sponsor).*

5. Land acquisition/easements: See the Land Acquisitions and Easements section below; please note, RTP legislation prohibits condemnation of any kind of interest in property. Therefore, acquisition of any kind of interest in property must be from a willing landowner or seller.
6. Trail accessibility assessment: assessment of trail conditions for accessibility and maintenance.

Ineligible Projects/Expenses

- Condemned Land as Matching Value: RTP legislation prohibits using RTP funds for condemnation of any kind of interest in property. An RTP project may be located on land condemned with funds from other sources. However, it is not permissible to use the value of condemned land toward the match requirement for an RTP project.
- Feasibility Studies: Trail feasibility studies are not a use permitted in the RTP legislation. The permissible uses relate to actual on-the- ground trail projects.
- Environmental Evaluation and Documentation: Projects intended solely for the purpose of covering environmental evaluation and documentation expenses are not permissible.
    - Reasonable environmental evaluation and documentation expenses, including costs associated with environmental permits and approvals, may be included as part of an approved project's engineering costs. Expenses incurred developing the environmental evaluation, necessary permits, as well as engineering costs, may not exceed 20% of the total funded grant amount.
    - Project expenses, in which a project sponsor will seek reimbursement via the grant, may not occur prior to the project start date. The project start date will be provided once the FHWA approves the project. The project start date will be provided to the project sponsor by the NDPRD.
- Law Enforcement: Routine law enforcement is not a use permitted in the RTP legislation.
- Planning: Trail planning is not a permissible use of RTP funds.
- Sidewalks: RTP funds will not normally be used to provide paths or sidewalks along or adjacent to public roads or streets, unless the path or sidewalk is needed to complete a missing link between other recreational trails.
- Roads: RTP funds may not be used to improve roads for general passenger vehicle use.
- Overhead: The regular operating expenses such as rent, building upkeep, utilities and all fixed costs associated with a business, agency or group.
- Indirect Costs: Only direct costs that can be identified specifically with a particular final cost objective directly related to the trail project are eligible.

Land Acquisitions and Easements

- Acquisition Costs: The following land acquisition costs are allowable and eligible for reimbursement under the Recreational Trails Program:
    - The appraised fair market value of fee simple title or an easement for the use of real property acquired by negotiated purchase.

- The purchase price for an easement or fee title to real property acquired below appraised value.
- The donated land value (the difference between the purchase price and appraised value) may be used as a match for federal funds to purchase that parcel of land, purchase other pieces of property, or develop facilities.
- Similarly, lands for which 100% of the value is donated may only be used as the organization's share of a project to purchase other land or build facilities.
- Appraisal fees.
- Boundary surveys, title search, legal filling fees.

- Ineligible Costs: Costs ineligible for reimbursement in an acquisition project include:
  - The purchase of real property to which the project sponsor became committed prior to federal approval.
  - Legal fees other than for filling and fines and penalties paid by the project sponsor.
  - Incidental costs relating to real property acquisition and interests in real property unless allowable under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.
  - Taxes for which the local sponsor would not have been liable to pay.
  - Damage judgments arising out of acquisition whether determined by judicial decision, arbitration or otherwise.

- Easements: In some instances, the applicant will not be able to purchase the property but can acquire an easement. An easement must be for a period of at least 25 years. During the time period, the easement cannot be revoked at will by the landowner unless the applicant or state is guilty of an infraction of the easement. The land must still be retained in public trail use for the duration of the easement period even though the easement has been revoked. Provisions stated in the easement cannot be detrimental to the proposed recreational development.

  A draft copy of the easement must accompany the application for acquisition and development projects. If an easement has been or is to be executed prior to the submission of a development project application, a draft copy of the easement should be sent to the NDPRD for review. Advance approval of such agreements may help ensure the eligibility of the site for funding. Negotiations for easements must follow general negotiated land purchase regulations including the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act.

Control and Tenure

Adequate control must be established by an applicant over any land (public or private) to be improved/developed with RTP grant funds, including documentation of the fee title, lease, easement, or use agreement. Lease, easement and use agreement terms must be for a term no less than 25 years.

The application must identify all outstanding rights or interests held by others on land upon which the project is proposed. A signed letter explaining control and tenure must be submitted for all projects not located on Federal Lands. The applicant will be required to submit a signed approval from the official responsible for management of the project property.

Application Process and Review

The following information outlines the review process for each submitted application.

Metropolitan Planning Organizations (MPOs)

Project sponsors that fall into one of the Metropolitan Planning Organizations' jurisdictions must have and provide approval that their project is in compliance with the MPO Long Range Transportation Plan. These areas include Bismarck-Mandan, Grand Forks, and Fargo.

Technical Review

Once a potential sponsor submits an application, NDPRD staff will review the application for completeness, eligibility, the sponsor's current grant status, match, property ownership, local/regional/federal approval, etc. Staff will forward eligible applications to the Recreational Trails Program Advisory Committee (RTPAC) for further consideration.

Recreational Trail Program Advisory Committee (RTPAC)

RTPAC membership represents a broad range of motorized and non-motorized trail users and associations. A total of nine committee members are appointed by the Director of the North Dakota Parks and Recreation Department and must be recreational trail users and represent trail interests (hiking, biking, horseback riding, paddling, OHV and snowmobile).

In North Dakota, the committee serves as the evaluation committee that reviews and prioritizes grant applications and recommends projects for funding. The project evaluation allows committee members to bring their knowledge of statewide and local recreation patterns, resources, and needs into consideration. Reviewers may rank a project based upon their evaluation of site suitability, fiscal consideration, commitment to long-term operation and maintenance, superior design, superior leverage of funding and partnership, ADA compliance, and project presentation, heritage and legacy context, and regional issues.

Committee members are appointed to 3-year terms. Upon completion of a 3-year term, NDPRD will advertise for replacement of the committee member. If no replacement is found, the existing committee member will be given the option to renew their term.

Pair-Based Scoring Process and Example

Pair-based scoring is a ranking methodology in which each project is individually ranked against each other project, one project at a time. In the example below, 7 applications were received and ranked. The numbers 1-7 correspond with the assigned application numbers. Projects are then compared starting with project number 1 vs. project number 2. The better of the two projects is then marked on the score sheet. Then project 1 is compared to project 3 and again the better project is marked on the score sheet. This process is repeated until project 1 has been compared

to all other applications. Project 2 is then compared against all other projects excluding project 1, then project 3 against all others excluding 1 and 2, etc., until each has been compared to all other projects and project preference has been established. Points are assigned based on the number of times a project is chosen.

Project #	Total Times Chosen	Pair Ranking
1	4	**1** vs. 2, **1** vs.3, 1 vs. **4**, 1 vs. **5**, **1** vs. 6, **1** vs. 7
2	2	**2** vs. 3, 2 vs. **4**, 2 vs. **5**, 2 vs. **6**, **2** vs. 7
3	0	3 vs. **4**, 3 vs. **5**, 3 vs. **6**, 3 vs. **7**
4	6	**4** vs. 5, **4** vs. 6, **4** vs. 7
5	5	**5** vs. 6, **5** vs. 7
6	3	**6** vs. 7
7	1	

____21_____ Total Points - The sum of all points should be 21.

In this example project number 4 was selected the most times and is ranked #1, followed by project 5 and so on. Once the projects have been ranked by all committee members, the scores will be averaged and the highest ranking projects will be submitted for environmental and historical review and clearance.

Environmental and Historical Requirements and Project Clearance

Documentation of compliance with the National Environmental Policy Act (NEPA) and other Federal environmental laws, regulations, and Executive Orders must be provided as part of an authorized project under the RTP. FHWA procedures in 23 CFR 771 apply to the RTP. Each project must be evaluated to determine the environmental impacts; however, most RTP projects will qualify as Categorical Exclusions (CE) under NEPA (23 CFR 771.117) if they meet the following requirements:

- Does not have significant impacts to planned growth or land use for the area;
- Does not require the relocation of a significant number of people;
- Do not have a significant impact on any natural, cultural, recreational, historic or other resource;
- Does not involve significant air, noise, or water quality impacts;
- Does not have significant impacts on travel patterns;
- Does not otherwise have any significant environmental impacts.

The following project types are CE by definition and do not require further review:

- Rehabilitation contained within the footprints of existing trails and trailhead facilities;
- Re-grading within the footprints of existing trails or trail parking areas;
- Striping and/or re-striping of existing facilities;

- Replacement, renovation, or rehabilitation of existing signs, kiosks, or markers;
- Alterations to existing facilities in order to make them accessible to the elderly and handicapped persons;
- Repair or replacement of existing fencing, guardrails, retaining walls, or berms within existing facilities, including areas needed for construction and staging.

After the Recreational Trails Program Advisory Committee (RTPAC) reviews and ranks the applications, the selected projects will be sent to the following agencies to meet the environmental review requirements:

- North Dakota Department of Health
- North Dakota Department of Transportation
- North Dakota Game and Fish
- North Dakota Parks and Recreation Department
- North Dakota State Historical Society
- North Dakota Water Commission
- US Department of Agriculture
- US Fish and Wildlife Service

All projects must be approved by the aforementioned agencies before funding can be awarded.

State Historic Preservation Office (SHPO) Requirements

The SHPO will be contacted to assure that the project proposal complies with State laws regarding archaeology on lands or historic properties.

- Any project element calling for alteration, rehabilitation, renovation, or demolition of a building or structure 45 years or older needs to be reviewed by the SHPO on a case-by-case basis.
- Photographs of properties that would be affected 45 years of age or older need to be submitted along with a narrative describing the project, including plans and specifications, as appropriate. Any available historical information on the property should also be submitted.
- It is illegal to disturb an archaeological site or to remove artifacts from an archaeological site or to remove an archaeological object on public or private lands, unless that activity is authorized under a permit and requisite permissions have been obtained.
- If human remains are found during an excavation on private or state lands, the local law enforcement office must be contacted pursuant to N.D.C.C. §23-06-27 to determine if they are Native American or are evidence of a crime scene.

If other archaeological materials are found during a ground disturbing activity, contact the SHPO at 701-328-2682. The SHPO can check to see if your project area has been surveyed and can give you a current list of archaeological consultants. Only professional archaeologists or persons working for recognized scientific organizations may apply for an archaeological permit.

Other Environmental Considerations

- Wetlands: Impacts to wetlands must be considered and may result in trail route or structure changes. All applications will be reviewed by NDPRD Grant staff for wetland impacts using the U.S. Fish and Wildlife's Wetland Mapper available at https://www.fws.gov/wetlands/Data/Mapper.html
- Threatened and Endangered Species: The occurrence of a protected species could be an important issue to consider during the development of an RTP project. Projects will be reviewed by the U.S. Fish and Wildlife Service and the North Dakota National Heritage Inventory Program.
- Hazardous Wastes and Contaminated Properties: Contaminated sites may be encountered during the development of RTP projects. Abandoned railroad lines being converted into trails are of particular concern. Site assessments and appropriate steps for remediation may be necessary.
- Noxious Weeds: Project sponsors are responsible for the spread of noxious weeds in conjunction with the trail project.
- Conservation Measures: Careful planning and the use of best management practices should be implemented during the construction phase and after the trail is built to help decrease impact and reduce cumulative effects to plant and wildlife communities. Avoiding habitat fragmentation should be considered and implemented when possible.

