

substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: April 14, 2003.

**Keith Takata,**

*Acting Regional Administrator, Region IX.*

■ For the reasons set out in the preamble, 40 CFR part 300 is amended as follows:

#### **PART 300—[AMENDED]**

■ 1. The authority citation for part 300 continues to read as follows:

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

#### **Appendix B—[Amended]**

■ 2. In Table 1 of Appendix B to part 300, for Arizona, the entry for “Indian Bend Wash Area” is amended by adding “P” in the Notes column.

[FR Doc. 03–10547 Filed 4–30–03; 8:45 am]

**BILLING CODE 6560–50–P**

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Administration for Children and Families**

#### **45 CFR Part 1309**

**RIN 0970—AB54**

#### **Head Start Program**

**AGENCY:** Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF).

**ACTION:** Final rule.

**SUMMARY:** The Administration on Children, Youth and Families is amending a Final Rule which applies to the purchase of Head Start facilities in order to include in the Rule provisions implementing a statutory