  The following conservation measures are suggested:
  - **Start and finish the project outside the migratory bird nesting periods of February 1st through July 15th.**
  - Design trial that avoids sensitive areas such as wetlands or other habitat that are rare in the area.
  - Reduce the invasion of invasive species by controlling weeds prior to construction and include a weed management plan for after construction.
  - Maintain clean trail building equipment to limit the spread of noxious weeds and invasive species.
  - Avoid practices that cause erosion.
  - Identify any off trail use immediately and have a plan to eliminate the problem.
  - ND Parks and Recreation Department recommends using the Best Management Practices when implementing this project.
  - Removal of existing trees should be completed when all other options are exhausted.
  - **Tree mitigation should be completed on a 2:1 basis and completed in the area of disturbance.**

Project Expenditure and Reimbursement Process
Contributions and Expenses
To be eligible for reimbursement funds, project costs must be incurred after the federal project approval start date. Donations of equipment, labor, and materials must be contributed after the federal project approval start date as well. Cash contributions may be received at any time.

The bidding and procurement process must also begin after the federal project approval start date; this date will be indicated on your project agreement from NDPRD. Please note a pre-approval award letter will be sent out to all projects that are ranked high enough to be funded; final approval will be contingent upon Solicitation of View (SOV) letters and responses. Upon successful completion of reviews, a project agreement, to include the project start/completion date, will be provided to the sponsor.

Local Share
Local match may include donated/volunteer labor, donated equipment and materials, and force account.

- Donated Labor: The time of a person donating services will be valued at a rate paid as a general laborer (per North Dakota Job Service's General Laborer Rate for the project area location, documented and provided by sponsor to NDPRD) unless the person is professionally skilled in the work being performed on the project (i.e. mason doing work on a retaining wall). When this is the case, the wage rate this individual is normally paid for performing this service may be charged to the project. The rates for labor should **not** include payroll additives or overhead costs. Evidence of the skilled labor rates must accompany the reimbursement request. Volunteer labor may be used as match only and is never a reimbursable item.
- Donated Equipment and Materials: Donated equipment and materials may be used as match only and are never reimbursable items. The value of the donated materials and equipment rental rates must be documented through an invoice or official letter from the donor/vendor.
- Force Account: Force account is different than volunteer labor or donated equipment and supplies. Force account refers to the use of a project sponsor's staff, equipment, and/or materials. All or part of the project sponsor's share may be provided through force account. Documentation must be verifiable from the project sponsor's records, and must be reasonable and necessary for efficient completion of the project.

Federal Matching Share
The federal share through the RTP for projects is limited to 80 percent except under the following circumstances:

- A Federal agency project sponsor may provide its own funds toward RTP projects as additional Federal share up to 95 percent of the project cost. The limitation is intended to ensure commitment to the project from State, local, or private co-sponsors. Under this provision, a Federal agency project sponsor may provide any amount of funds, provided the total Federal share does not exceed 95 percent.

- Funds from Federal Programs: RTP funds may be matched with funds available under other Federal funding programs, if the project also is eligible for funding under the other Federal program. Federal funds received by any project sponsor from another Federal program may be credited as if they were the non-Federal share, and may be used to match RTP project funds up to 100 percent of the project cost.

Procurement

Please note *this section is only applicable to project sponsors that are Title VI compliant*. If the sponsor is not Title VI compliant, the NDPRD will be coordinating the bidding and procurement process.

Grant recipients are required to follow the State of North Dakota's procurement guidelines when purchasing goods or services needed to complete a project. Please refer to N.D.C.C. §54-44.4-14 and N.D.A.C. Chapter 4-12-08.

- Purchases $2,500.00 and below: Use adequate procedures to ensure commodities and services are obtained at a fair and reasonable price, which may include the soliciting only one informal bid or proposal. Rotate vendors solicited on an equitable basis "Fair and reasonable" price can be based on previous purchases, market research, a published price list, or by simply soliciting more than one vendor. Remember, "When in doubt, bid it out." Use the state purchasing card whenever possible.
- Purchases $2,500.01 to $25,000.00: Solicit no fewer than three vendors, insofar as practical, to submit oral or written informal bids or proposals. If you do not receive three bids or proposals, provide a written justification (e.g., "only two known vendors" or "contacted three vendors, only two responded").
- Purchases over $25,000.00: Solicit formal sealed bids or proposals with notice to approved bidders on the State Bidders List and post on the State Procurement Online website.
- Limited Competitive and Noncompetitive Procurements: Occasionally, circumstances arise under which a fully competitive procurement process may be difficult or impossible. Procurement is noncompetitive when there is no bidding process. Limited competition occurs when competition is possible, but the requirements of the solicitation restrict competition to particular bidders. Project sponsors must use the State's Alternate Procurement Request form, SFN 51403 to document this process and submit to NDPRD prior to entering into a contract or incurring an expense which is classified as a limited competitive or noncompetitive purchase. In accordance with federal regulations, NDPRD will then forward to FHWA for approval. NDPRD will notify the project sponsor of FHWA's decision within 10 business days of the forms submittal along with a reason, if denied.
- Documentation Requirements: Each procurement transaction must be adequately documented for audit and public record purposes. If the purchase is over $2,500.01, the procurement file must have evidence that three vendors were solicited or document the reason three bids were not obtained using the guidelines and forms listed above. Include

any required approvals, solicitation documents used, list of bidders solicited and responses received. In addition, a bid tab or summary must be included which includes the name, address and phone number of the all bidders along with evaluation worksheets, reasons for rejecting a particular bid, and method of award (e.g. purchasing card or purchase order).

- Exemptions by Statute: Please note, certain commodities and services are not subject to state procurement laws. The following commodities and services are exempted from state procurement practices, as follows:
    - Land, building, space, or the rental thereof, however before making a commitment to obtain land for a RTP project, an appraisal must be submitted to the Parks and Recreation Department for approval. The land is required to be appraised by a certified general appraiser with federal experience according to the Uniform Appraisal Standards for Federal Land Acquisitions (located on the web at http://www.justice.gov/enrd/land-ack/Uniform-Appraisal-Standards.pdf). No more than the appraised value can be paid.
    - Specific commodities and services as determined by written directive by the Director of OMB in N.D.A.C § 4-12-01-04 such as: A. contracts for public buildings and public improvement contract bids, pursuant to N.D.C.C. Title 48. B. Contracts for architect, engineer, and land surveying services pursuant to N.D.C.C. Chapter 54-44.7.

Public Improvement Projects

Public improvement means any improvement undertaken by a governing body for the good of the public and which is paid for with any public funds, including public loans, bonds, leases, or alternative funding, and is constructed on public land or within an existing or new public building or any other public infrastructure or facility if the result of the improvement will be operated and maintained by the governing body. The term does not include a county road construction and maintenance, state highway, or public service commission project governed by title 11, 24, or 38.

The threshold for bidding construction of a public improvement is one hundred fifty thousand dollars. The threshold for procuring plans, drawings, and specifications from an architect or engineer for construction of a public improvement is one hundred fifty thousand dollars.

If the estimated cost for the construction of a public improvement is in excess of the threshold, the governing body shall advertise for bids by publishing for three consecutive weeks. The first publication of the advertisement must be at least twenty-one days before the date of the opening of bids.

Each governing body shall require a statement from any person preparing the plans and specifications for a public building or facility that, in the professional judgment of that person, the plans and specifications are in conformance with the Americans with Disabilities Act accessibility guidelines for buildings and facilities as contained in the appendix to title 28, Code

of Federal Regulations, part 36 [28 CFR 36], subject to the exception stated in section 54-21.3-04.1.

*Please refer to http://www.legis.nd.gov/cencode/t48c01-2.pdf for more detail and specific guidelines in regards to Public Improvement Project Bids and Contracts.

- Required Contract Language: Attached to this manual is FHWA Form 1273 and Title VI nondiscrimination assurances, which are required to be included in its entirety in every RTP contract between a project sponsor and any organization, group, agency or individual they do business with (see attachments B and C). Failure to include this form will result in forfeiture of RTP funds for the project portion covered by of the contract in question. While including this form is a federal requirement, only certain portions may apply depending on the contracted dollar amount or the location of the project (federal road right of way). Please direct any questions relating to this form to NDPRD grant staff.

- Disadvantaged Business Enterprise Program: Project sponsors are encouraged to work with disadvantaged businesses, including those owned by minorities, women, and socially and economically disadvantaged individuals, when practical and applicable to the State's procurement guidelines. For more information on the ND Department of Transportation's Disadvantaged Business Enterprise Program, please visit http://www.dot.nd.gov/divisions/civilrights/dbeprogram.htm.

Reimbursement

The project sponsor will not receive upfront funding at the time of project approval. Instead, the sponsor must pay the bills and be reimbursed for a maximum of 80% of the expenses incurred for the project. **To avoid the risk of losing funding, reimbursement requests must be submitted approximately every 6 months during the project period.** Land donations will be credited towards the match of the sponsor's share of the project.

As in any program where a reimbursement is requested for a portion of the project costs, adequate documentation and records are essential. There must be definite supporting documentation (i.e. invoices and canceled checks-**front and back**) for each item of cost claimed-estimates are not sufficient. NDPRD may request additional support documentation in order to process a billing.

- Reimbursement Requests: The following is a list of documentation NDPRD will need to process reimbursement requests:
    - Grant Program Reimbursement Request Form.
    - Affidavit of publication, supplied by the newspaper when you advertise for bids.
    - For purchases over $2,500.01, include any required approvals, solicitation documents used, list of bidders solicited and responses received. In addition, a bid tab or summary must be included which includes the name, address and phone number of the all bidders along with evaluation worksheets, reasons for rejecting

a particular bid, and method of award (e.g. purchasing card or purchase order). Forms should be dated and signed by responsible official.
    - Contractor invoices (or final payment, if countersigned by contractor acknowledging payment of all prior charges, and if the cost of each major work item is shown) and cancelled checks to contractor (**front and back**).
    - All other cancelled checks (**front and back**).
    - Copies of invoices. Not monthly statements.
    - Individual earnings records for the calendar year or payroll journals. Should show gross wages, withholdings and net pay for each pay period – See Force Account Form.
    - Equipment rental time records.
    - Detailed schedule showing how you computed owned-equipment rental rates. For donated equipment time, you must use hourly rates via a quote from a local rent all or a published equipment billing chart for a municipality.

- Partial Billings: A partial billing along with supporting documentation may be submitted to NDPRD after portions of the work have been completed. Submit the completed "Reimbursement Request Form." The state will retain 5% of the grant amount until the project is complete and a final inspection completed. Supporting documentation needed includes the following:
    - Expenditure Records indicated above
    - Volunteer Logs

- Final Billings: In order for a project to be considered completed and ready for final billing, it should be submitted within thirty days of the completion of the project or grant expiration date, whichever comes first. Final project billings must be submitted to NDPRD utilizing the process outlined above. Final project billing and grant closeout will not be completed until NDPRD has conducted the final inspection and certified the project is indeed complete, meeting the project description outlined in the grant application and/or project amendment.

- Reimbursement Request Form: A separate file should be established and maintained for each RTP project. The project sponsor is responsible to track costs according to the categories on the Grant Programs Reimbursement Request Form and must maintain an auditable record for a period of not less than 3 years from the date of the final reimbursement. A grant reimbursement form must be submitted for all payment requests and reimbursements. Only the form provided by NDPRD will be accepted.

Projects that have not shown progress for six months, risk potential termination of RTP funding. If no reimbursement requests are received, NDPRD will assume no progress has been made.

Amendments

During the project period, various situations may result in changes or deviations from the Project description. An amendment is necessary to add to, or alter the approved project. Changes that

may necessitate an amendment are increases or decreases in the grant amount, project scope changes, or an extension of the project period.

- Changes in Project Scope: Only those items approved for the project are eligible for federal assistance. Similarly, facilities must be constructed in the same location as designated on the plans submitted with the application. Due to unforeseen changes in project costs or revisions in the plans for the facility, certain items may have to be added or deleted from the project after it is approved. These changes may require submission to the Federal Government for approval. In the case of adding an item to the project, construction on that item cannot begin until the amendment is approved.

  The amount of federal assistance specified on the award letter is the maximum amount reserved for that particular project. Costs over this amount have to be paid by the applicant. All changes in project scope should be in accordance with the intent of the original application, and must be justifiable. The need for the change must be documented by a letter to the NDPRD, accompanied by revised cost estimates, construction plans and maps.

- Project Period Extensions: All acquisition and development must take place within the project period, which is identified in the award letter. The award letter is sent to the project sponsor after the project has received Federal approval. The target date for project completion will be based on an 18-month project period. The project sponsor is encouraged to complete the project as soon as possible as inflation can add a 5% cost increase each year.

  If the project cannot be completed during the period identified on the project agreement, contact NDPRD.

- Submission of an Amendment Request: The sponsoring agency initiates the amendment by submitting a request for the changes to NDPRD. This request should include all project revisions desired, including cost estimates, maps or design plans, and justification of the need for the changes. It is recommended the NDPRD be contacted prior to the submission of the amendment request. Department staff will be able to provide advice on the feasibility of an amendment approval. An amendment for a change in project scope can be requested any time prior to the construction of the added item or acquisition of the added tract. An amendment for an extension of time should be submitted forty-five days before the project is scheduled to expire.

  It is essential that amendment requests be kept to a minimum. Amendments are used to cover items that could not be anticipated in the original project. Major deviations from the original project will not be accepted. It is the responsibility of the project sponsor to thoroughly determine the type of project prior to submission and, upon approval, carry through with that project.

Project Termination
A project sponsor may request withdrawal of the project at any time prior to the first payment or expenditure of grant funds. After the initial payment, the project may be rescinded, modified or amended only by written mutual agreement between the project sponsor and NDPRD.

NDPRD may terminate the project in whole or in part, at any time before the date of completion, if it is determined the project sponsor has failed to comply with the terms of the project proposal or the intent of the program. Failure by the project sponsor to comply with the terms of the grant may cause suspension of all obligations by and a return of any monies received. If a project is terminated the project sponsor will be notified in writing of the determination and the reasons for the termination, together with the effective date. Payments made to the project sponsor or recovery of funds by the NDPRD under projects terminated for cause shall be in accord with the legal rights and liabilities of the parties.

NDPRD may terminate the grants in whole, or in part at any time before the date of completion, when all parties agree that the continuation of the project would not produce beneficial results commensurate with the further expenditure of funds. The parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated. The project sponsor shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. Termination either for cause or for convenience requires the project in question be brought to a state of recreational usefulness agreed upon by the project sponsor and NDPRD or all funds must be returned.

Project Site Retention & Future Responsibilities
At the time of project approval, the project sponsor through the acceptance of funds, commits that the facilities developed with federal assistance must remain open for general public use and will be operated and maintained. If RTP monies are used for land acquisition the land must remain in public trail use for perpetuity. If RTP monies are used for development, the site and facility must remain in public trail use until the facilities become obsolete or are at the end of their useable life.

Signage Requirement
Project sites funded through the Recreational Trails Program are required to display language and/or a sign stating the funding assistance for the site came through a partnership between the FHWA and NDPRD.

Attachment C: FHWA Form 1273

FHWA-1273 -- Revised May 1, 2012

REQUIRED CONTRACT PROVISIONS
FEDERAL-AID CONSTRUCTION CONTRACTS

I. General
II. Nondiscrimination
III. Nonsegregated Facilities
IV. Davis-Bacon and Related Act Provisions
V. Contract Work Hours and Safety Standards Act Provisions
VI. Subletting or Assigning the Contract
VII. Safety: Accident Prevention
VIII. False Statements Concerning Highway Projects
IX. Implementation of Clean Air Act and Federal Water Pollution Control Act
X. Compliance with Government wide Suspension and Debarment Requirements
XI. Certification Regarding Use of Contract Funds for Lobbying

ATTACHMENTS

A. Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (included in Appalachian contracts only)

I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under Title 23 (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services).

The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services). The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Contracting agencies may reference Form FHWA-1273 in bid proposal or request for proposal documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract).

2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract.

3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.

4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors.

II. NONDISCRIMINATION

The provisions of this section related to 23 CFR Part 230 are applicable to all Federal-aid construction contracts and to all related construction subcontracts of $10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR 60, 29 CFR 1625-1627, Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 60-1.4(b) and, for all construction contracts exceeding $10,000, the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.

Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR 60, and 29 CFR 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), and Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The following provision is adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.

1. Equal Employment Opportunity: Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (28 CFR 35, 29 CFR 1630, 29 CFR 1625-1627, 41 CFR 60 and 49 CFR 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 1630 are incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract.

b. The contractor will accept as its operating policy the following statement:

"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."

2. EEO Officer: The contractor will designate and make known to the contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active EEO program and who must be assigned adequate authority and responsibility to do so.

3. Dissemination of Policy: All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

4. Recruitment: When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.

c. The contractor will encourage its present employees to refer minorities and women as applicants for employment. Information and procedures with regard to referring such applicants will be discussed with employees.

5. Personnel Actions: Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with its obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of their avenues of appeal.

6. Training and Promotion:

a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.

b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).

c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of employees who are minorities and women and will encourage eligible employees to apply for such training and promotion.

7. Unions: If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use good faith efforts to obtain the cooperation of such unions to increase opportunities for minorities and women. Actions by the contractor, either directly or through a contractor's association acting as agent, will include the procedures set forth below:

a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.

b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minorities and women. The failure of a union to provide sufficient referrals (even though it is obligated to provide exclusive referrals under the terms of a collective bargaining agreement) does not relieve the contractor from the requirements of this paragraph. In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the contracting agency.

8. Reasonable Accommodation for Applicants / Employees with Disabilities: The contractor must be familiar with the requirements for and comply with the Americans with Disabilities Act and all rules and regulations established there under. Employers must provide reasonable accommodation in all employment activities unless to do so would cause an undue hardship.

9. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment: The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.

a. The contractor shall notify all potential subcontractors and suppliers and lessors of their EEO obligations under this contract.

b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

10. Assurance Required by 49 CFR 26.13(b):

a. The requirements of 49 CFR Part 26 and the State DOT's U.S. DOT-approved DBE program are incorporated by reference.

b. The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted

contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the contracting agency deems appropriate.

11. Records and Reports: The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following the date of the final payment to the contractor for all contract work and shall be available at reasonable times and places for inspection by authorized representatives of the contracting agency and the FHWA.

a. The records kept by the contractor shall document the following:

(1) The number and work hours of minority and non-minority group members and women employed in each work classification on the project;

(2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and

(3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women;

b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special provision, the contractor will be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

III. NONSEGREGATED FACILITIES

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of $10,000 or more.

The contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

IV. DAVIS-BACON AND RELATED ACT PROVISIONS

This section is applicable to all Federal-aid construction projects exceeding $2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size). The requirements apply to all projects located within the right-of-way of a roadway that is functionally classified as Federal-aid highway. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. Contracting agencies may elect to apply these requirements to other projects.

The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 "Contract provisions and related matters" with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

1. Minimum wages

a. All laborers and mechanics employed or working upon the site of the work, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph 1.d. of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph 1.b. of this section) and the Davis-Bacon poster (WH–1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

b. (1) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(ii) The classification is utilized in the area by the construction industry; and

(iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(2) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(3) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. The Wage and Hour Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(4) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs 1.b.(2) or 1.b.(3) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

c. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

d. If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

2. Withholding

The contracting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract, or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the contracting agency may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

3. Payrolls and basic records

a. Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

b. (1) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the contracting agency. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g. , the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division Web site at http://www.dol.gov/esa/whd/forms/wh347instr.htm or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered

worker, and shall provide them upon request to the contracting agency for transmission to the State DOT, the FHWA or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the contracting agency..

(2) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(i) That the payroll for the payroll period contains the information required to be provided under §5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under §5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH–347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 3.b.(2) of this section.

(4) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

c. The contractor or subcontractor shall make the records required under paragraph 3.a. of this section available for inspection, copying, or transcription by authorized representatives of the contracting agency, the State DOT, the FHWA, or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the FHWA may, after written notice to the contractor, the contracting agency or the State DOT, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

4. Apprentices and trainees

a. Apprentices (programs of the USDOL).

Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.

Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

b. Trainees (programs of the USDOL).

Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration.

The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration.

Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

c. Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

d. Apprentices and Trainees (programs of the U.S. DOT).

Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the particular program.

5. Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

6. Subcontracts. The contractor or subcontractor shall insert Form FHWA-1273 in any subcontracts and also require the subcontractors to include Form FHWA-1273 in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

7. Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

8. Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

9. Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. Certification of eligibility.

a. By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

b. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

c. The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

V. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

The following clauses apply to any Federal-aid construction contract in an amount in excess of $100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by 29 CFR 5.5(a) or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

1. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

2. Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (1.) of this section, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic,

including watchmen and guards, employed in violation of the clause set forth in paragraph (1.) of this section, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1.) of this section.

3. Withholding for unpaid wages and liquidated damages. The FHWA or the contacting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2.) of this section.

4. Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1.) through (4.) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1.) through (4.) of this section.

VI. SUBLETTING OR ASSIGNING THE CONTRACT

This provision is applicable to all Federal-aid construction contracts on the National Highway System.

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the contracting agency. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635.116).

a. The term “perform work with its own organization” refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions:

(1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;

(2) the prime contractor remains responsible for the quality of the work of the leased employees;

(3) the prime contractor retains all power to accept or exclude individual employees from work on the project; and

(4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract.

2. The contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

5. The 30% self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements.

VII. SAFETY: ACCIDENT PREVENTION

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C.3704).

VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, Form FHWA-1022 shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

18 U.S.C. 1020 reads as follows:

"Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined under this title or imprisoned not more than 5 years or both."

IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

By submission of this bid/proposal or the execution of this contract, or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any person who is or will be utilized in the performance of this contract is not prohibited from receiving an award due to a violation of Section 508 of the Clean Water Act or Section 306 of the Clean Air Act.
2. That the contractor agrees to include or cause to be included the requirements of paragraph (1) of this Section X in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements.

X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost $25,000 or more – as defined in 2 CFR Parts 180 and 1200.

1**. Instructions for Certification – First Tier Participants:**

a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.

b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.

c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default.

d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. “First Tier Covered Transactions” refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (https://www.epls.gov/), which is compiled by the General Services Administration.

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The

knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

* * * * *

2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

(1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;

(2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification; and

(4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

2. **Instructions for Certification - Lower Tier Participants:**

(Applicable to all subcontracts, purchase orders and other lower tier transactions requiring prior FHWA approval or estimated to cost $25,000 or more - 2 CFR Parts 180 and 1200)

a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. “First Tier Covered Transactions” refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (https://www.epls.gov/), which is compiled by the General Services Administration.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The

knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

* * * * *

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

* * * * *

XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed $100,000 (49 CFR 20).

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the

undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed $100,000 and that all such recipients shall certify and disclose accordingly.

ATTACHMENT A - EMPLOYMENT AND MATERIALS PREFERENCE FOR APPALACHIAN DEVELOPMENT HIGHWAY SYSTEM OR APPALACHIAN LOCAL ACCESS ROAD CONTRACTS

This provision is applicable to all Federal-aid projects funded under the Appalachian Regional Development Act of 1965.

1. During the performance of this contract, the contractor undertaking to do work which is, or reasonably may be, done as on-site work, shall give preference to qualified persons who regularly reside in the labor area as designated by the DOL wherein the contract work is situated, or the subregion, or the Appalachian counties of the State wherein the contract work is situated, except:

a. To the extent that qualified persons regularly residing in the area are not available.

b. For the reasonable needs of the contractor to employ supervisory or specially experienced personnel necessary to assure an efficient execution of the contract work.

c. For the obligation of the contractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that the number of nonresident persons employed under this subparagraph (1c) shall not exceed 20 percent of the total number of employees employed by the contractor on the contract work, except as provided in subparagraph (4) below.

2. The contractor shall place a job order with the State Employment Service indicating (a) the classifications of the laborers, mechanics and other employees required to perform the contract work, (b) the number of employees required in each classification, (c) the date on which the participant estimates such employees will be required, and (d) any other pertinent information required by the State Employment Service to complete the job order form. The job order may be placed with the State Employment Service in writing or by telephone. If during the course of the contract work, the information submitted by the contractor in the original job order is substantially modified, the participant shall promptly notify the State Employment Service.

3. The contractor shall give full consideration to all qualified job applicants referred to him by the State Employment Service. The contractor is not required to grant employment to any job applicants who, in his opinion, are not qualified to perform the classification of work required.

4. If, within one week following the placing of a job order by the contractor with the State Employment Service, the State Employment Service is unable to refer any qualified job applicants to the contractor, or less than the number requested, the State Employment Service will forward a certificate to the contractor indicating the unavailability of applicants. Such certificate shall be made a part of the contractor's permanent project records. Upon receipt of this certificate, the contractor may employ persons who do not normally reside in the labor area to fill positions covered by the certificate, notwithstanding the provisions of subparagraph (1c) above.

5. The provisions of 23 CFR 633.207(e) allow the contracting agency to provide a contractual preference for the use of mineral resource materials native to the Appalachian region.

6. The contractor shall include the provisions of Sections 1 through 4 of this Attachment A in every subcontract for work which is, or reasonably may be, done as on-site work.

Rules and Regulations

Federal Register
Vol. 75, No. 177
Tuesday, September 14, 2010

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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OFFICE OF MANAGEMENT AND BUDGET

2 CFR Part 170

RIN 0348–AB61

Requirements for Federal Funding Accountability and Transparency Act Implementation

AGENCY: Office of Federal Financial Management, Office of Management and Budget (OMB).

ACTION: Interim final guidance to agencies with opportunity for comment.

SUMMARY: OMB is issuing interim final guidance to agencies to establish requirements for Federal financial assistance applicants, recipients, and subrecipients that are necessary for the implementation of the Federal Funding Accountability and Transparency Act of 2006, hereafter referred to as "the Transparency Act" or "the Act". This interim final guidance provides standard wording for an award term that each agency must include in grant and cooperative agreement awards it makes on or after October 1, 2010, to require recipients to report information about first-tier subawards and executive compensation under only those awards. This implementation of the requirement for reporting of subawards and executive compensation under Federal assistance awards parallels the implementation for subcontracts and executive compensation under Federal procurement contracts, which is in the Federal Acquisition Regulation.

DATES: The effective date for this interim final guidance is September 14, 2010. Comments on the interim final guidance must be received by no later than October 14, 2010.

ADDRESSES: Comments may be sent to regulations.gov, a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type "FFATA subaward reporting" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received by the date specified above will be included as part of the official record and considered in preparing the final guidance.

Marguerite Pridgen, Office of Federal Financial Management, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503; telephone 202–395–7844; fax 202–395–3952; e-mail *mpridgen@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Marguerite Pridgen, Office of Federal Financial Management, Office of Management and Budget, telephone (202) 395–7844 (direct) or (202) 395–3993 (main office) and e-mail: *mpridgen@omb.eop.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On June 6, 2008 [73 FR 32417], the Office of Management and Budget (OMB) published proposed guidance to Federal agencies with an award term needed to implement requirements related to subaward reporting under the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282, as amended by section 6202 of Public Law 110–252, hereafter referred to as "the Transparency Act" or "the Act"). The guidance was proposed for adoption in a new part 33 within title 2 of the Code of Federal Regulations (CFR).

We are adopting the interim final guidance in 2 CFR part 170, a different 2 CFR part than part 33 in which we originally proposed to adopt it in June 2008. The reason is that part 33 now is within a newly created subchapter in 2 CFR that is for OMB guidance related to pre-award responsibilities (for more information on the new 2 CFR subchapters, see the notice in today's **Federal Register** that adopts 2 CFR part 25). The content of the guidance following this preamble is better suited to another new subchapter for guidance on national policy requirements, a subchapter that includes part 170.

We received comments from 75 entities in response to the 2008 **Federal Register** notice, including: 29 State agencies and two associations of State officials; 16 institutions of higher education and an association of research universities; six nonprofit organizations and an association of nonprofits; two local governmental organizations and an association of local government officials; two commercial firms; one individual; and 14 Federal agencies. Some of the comments concerned subaward reporting under the Transparency Act but were not directly related to the content of the guidance. For example, we received comments that suggested:

- Specific data elements that either should be included in, or excluded from, the information that will be required for each subaward.
- A need for better definitions of some data elements or clarification of the information desired in some data fields.
- Using the same information technology systems for submission of data on both: (1) Subawards under Federal assistance awards subject to the Transparency Act's requirements; and (2) subcontracts that entities receiving Federal procurement contracts must submit under the Act.
- Other specific features that it would be important to include in those information technology systems.

When we received them in 2008, we referred comments that do not directly relate to the policy guidance to the appropriate Federal agency groups, including the groups that were working on the design of systems to which entities will submit data to fulfill their reporting responsibilities under the Act. As stated in the 2008 **Federal Register** notice, the data elements and other aspects of subaward reporting are separate from the policy guidance. The General Services Administration has recently published the information collections with an opportunity for public comment that provide the specific data elements required for Transparency Act reporting of subawards and executive compensation [75 FR 43165]. The Federal acquisition councils have simultaneously published for public comment their proposed information collection for subcontract reporting pursuant to the Transparency Act.

As it was proposed in 2008, the new part 33 would have required direct recipients of Federal agency awards and, with some exceptions, subrecipients at all lower tiers (if their

subawards were subject to Transparency Act reporting requirements) to have DUNS numbers and register in the CCR. Since the publication of the June 2008 proposal, OMB proposed a new part 25 to 2 CFR on February 18, 2010 [75 FR 7316]. The proposed part 25 superseded the DUNS number and CCR elements of the June 2008 notice and limited the DUNS number requirement to applicants, recipients, and first-tier subrecipients only. The preamble of the February 2010 **Federal Register** document also contained responses to the public comments on the DUNS and CCR requirements proposed in June 2008. Part 25 is being finalized in another document in this section of today's **Federal Register.** Therefore, the DUNS and CCR requirements will not be addressed further in this document. The remainder of this document addresses the portions of the 2008 proposal related to reporting of subawards, as well as the additional reporting on executive compensation that is required by the subsequent amendment to the Transparency Act. In developing the interim final policy guidance on subaward reporting, we considered:

- All comments relevant to that subject in the 2008 proposal;
- The experience gained under the guidance for, and practical implementation of, recipient reporting required by section 1512 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, hereafter referred to as "the Recovery Act"), which we consider to be the pilot program for subaward reporting envisioned by paragraph (d)(1) of section 2 of the Transparency Act; and
- New transparency and Open Government policies put in effect since the publication of the 2008 proposal, including the amendment of the Transparency Act by section 6202 of Public Law 110–252 to require the reporting of the names and total compensation of a recipient's or subrecipient's five most highly compensated executives.

Because most aspects of this guidance were proposed in 2008, with opportunity for comment, and given the public benefits to be gained by expediting the implementation of subaward reporting under the Transparency Act, we are publishing this guidance as interim final.

The following section provides detailed responses to comments that we received on the portions of the guidance proposed in 2008 that are relevant to subaward reporting. Each response describes any revisions that we included in the interim final guidance as a result of the comment.

II. Comments, Responses, and Changes to the Guidance

A. Comments on the 2008 Federal Register Preamble

Comment: Two commenters noted that the preamble of the 2008 **Federal Register** notice missed one data element—an award title descriptive of the purpose of the funding action—when it listed the data elements that the Transparency Act specifies for Federal agencies' awards.

Response: The commenters are correct that the Act specifies the additional data element. The inadvertent omission did not affect the proposed guidance, however. The data elements were listed solely as background explanatory information in the preamble of the 2008 **Federal Register** notice.

Comment: With respect to that same list of data elements in the preamble, one commenter asked whether the inclusion of the country of the recipient and its parent entity was a typographical error. The commenter suggested that the data element likely was meant to be the *county,* rather than the *country.*

Response: Although the specifics of the data elements do not affect the guidance, the data element specified in the Transparency Act is the country, rather than the county.

B. General Comments Related to the Act and Guidance

Comment: Thirty nine commenters expressed concern that recipients and subrecipients must allocate additional resources in order to comply with the new requirements for subaward reporting. They cited the need to change business processes and systems to begin to collect data that they are not collecting now and do it electronically. They also noted the continuing need for resources to compile and report data after that initial transition period. Most of the commenters noted the fiscal impact of subaward reporting and the provision in the Transparency Act that provides for recovering the additional costs. Some State agencies expressed concern that the increased administration costs would deplete resources available for program purposes and some suggested that the new requirement is an unfunded mandate. Some institutions of higher education noted that the limitation in OMB Circular A–21 on recovery of indirect costs could prevent them from recovering those costs from their Federal awards. Some State agencies suggested that the costs should be allocable as direct program costs. A number of commenters were concerned that the added burdens of reporting could discourage some entities, especially smaller subrecipient entities, from applying for Federal grants.

Response: This guidance requires only prime grant recipients to report to the Federal Government on subawards and executive compensation. Nevertheless, we understand the administrative changes and effort that are associated with reporting on subawards. As section (d)(2)(A) of the Transparency Act provides, recipients and subrecipients are allowed "to allocate reasonable costs for the collection and reporting of subaward data as indirect costs." We will assess the overall cost impact of the new requirements on recipients and subrecipients, as well as their ability to recover the indirect costs under current limitations in statute, policy, program regulations, or practice.

Comment: Nine commenters suggested that it was premature to propose the policy guidance. Among reasons given were that we did not yet provide details about all data elements that will be required in each report of an obligating action, the definitions of the data elements, and the reporting format and procedures that will be used. A few commenters noted that the award term in the proposed guidance referred to a Web site at which entities would submit subaward data but observed that the site was not ready to receive data and had no further details on what or how to report. One commenter asked if there was an exception process when there are systems issues to be resolved.

Response: We revised the wording of the award term to further clarify that the Web site will be the source of the detailed information on what to report (*i.e.,* the specific data elements and their definitions) and how to report (*i.e.,* the formats and information technology system features). That information will be posted at the Web site before non-Federal entities are required to report data on subaward obligations. In addition, the General Services Administration's Paperwork Reduction Act information collection also provides the specific data elements required for Transparency Act reporting.

There is an important distinction to be made between the policy guidance contained in this **Federal Register** notice and the operational details on what and how to report. Under the current statute, non-Federal entities will be required to report subaward data, a basic requirement that does not depend on the specific data elements and

procedural details. The policy guidance and the award term it contains are the means for having agencies formally communicate that basic statutory requirement to recipients and subrecipients. Neither the guidance nor the award term needs to contain the operational details about the specific data elements to be reported or how to submit the data. Both need to be in place now so that agencies can use the award term to provide timely notification to recipients and subrecipients about their responsibilities.

Nonetheless, we fully recognize that the operational details also are very important. To ensure adequate opportunity for public comment, we have published the data elements and other details that affect the public. Further, we have made every effort to minimize the burden associated with Transparency Act reporting, through both pre-population of data and use of an electronic system that facilitates streamlined reporting [75 FR 43165–43166]. With respect to the question concerning the exception process, the Transparency Act does not provide for exceptions due to unresolved systems issues.

Comment: Twenty two commenters recommended delaying the January 1, 2009, date on which the Transparency Act provided that subaward reporting would begin. They stated that the implementation timeframe was not reasonable, especially since the procedures for compiling and submitting the data would not be set until after completion of a pilot that had not yet begun. Seven of the commenters also recommended that OMB grant the 18-month extension to the deadline that the Act allowed for subrecipients under awards to State, local, and tribal governments, if the Director of OMB determined that compliance would impose an undue burden for those subrecipients.

Response: A subaward reporting pilot was conducted in the Fall of 2008 to assess the burden of subaward reporting on recipients and subrecipients. The results of the pilot were mixed and showed that there were various unresolved policy and procedural issues surrounding subaward reporting. In 2009, the Recovery Act was enacted and required reporting of funds awarded to prime recipients, subrecipients and vendors. The Recovery Act reporting effort, which commenced in October 2009, served as a demonstration of subaward reporting on a governmentwide scale which is why we consider it to be the pilot program for subaward reporting envisioned by paragraph (d)(1) of section 2 of the Transparency Act. Various audits and reviews have been conducted on Recovery Act implementation. Some of the reports from those reviews are available on the Recovery.gov Web site under the "Accountability" section and include information on recipient challenges with implementing reporting requirements under the Recovery Act.

In a memorandum dated April 6, 2010 with the subject line "Open Government Directive—Federal Spending Transparency," OMB established an October 1, 2010 deadline for Federal agencies to initiate subaward reporting pursuant to the Transparency Act and provide a timeline for additional guidance to assist in meeting the goals established in the memorandum.

Comment: Three commenters pointed out that the proposed guidance did not include a detailed implementation of a Transparency Act provision that provides an exemption from the subaward reporting requirement for an entity that demonstrates to the Director of OMB that its gross income, from all sources, did not exceed $300,000 in the previous tax year. The Act provides for the exemption until the Director determines that the imposition of the reporting requirement will not place an undue burden on such entities. The commenters noted that the guidance did not disclose how to request a reporting exemption, what proofs would be required, and what evaluation factors OMB would use in granting exemptions.

Response: The award term in Appendix A to part 170 of the guidance properly includes that exception to the subaward reporting requirement. Section 2(e) of the Transparency Act allows the Director, OMB, to exempt any entity that demonstrates its gross income, from all sources, did not exceed $300,000 in the entity's previous tax year, from reporting the first-tier subaward information, until the Director determines that the imposition of the reporting requirement will not cause undue burden on the entity. The Director has exempted entities that fall under this category at this time.

Comment: Two commenters raised questions concerning the applicability of the Paperwork Reduction Act (PRA). One stated that the Transparency Act and guidance did not comply with the PRA. The other suggested that OMB could not yet provide the PRA clearance for the information collection associated with subaward reporting, because the data elements and format were not specified in the guidance proposed on 2008.

Response: As stated in the response to a previous comment, the nature of the guidance is distinct from that of the operational details. What requires PRA clearance, as correctly noted by the second commenter, are the data elements and similar details for which reporting burdens can be estimated. The General Services Administration has recently published the information collections for public comment that provide the specific data elements required for Transparency Act reporting of subawards and executive compensation [75 FR 43165]. It is not pertinent to the issuance of the guidance in this **Federal Register** notice on the basic statutory requirement to report.

Comment: With respect to the requirement to report each action under a subaward that obligates $25,000 or more in Federal funding, ten commenters recommended raising the $25,000 threshold due to the potential magnitude of the burdens, especially on small entities. The commenters suggested setting the threshold at $100,000 or more, to be parallel with their State's reporting requirement, the simplified acquisition threshold for Federal procurement contracts, or the threshold in OMB Circular A–133 at which an entity must have a single audit. One State agency asked if it could request a waiver to increase that threshold.

Response: We made no change to the threshold in the guidance. The $25,000 threshold is set by the Transparency Act and there is no provision in the statute that authorizes a waiver to increase the threshold.

Comment: Four commenters stated that the new subaward reporting requirement overlapped with at least some Federal agencies' existing requirements for reporting on subawards. As an example, one commenter cited information about subawards that applications to agencies either contain or could be amended to contain. Two non-Federal entities and one Federal agency were concerned that the existing and new requirements could be redundant, thereby unnecessarily increasing the burdens of subaward reporting. One Federal agency stated that it currently obtained information about all subawards, and not just those above the $25,000 threshold, and did not want to lose insight into the subawards below $25,000 due to the Transparency Act threshold.

Response: Relatively few Federal agency awarding offices currently obtain the details about each subaward obligation that they would need to do the reporting under the Transparency Act. Many agencies receive individual applications that identify the applicant's

intent to make a subaward of a specified amount if its application is successful. However, the actual subaward recipient may not be known at that time or, if known, the amount that a successful applicant obligates may not be the same as it originally planned and proposed, for various reasons (*e.g.*, the Federal award it receives may be for a lesser amount than it proposed or it may rebudget after receiving the award, as pertinent Federal rules allow it to do without the Federal agency's prior approval). Given that what the application describes is only a plan, it cannot serve as a definitive source of information for Transparency Act purposes. At this time, we are not asking for reporting of subaward information below the first-tier.

With respect to the relatively few Federal awarding offices that do obtain post-award data on actual subaward obligations, we are directing those agencies to take the necessary steps to ensure that their recipients are not required, due to the combination of agency-specific and Transparency Act reporting requirements, to submit the same or similar data multiple times during a given reporting period.

Comment: Five commenters asked about the consequences of a subrecipient's noncompliance with requirements related to the Transparency Act. Two commenters expressed concern that delivery of essential services could be interrupted if awards could not be made or payments had to be suspended.

Response: After a subaward is made, the range of consequences that may result from the subrecipient's material failure to comply with a requirement related to the Transparency Act should be no different than it is for a material failure to comply with other Federal requirements. The same remedies are available to the recipient and—should the matter of a subrecipient entity's noncompliance become an issue for the Federal Government—to a Federal agency.

C. Comments Related to the Applicability of the Guidance

Comment: One commenter stated that the guidance should not apply to loan guarantees because the definition of "federal award" in the Transparency Act does not explicitly mention them. The commenter expressed concern that the requirement in the guidance for lenders, small businesses, and rural businesses to obtain DUNS numbers could be an added barrier to their participation in U.S. Department of Agriculture (USDA) rural development and Small Business Administration (SBA) programs that stimulate financing for small and rural businesses. The commenter recommended not applying the guidance to loan guarantees under those programs until a **Federal Register** notice was published, with an opportunity to comment, that proposed applying Transparency Act requirements to those programs specifically.

Response: Although the 2008 **Federal Register** notice proposed applicability of the guidance broadly to all of the types of financial assistance subject to the Transparency Act, we revised the interim final guidance to implement at this time only the reporting requirements specifically for first-tier subawards under grants and cooperative agreements in light of these public comments and concerns. We are deferring to a later date the implementation of subaward reporting under other financial assistance subject to the Act, which includes loans and loan guarantees, as well as lower-tier subawards.

We understand the legitimate concern that additional administrative requirements can have an impact on financial assistance applicants and recipients under any Federal program. However, to publish a notice that lists the hundreds of programs individually would be unnecessary and impractical.

Comment: One Federal agency suggested we make it clearer that financial assistance provided through assessed and voluntary contributions is subject to the guidance, by explicitly listing that type of assistance in the proposed definition of "Federal financial assistance subject to the Transparency Act." The definition in section 33.325 of the proposed guidance included them only implicitly, through the inclusion of a category of "other financial assistance transactions that authorize the non-Federal entities' expenditure of Federal funds."

Response: We agree and made the change to the guidance (in what now is section 170.320).

Comment: A Federal agency recommended that the guidance not apply to loans, loan guarantees, interest subsidies, and insurance that recipients provide as subawards to subrecipients. The agency stated that the Transparency Act did not explicitly identify them as subawards and their inclusion would be inconsistent with coverage of the administrative requirements for grants to and agreements with educational and other nonprofit organizations that are in 2 CFR part 215 (OMB Circular A–110).

Response: We did not revise the guidance. The Act requires OMB to "ensure that data regarding subawards are disclosed in the same manner as data regarding other Federal awards." The Transparency Act's definition of "federal award" includes types of financial assistance awards that are not subject to the administrative requirements in 2 CFR part 215, and therefore includes them both at the prime tier between Federal agencies and recipients and at lower tiers between recipients and subrecipients. While only subawards under grants and cooperative agreements need to be reported at this time, subawards under all types of Federal financial assistance subject to the Transparency Act will need to be reported at a later date.

Comment: One Federal agency expressed concern that it would be difficult to provide an actual dollar amount associated with a transfer of title to Federally owned property.

Response: We revised the definition of "Federal financial assistance subject to the Transparency Act" in that section (which now is section 170.320) to clarify that the guidance does not apply to transfers of title to Federally owned property.

Comment: One Federal agency suggested amending the proposed guidance to explicitly exclude Cooperative Research and Development Agreements (CRDAs) under 15 U.S.C. 3710a from coverage under the Transparency Act. CRDAs are instruments authorized for use between Federal laboratories and non-Federal entities for technology transfer purposes. The commenter noted that the statute permits a Federal laboratory to receive funds from a non-Federal entity under a CRDA and expressed concern that a funds transfer might be perceived as a subaward to the Federal laboratory.

Response: We agree and made a change to the definition of "Federal financial assistance subject to the Transparency Act" in that section (which now is section 170.320) of the guidance. The definition of "cooperative research and development agreement" in 15 U.S.C. 3710a excludes transactions under which Federal funds are provided to non-Federal entities. It also distinguishes CRDAs, which are not Federal financial assistance awards, from cooperative agreements under the Federal Grant and Cooperative Agreement Act in 31 U.S.C., chapter 63.

Comment: One commenter noted that the proposed guidance did not apply to a Federal agency that receives an award from another agency and asked whether it would apply to an award that a Federal agency receives from a non-Federal entity.

Response: Yes, the guidance applies. The non-Federal entity would have to report the subaward. At this time, the

non-Federal entity would not have to report lower-tier subawards. To clarify this, we revised the definition of "entity" in the award term that now is in Appendix A to part 170.

Comment: One commenter stated that it acts as a fund manager overseeing accounts for Federal agencies into which voluntary payments, court-ordered settlements, fines, and other sources of funds are deposited. It noted that the Federal agency specifies the entities to whom funds from those accounts are obligated. The commenter asked if it is the recipient in that case and the other entities are the subrecipients, or if the entities to whom it awards the funds are the prime recipients because the Federal agency makes the funding decisions.

Response: If the funds cited in the comment are available for obligation or reobligation for Federal program purposes, this situation is somewhat similar to that of a grant under which the recipient is authorized to: (1) Make loans for program purposes to subrecipients; (2) merge the funds received from those subrecipients' loan payments back into the corpus of grant funding; and (3) use those repaid funds to make new loans. In both that case and the case raised by the commenter, the non-Federal entity that manages Federal agency funds that are available for program purposes is the recipient. The entities that receive the funds that the recipient obligates or reobligates are subrecipients.

Comment: One commenter suggested not applying the reporting requirement below the first-tier of subawards under mandatory programs such as block and formula grants and other types of assistance to State, local, and tribal governments.

Response: The Transparency Act does not authorize a limitation on the reporting requirement to the first-tier of subawards. At this time, however, we are deferring to a later date the implementation of the reporting requirement below the first-tier.

Comment: Six commenters asked whether the requirements in the guidance applied to prior program announcements, awards, and subawards. One of the commenters pointed out that an applicant who already had applied in response to a previously issued announcement might have decided not to apply if it had been informed about the Transparency Act requirements prior to doing so. Others noted they would need to amend previously issued awards if the requirements applied to them.

Response: New Federal, non-Recovery Act funded grant awards and cooperative agreements with an award date on or after October 1, 2010, and resulting first-tier subawards, are subject to the reporting requirements in this guidance. New Federal grants and cooperative agreements are grants and cooperative agreements with a new Federal Award Identification Number (FAIN) as of October 1, 2010. They do not include obligating actions on or after October 1, 2010, that provide additional funding under continuing grants and cooperative agreements awarded in prior fiscal years.

D. Other Comments

Comment: Two commenters raised questions about the dates in the proposed paragraph 33.200(a)(2). One commenter asked what was meant by the effective date of the part cited in paragraph (a)(2)(i). The other commenter recommended changing the date in paragraph (a)(2)(ii). That paragraph required a Federal agency to incorporate Transparency Act requirements into a program announcement or other application instructions if awards would be made after October 1, 2008, in response to applications using those instructions. The commenter recommended changing the date to December 31, 2008.

Response: The guidance in 2 CFR part 170 is effective today, with its publication in the **Federal Register**. We revised the date in paragraph 170.200(a)(2)(ii) to October 1, 2010.

Comment: Three commenters noted that some entities may want to take advantage of the flexibility that the award term in the proposed guidance gave a recipient to either: (1) Pass the responsibility for reporting on lower-tier subawards to the subrecipients who made those subawards; or (2) do that reporting itself, which would require the recipient to collect the information from lower-tier subrecipients. One, a State agency, stated that it maintains a complete data base that should be sufficient to meet the Transparency Act requirements.

Response: We recognize the burdens associated with subaward reporting and understand that programs and organizations differ. However, prime recipients will not have the option to delegate reporting of subgrant information to their subrecipients. We believe that this may help reduce reporting burden on subaward recipients.

Comment: Six commenters asked for clarification on the meaning of the phrases "date of obligation" and "obligating action" used in the award term in the proposed section 33.220 with respect to subawards. Two commenters asked how the date of obligation would be defined for a subaward that allowed reimbursement of pre-award costs a subrecipient incurred on or after a "start date" that was prior to the date on which the subaward was signed.

Response: With respect to a subaward, an obligating action is a transaction that makes available to the subrecipient a known amount of funding for program purposes. Examples include a new subaward, an incremental funding amendment that increases the total amount of a subaward, or a quarterly allotment under a formula grant program.

We made no change to the guidance, since "obligations" is a well established term in OMB's guidance on administrative requirements for grants and agreements (2 CFR part 215 and the common rule that Federal agencies adopted to implement OMB Circular A–102). Under most Federal grants and cooperative agreements, recipients regularly report amounts of "unobligated balances" to Federal agencies on the standard financial reporting forms.

The date of obligation for a subaward is the date on which the recipient authorizes the subrecipient to incur costs against the known amount it obligates, and does so in a way that legally obliges the recipient to provide funds to cover costs that are incurred in accordance with the subaward's terms and conditions. That date usually is associated with the signature of a formal document, either the initial subaward or an amendment to it. That is distinct from the "start date" cited in the example of pre-award costs, since we assume that the subrecipient incurs those costs at its own risk, in anticipation of the subaward, and that the recipient has no legal obligation—until it signs the subaward—to provide award funds to cover those costs.

Comment: Eight commenters questioned whether the guidance required reporting of obligations or disbursements as the award amounts. One commenter recommended that recipients and subrecipients report "expenditures," the term used in the Transparency Act. Four State agencies asked how "obligations" would be determined in some programs that adjust the amount a subrecipient receives at some time after the initial obligation. One of the agencies cited the example of the school lunch program, under which the amount obligated is not known until after the subrecipient expends the funds.

Response: The guidance requires reporting of each obligation, rather than each disbursement against the amount

obligated. If a recipient obligates a specific known amount for a subaward, even if it may be adjusted later, it must report the obligation when it is made. For a program like the school lunch program, however, where the initial subaward provides the subrecipient with an open-ended authorization of unspecified amount, the obligation date corresponds to the date on which the amount of the obligation is specified. Reporting is required by the end of the month following the month in which the subaward obligation was made.

Comment: One commenter recommended revising the requirement to report each obligating action within 30 days of the date of obligation. The commenter suggested allowing reporting quarterly, semiannually, or annually.

Response: We changed the guidance and award term to require obligations to be reported no later than the end of the month following the month of the obligation. For example, if a subaward is made on October 2, 2010, the subaward information must be reported by no later than November 30, 2010.

Comment: Ten commenters requested additional clarification about the difference between a subaward, which must be reported under the Transparency Act, and procurement under an award, which is not subject to the reporting requirement.

Response: It is worth noting that recipients for many years have had to judge whether a transaction under their Federal award was a subaward or a procurement action. That is because a recipient must include different requirements in a subaward than it does in a procurement under an award, in accordance with the administrative requirements in 2 CFR part 215 (OMB Circular A 110) or the common rule implementing OMB Circular A 102. Also, when the transaction provides funds to a for-profit entity, the recipient must properly take into account whether the transaction would be more characteristic of a vendor relationship than a subrecipient under ___.210 of OMB Circular A–133. The judgments a recipient must make to decide whether a lower tier agreement is a subaward or procurement for Transparency Act reporting purposes are the same as the judgments it makes to establish which terms and conditions to include in the agreement. Prime recipients should refer to awarding agency supplemental guidance, if any, in making such a determination.

Two examples may help clarify the distinction, which is based on the purpose of the transaction between the recipient or subrecipient and the entity at the next lower tier. If the purpose of the lower-tier transaction is the same as the purpose of the substantive program supported by the Federal award at the prime tier, so that the recipient through that lower tier transaction is in effect handing a portion of the substantive program over to the lower-tier entity for performance, the lower-tier transaction is a subaward. The two examples follow:

• *Example 1: Provision of health services.* A Federal program provides funding to State agencies to deliver a variety of services for older citizens. If the State provides funds to a third party to carry out a type of service (*e.g.*, mental health services) that is authorized under the program and the State otherwise might deliver itself, the agreement is a subaward because the third party is carrying out substantive programmatic activity that is the purpose of the Federal award. If a recipient or subrecipient obtains the services of a third party to help in designing public service announcements or developing educational materials about the program—goods or services that the State or subrecipient needs to carry out the program that is the purpose of the award—that would be a procurement under the award or subaward.

• *Example 2: Research.* An agency makes an award to a university to investigate basic physics to understand why certain materials have the properties they do. To do some of the experiments, the university researchers need an instrument that does not yet exist. The university provides funding under the Federal award to a small firm to carry out a research and development project and develop an instrument. The award to the firm has the purpose of instrument development, and does not have the same purpose as the Federal award. The award to the firm is a procurement action. If the university instead made an award to the firm to perform some of the basic research on physics of materials that is the substantive program purpose of the Federal award, and the recipient determines it does not have a vendor relationship with the firm under this award as described in Sec. __.210 of the attachment to OMB Circular A–133, the award to the firm would be a subaward.

Comment: One commenter from a State agency said that it is unclear whether Medicaid is considered Federal financial assistance for the purposes of the subaward reporting requirement.

Response: There are no program exemptions under this guidance even though there are other types of exemptions which are described in the guidance. If a state makes a subaward under a grant or cooperative agreement to an entity other than an individual who is a natural person, the subaward is $25,000 or more, and no exemptions apply, the state would need to report the subaward.

Comment: Three commenters raised issues with wording in the award term in the proposed section 33.220 that related to the $25,000 reporting threshold for subawards. Two commenters asked for clarification on the meaning of "life of the subaward," as that phrase was used, both in the award term and the associated guidance to Federal agencies on use of the award term. Another commenter suggested that readers might perceive "$25,000 over the life of the subaward" to be inconsistent with "each action that obligates $25,000 or more in Federal funding." One of the commenters also suggested consistent wording to replace "a total value of $25,000" in one paragraph and "in that range" in another paragraph.

Response: With respect to the comment concerning the apparent inconsistency between "a total value of 25,000" and "each action that obligates $25,000 or more in Federal funding," it should be noted that the two phrases refer to related but different requirements addressing lower-tier subaward reporting. We have revised the interim final guidance to show that only recipient reporting of first-tier subawards will be required at this time, and therefore, the comment is no longer relevant. We have replaced the phrase "life of the subaward" with alternative wording that more clearly specifies when a recipient must include the Transparency Act reporting requirement in a subaward it makes to a subrecipient. For new Federal grants or cooperative agreements as of October 1, 2010, if the initial award is $25,000 or more, reporting of subaward information is required. If the initial award is below $25,000 but subsequent award modifications result in a total award of $25,000 or more, the award is subject to the reporting requirements, as of the date the award exceeds $25,000. If the initial award is $25,000 or more, but funding is subsequently de-obligated such that the total award amount falls below $25,000, the award continues to be subject to the reporting requirements of the Transparency Act.

Comment: One commenter asked for clarification concerning reporting requirements for incrementally funded subawards. The commenter gave as an example a subaward that a recipient expected to exceed $25,000 over the duration of the subaward, but for which

the initial obligation was less than $25,000.

Response: Each action that obligates $25,000 or more in Federal funds must be reported.

Comment: Three commenters asked whether a recipient or subrecipient would be required to report a downward adjustment in the amount of a subaward it had made previously.

Response: We made no change to the guidance. The award term that now is in section Appendix A to part 170 of the guidance refers recipients and subrecipients to the web site at which data submission instructions will be posted. Those instructions will include the specific data elements and their definitions that, as discussed in Section I of this **Federal Register** notice, have been established through a separate process under the Paperwork Reduction Act [75 FR 43165]. The instructions will address whether reporting of reductions in subaward amounts, sometimes called "deobligations," are a subcategory of obligations to be reported.

Comment: One commenter asked about the requirement to submit changed information other than subaward amounts, such as a change in subrecipient information.

Response: If the information that was reported was correct at the time it was reported and changed at a later date, there would be no need to subsequently revise the information in previously submitted reports. The updated information would be included in reports of subsequent obligations under the same subaward, however.

That is distinct from a case in which a recipient later discovers that information it reported was erroneous at the time it was reported. Questions concerning error corrections in that case are being considered by the interagency group developing the data elements and information technology systems for subaward reporting. As discussed in the response to the previous comment, the process for resolving those issues will include an opportunity for public input.

Comment: Four commenters asked how one would report subawards to recipients with multiple Federal funding sources. One commenter asked if the amount of funding from each program listed in the Catalog of Federal Domestic Assistance (CFDA) would need to be reported.

Response: Each action that obligates $25,000 or more in Federal funding would need to be separately reported. For new Federal grants or cooperative agreements as of October 1, 2010, if the initial award is $25,000 or more, reporting of subaward information is required. If the initial award is below $25,000 but subsequent award modifications result in a total award of $25,000 or more, the award is subject to the reporting requirements, as of the date the award exceeds $25,000. If the initial award exceeds $25,000 but funding is subsequently de-obligated such that the total award amount falls below $25,000, the award continues to be subject to the reporting requirements of the Transparency Act. If a single action obligates funding from multiple programs, the data submitted for that action would include the CFDA number for the program that is the predominant source of the Federal funding. If a program's funding is obligated by a separate amendment to the same subaward agreement that provides other programs' funding, however, then the data reported for each amendment to the agreement would include the CFDA number of the program that provided the funding for that amendment.

Comment: One commenter asked whether, in light of the new reporting requirements, a subrecipient would be subject to Federal audit requirements if it received $500,000 or more either from a single program or a combination of programs.

Response: The new reporting requirements under the Transparency Act do not change the audit requirements in OMB Circular A–133, section ▮ ▮.200, that apply to a non-Federal entity that expends $500,000 or more in "federal awards" (which the Circular defines to include Federal financial assistance received indirectly through pass-through entities).

III. Next Steps

Federal agencies that award Federal financial assistance subject to the Transparency Act will implement the interim final guidance in 2 CFR part 170 through their regulations, internal policy guidance to awarding offices, program announcements and application instructions, and the award term that now is in section Appendix A to part 170. The General Services Administration has recently published in the **Federal Register** with an opportunity for public comment the information collections that provide the specific data elements required for Transparency Act reporting of subawards and executive compensation [75 FR 43165]. The information collections will be modified as appropriate in response to public comments and published with any other operational guidelines before recipients begin reporting data on subawards.

List of Subjects in 2 CFR Part 170

Business and industry, Colleges and universities, Cooperative agreements, Farmers, Federal aid programs, Grant programs, Grants administration, Hospitals, Indians, Insurance, International organizations, Loan programs, Nonprofit organizations, Reporting and recordkeeping requirements, State and local governments, Subsidies.

Danny Werfel,
Controller.

Authority and Issuance

▮ For the reasons set forth above, the Office of Management and Budget amends 2 CFR chapter I by adding part 170 to read as follows:

PART 170—REPORTING SUBAWARD AND EXECUTIVE COMPENSATION INFORMATION

Sec.

Subpart A—General

170.100 Purposes of this part.
170.105 Types of awards to which this part applies.
170.110 Types of entities to which this part applies.
170.115 Deviations.

Subpart B—Policy

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170.220 Award term

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170.300 Agency.
170.305 Award.
170.310 Entity.
170.315 Executive
170.320 Federal financial assistance subject to the Transparency Act.
170.325 Subaward.
170.330 Total compensation.
Appendix A to Part 170—Award Term

Authority: Pub. L. 109–282; 31 U.S.C. 6102.

Subpart A—General

§ 170.100 Purposes of this part.

This part provides guidance to agencies to establish requirements for recipients' reporting of information on subawards and executive total compensation, as required by the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), as amended by section 6202 of Public Law 110–252, hereafter referred to as "the Transparency Act".

§ 170.105 Types of awards to which this part applies.

This part applies to an agency's grants, cooperative agreements, loans,

and other forms of Federal financial assistance subject to the Transparency Act, as defined in § 170.320.

§ 170.110 Types of entities to which this part applies.

(a) *General.* Through an agency's implementation of the guidance in this part, this part applies to all entities, other than those excepted in paragraph (b) of this section, that—

(1) Apply for or receive agency awards; or

(2) Receive subawards under those awards.

(b) *Exceptions.* (1) None of the requirements in this part apply to an individual who applies for or receives an award as a natural person (*i.e.*, unrelated to any business or non-profit organization he or she may own or operate in his or her name).

(2) None of the requirements regarding reporting names and total compensation of an entity's five most highly compensated executives apply unless in the entity's preceding fiscal year, it received—

(i) 80 percent or more of its annual gross revenue in Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at § 170.320 (and subawards); and

(ii) $25,000,000 or more in annual gross revenue from Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at § 170.320; and

(3) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

§ 170.115 Deviations.

Deviations from this part require the prior approval of the Office of Management and Budget (OMB).

Subpart B—Policy

§ 170.200 Requirements for program announcements, regulations, and application instructions.

(a) Each agency that makes awards of Federal financial assistance subject to the Transparency Act must include the requirements described in paragraph (b) of this section in each program announcement, regulation, or other issuance containing instructions for applicants:

(1) Under which awards may be made that are subject to Transparency Act reporting requirements; and

(2) That either:

(i) Is issued on or after the effective date of this part; or

(ii) Has application or plan due dates after October 1, 2010.

(b) The program announcement, regulation, or other issuance must require each entity that applies and does not have an exception under § 170.110(b) to ensure they have the necessary processes and systems in place to comply with the reporting requirements should they receive funding.

(c) Federal agencies that obtain post-award data on subaward obligations outside of this policy should take the necessary steps to ensure that their recipients are not required, due to the combination of agency-specific and Transparency Act reporting requirements, to submit the same or similar data multiple times during a given reporting period.

§ 170.220 Award term.

(a) To accomplish the purposes described in § 170.100, an agency must include the award term in Appendix A to this part in each award to a non-Federal entity under which the total funding will include $25,000 or more in Federal funding at any time during the project or program period.

(b) An agency—

(1) Consistent with paragraph (a) of this section, is not required to include the award term in Appendix A to this part if it determines that there is no possibility that the total amount of Federal funding under the award will equal or exceed $25,000. However, the agency must subsequently amend the award to add the award term if changes in circumstances increase the total Federal funding under the award to $25,000 or more during the project or program period.

Subpart C—Definitions

§ 170.300 Agency.

Agency means a Federal agency as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

§ 170.305 Award.

Award, for the purposes of this part, effective October 1, 2010, means a grant or cooperative agreement. On future dates to be specified by OMB in policy memoranda available at the OMB Web site, award also will include other types of awards of Federal financial assistance subject to the Transparency Act, as defined in § 170.320.

§ 170.310 Entity.

Entity has the meaning given in 2 CFR part 25.

§ 170.315 Executive.

Executive means officers, managing partners, or any other employees in management positions.

§ 170.320 Federal financial assistance subject to the Transparency Act.

Federal financial assistance subject to the Transparency Act means assistance that non-Federal entities described in § 170.105 receive or administer in the form of—

(a) Grants;

(b) Cooperative agreements (which does not include cooperative research and development agreements pursuant to the Federal Technology Transfer Act of 1986, as amended (15 U.S.C. 3710a));

(c) Loans;

(d) Loan guarantees;

(e) Subsidies;

(f) Insurance;

(g) Food commodities;

(h) Direct appropriations;

(i) Assessed and voluntary contributions; and

(j) Other financial assistance transactions that authorize the non-Federal entities' expenditure of Federal funds.

(b) Does not include—

(1) Technical assistance, which provides services in lieu of money;

(2) A transfer of title to Federally owned property provided in lieu of money, even if the award is called a grant;

(3) Any classified award; or

(4) Any award funded in whole or in part with Recovery funds, as defined in section 1512 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

§ 170.325 Subaward.

Subaward has the meaning given in paragraph e.3 of the award term in Appendix A to this part.

170.330 Total compensation.

Total Compensation has the meaning given in paragraph e.5 of the award term in Appendix A to this part.

Appendix A to Part 170—Award Term

I. Reporting Subawards and Executive Compensation.

a. *Reporting of first-tier subawards.*

1. *Applicability.* Unless you are exempt as provided in paragraph d. of this award term, you must report each action that obligates $25,000 or more in Federal funds that does not include Recovery funds (as defined in section 1512(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111–5) for a subaward to an entity (see definitions in paragraph e. of this award term).

2. *Where and when to report.*

i. You must report each obligating action described in paragraph a.1. of this award term to *http://www.fsrs.gov.*

ii. For subaward information, report no later than the end of the month following the month in which the obligation was made. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)

3. *What to report.* You must report the information about each obligating action that the submission instructions posted at *http://www.fsrs.gov specify.*

b. *Reporting Total Compensation of Recipient Executives.*

1. *Applicability and what to report.* You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—

i. the total Federal funding authorized to date under this award is $25,000 or more;

ii. in the preceding fiscal year, you received—

(A) 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and

iii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report executive total compensation described in paragraph b.1. of this award term:

i. As part of your registration profile at *http://www.ccr.gov.*

ii. By the end of the month following the month in which this award is made, and annually thereafter.

c. *Reporting of Total Compensation of Subrecipient Executives.*

1. *Applicability and what to report.* Unless you are exempt as provided in paragraph d. of this award term, for each first-tier subrecipient under this award, you shall report the names and total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if—

i. in the subrecipient's preceding fiscal year, the subrecipient received—

(A) 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and

ii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report subrecipient executive total compensation described in paragraph c.1. of this award term:

i. To the recipient.

ii. By the end of the month following the month during which you make the subaward. For example, if a subaward is obligated on any date during the month of October of a given year (*i.e.,* between October 1 and 31), you must report any required compensation information of the subrecipient by November 30 of that year.

d. *Exemptions*

If, in the previous tax year, you had gross income, from all sources, under $300,000, you are exempt from the requirements to report:

i. Subawards,

and

ii. The total compensation of the five most highly compensated executives of any subrecipient.

e. *Definitions.* For purposes of this award term:

1. *Entity* means all of the following, as defined in 2 CFR part 25:

i. A Governmental organization, which is a State, local government, or Indian tribe;

ii. A foreign public entity;

iii. A domestic or foreign nonprofit organization;

iv. A domestic or foreign for-profit organization;

v. A Federal agency, but only as a subrecipient under an award or subaward to a non-Federal entity.

2. *Executive* means officers, managing partners, or any other employees in management positions.

3. *Subaward:*

i. This term means a legal instrument to provide support for the performance of any portion of the substantive project or program for which you received this award and that you as the recipient award to an eligible subrecipient.

ii. The term does not include your procurement of property and services needed to carry out the project or program (for further explanation, see Sec. ▮ ▮ .210 of the attachment to OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations").

iii. A subaward may be provided through any legal agreement, including an agreement that you or a subrecipient considers a contract.

4. *Subrecipient* means an entity that:

i. Receives a subaward from you (the recipient) under this award; and

ii. Is accountable to you for the use of the Federal funds provided by the subaward.

5. *Total compensation* means the cash and noncash dollar value earned by the executive during the recipient's or subrecipient's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)):

i. *Salary and bonus.*

ii. *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

iii. *Earnings for services under non-equity incentive plans.* This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

iv. *Change in pension value.* This is the change in present value of defined benefit and actuarial pension plans.

v. *Above-market earnings on deferred compensation which is not tax-qualified.*

vi. Other compensation, if the aggregate value of all such other compensation (e.g. severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds $10,000.

[FR Doc. 2010–22705 Filed 9–13–10; 8:45 am]

BILLING CODE 3110–01–P

Standard U.S. DOT Title VI Assurances

The (Title of Recipient) (hereinafter referred to as the "Recipient") HEREBY AGREES THAT as a condition to receiving any Federal financial assistance from the Department of Transportation it will comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d-42 U.S.C. 2000d-4 (hereinafter referred to as the Act), and all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, SubTitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964 (hereinafter referred to as the Regulations) and other pertinent directives, to the end that in accordance with the Act, Regulations, and other pertinent 'directives, no person in the United States shall, on the grounds of race color, or national origin, he excluded from participation in, he denied the benefits of, or he otherwise subjected to discrimination under any program or activity for which the Recipient receives Federal financial assistance from the Department of Transportation, including the *(Name of Appropriate Administration)*, and HEREBY GIVES ASSURANCE THAT it will promptly take any measures necessary to effectuate this agreement. This assurance is required by subsection 21.7(a)(1) of the Regulations, a copy of which is attached.

More specifically and without limiting the above general assurance, the Recipient hereby gives the following specific assurances with respect to its *(Name of Appropriate Program)*:

1. That the Recipient agrees that each "program" and each "facility as defined in subsections 21.23(e) and 21.23(b) of the Regulations, will be (with regard to a "program") conducted, or will be (with regard to a "facility") operated in compliance with all requirements imposed by, or pursuant to, the Regulations.

2. That the Recipient shall insert the following notification in all solicitations for bids for work or material subject to the Regulations and made in connection with all *(Name of Appropriate Program)* and, in adapted form in all proposals for negotiated agreements:

The (Recipient), in accordance with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C 2000d to 2000d-4 and Title 49, Code of Federal Regulations, Department of Transportation, SubTitle A, Office the Secretary, Part 21, Nondiscrimination in Federally assisted programs of the Department of Transportation issued pursuant to such Act, hereby notifies all bidden that it will affirmatively insure that in any contact entered into pursuant to this advertisement, minority business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

3. That the Recipient shall insert the clauses of Appendix A of this assurance in every contract subject to the Act and the Regulations.

4. That the Recipient shall insert the clauses of Appendix B of this assurance, 'as a covenant running with the land, in any deed from the United States effecting a transfer of real property, structures, or improvements thereon, or interest therein.

5. That where the Recipient receives Federal financial assistance to construct a facility, or part of a facility, the assurance shall extend to the entire facility and facilities operated in connection therewith.

6. That where the Recipient receives Federal financial assistance in the form, or for the acquisition of real property or an interest in real property, the assurance shall extend to rights to space on, over or under such property.

7. That the Recipient shall include the appropriate clauses set forth in Appendix C of this assurance, as a covenant running with the land, in any future deeds, leases, permits, licenses, and similar agreements entered into by the Recipient with other parties: (a) for the subsequent transfer of real property acquired or improved under *(Name of Appropriate Program);* and (b) for the construction or use of or access to space on, over or under real property acquired, or improved under *(Name of Appropriate Program).*

8. That this assurance obligates the Recipient for the period during which Federal financial assistance is extended to the program, except where the Federal financial assistance is to provide, or is in the form of, personal property, or real property or interest therein or structures or improvements thereon, in which case the assurance obligates the Recipient or any transferee for the longer of the following periods: (a) the period during which the property is used for a purpose for which the Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits; or (b) the period during which the Recipient retains ownership or possession of the property.

9. The Recipient shall provide for such methods of administration for the program as are found by the Secretary of Transportation or the official to whom he delegates specific authority to give reasonable guarantee that it, other recipients, sub-grantees, contractors, subcontractors, transferees, successors in interest, and other participants of Federal financial assistance under such program will comply with all requirements imposed or pursuant to the Act, the Regulations and this assurance.

10. The Recipient agrees that the United States has a right to seek judicial enforcement with regard to any matter arising under the Act, the Regulations, and this assurance.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Recipient Department of Transportation under the *(Name of Appropriate Program)* and is binding on it, other recipients, sub-grantees, contractors, subcontractors, transferees, successors in interest and other participants in the *(Name of Appropriate Program).* The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Recipient

Dated_____

_____
(Recipient)

by_____
(Signature of Authorized Official)

APPENDIX A

During the performance of this contract, the contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

(1) Compliance with Regulations: The contractor shall comply with the Regulation relative to nondiscrimination in Federally-assisted programs of the Department of Transportation (hereinafter, "DOT") Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

(2) Nondiscrimination: The Contractor, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor shall not participate either directly or indirectly in the discrimination prohibited by section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.

(3) Solicitations for Subcontractors, Including Procurements of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the contractor of the contractor's obligations under this contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.

(4) Information and Reports: The contractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the *(Recipient)* or the *(Name of Appropriate Administration)* to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information the contractor shall so certify to the *(Recipient)*, or the *(Name of Appropriate Administration)* as appropriate, and shall set forth what efforts it has made to obtain the information.

(5) Sanctions for Noncompliance: In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, the *(Recipient)* shall impose such contract sanctions as it or the *(Name of Appropriate Administration)* may determine to be appropriate, including, but not limited to:

(a) withholding of payments to the contractor under the contract until the contractor complies, and/or
(b) cancellation, termination or suspension of the contract, in whole or in part.

(6) Incorporation of Provisions: The contractor shall include the provisions of paragraphs (1) through (6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.

The contractor shall take such action with respect to any subcontractor procurement as the *(Recipient)* or the *(Name of Appropriate Administration)* may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that, in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the contractor may request the *(Recipient)* to enter into such litigation to protect the interests of the *(Recipient)*, and, in addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

A. The following clauses shall he included in any and all deeds effecting or recording the transfer of real property, structures or improvements thereon, or interest therein from the United States.

(GRANTING CLAUSE)

NOW, THEREFORE, the Department of Transportation, as authorized by law, and upon the condition that the *(Name of Recipient)* will accept Title to the lands and maintain the project constructed thereon, in accordance with *(Name of Appropriate Legislative Authority)*, the Regulations for the Administration of *(Name of Appropriate Program)* and the policies and procedures prescribed by *(Name of Appropriate Administration)* of the Department of Transportation and, also in accordance with and in compliance with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, SubTitle A, Office of the Secretary, Part 21, Nondiscrimination in federally assisted programs of the Department of Transportation (hereinafter referred to as the Regulations) pertaining to and effectuating the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252; 42 U.S.C. .2000d to 2000d-4), does hereby remise, release, quitclaim and convey unto the *(Name of Recipient)* all the right, Title and interest of the Department of Transportation in and to said lands described in Exhibit "A" attached hereto and made a part hereof.

(HABENDUM CLAUSE)

TO HAVE AND TO HOLD said lands and interests therein unto *(Name of Recipient)* and its successors forever, subject, however, to the covenants, conditions, restrictions and reservations herein contained as follows, which will remain in effect for the period during which the real property or structures are used for a purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits and shall be binding on the *(Name of Recipient)*, its successors and assigns.

The *(Name of Recipient)*, in consideration or the conveyance of said lands and interests in lands, does hereby covenant and agree as a covenant running with the land for itself, its successors and assigns, that (1) no person shall on the grounds of race, color, or national origin, he excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination with regard to any facility located wholly or in part on over or under such lands hereby conveyed [,] [and)* (2) that the *(Name of Recipient)* shall use the lands and interests in lands and interests in lands so conveyed, in compliance with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, SubTitle A, Office of the Secretary, Part 21, Nondiscrimination in federally assisted programs of the Department of Transportation - Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may he amended [,] and (3) that in the event of breach of any of the above-mentioned nondiscrimination conditions, the Department shall have a right to reenter said lands and facilities on said land, and the above described land and facilities shall thereon revert to and vest in and become the absolute property of the Department of Transportation and its assigns as such interest existed prior to this instruction.*

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* Reverter clause and related language to be used only when it is determined that such a clause is necessary in order to effectuate the purposes of Title VI of the Civil Rights Act of 1964.

APPENDIX C

The following clauses shall be included in all deeds, licenses, leases, permits, or similar instruments entered into by the *(Name of Recipient)* pursuant to the provisions of Assurance 6(a).

The (grantee, licensee, lessee, permitee, etc., as appropriate) for himself, his heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree [in the case of deeds and leases add "as a covenant running with the land"] that in the event facilities are constructed, maintained, or otherwise operated on the said property described in this (deed, license, lease, permit, etc.) for a purpose for which a Department of Transportation program or activity is extended or for another purpose involving the provision of similar services or benefits, the (grantee, licensee, lessee, permitee, etc.) shall maintain and operate such facilities and services in compliance with all other requirements imposed pursuant to Title 49, Code of Federal Regulations, Department of Transportation, SubTitle A, office of the Secretary, Part 21, Nondiscrimination in Federally-assisted programs of the Department of Transportation - Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

[Include in licenses, leases, permits, etc.]*

That in the event of breach of any of the above nondiscrimination covenants, *(Name of Recipient)* shall have the right to terminate the [license, lease, permit, etc.] and to re-enter and repossess said land and the facilities thereon, and hold the same as if said [licenses, lease, permit, etc.] had never been made or issued.

[Include in deed.]*

That in the event of breach of any of the above nondiscrimination covenants, *(Name of Recipient)* shall have the right to reenter said lands and facilities thereon, and the above described lands and facilities shall thereupon revert to and vest in and become the absolute property of *(Name of Recipient)* and its assigns.

The following shall be included in all deeds, licenses, leases, permits, or similar agreements entered into by *(Name of Recipient)* pursuant to the provisions of Assurance 6(b).

The (grantee, licensee, lessee, permitee, etc., as appropriate) for himself, his personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree (in the case of deeds, and leases add "as a covenant running with the land") that (1) no person on the ground of race, color. or national origin shall be excluded from participation in, denied the benefits of, or he otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over or under such land and the furnishing of services thereon, no person on the ground of, race, color, or national origin shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the (grantee, licensee, lessee, permitee, etc.) shall use the premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations. Department of Transportation, SubTitle A, Office of the Secretary. Part 21, Nondiscrimination in Federally-assisted programs of the Department of Transportation - Effectuation of Title VI of the Civil Rights Act of 1964), and as said Regulations may be amended.

[Include in licenses, leases, permits, etc.]*

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* Reverter clause and related language to be used only when it is determined that such a clause is necessary in order to effectuate the purposes of Title VI of the Civil Rights Act of 1964.

That in the event of breach of any of the above nondiscrimination covenants, (Name of Recipient) shall have the right to terminate the [license, lease, permit, etc.] and to reenter and repossess said land and the facilities thereon, and hold the same as if said [license, lease, permit, etc.] had never been made or issued.

[Include in deeds]*

That in the event of breach of any of the above nondiscrimination covenants, *(Name of Recipient)* shall have the right to reenter said land and facilities there-on, and the above described lands and facilities shall thereupon revert to and vest in and become the absolute property of *(Name of Recipient)* and its assigns.

* Reverter clause and related language to be used only when it is determined that such a clause is necessary in order to effectuate the purposes of Title VI of the Civil Rights Act of 1964.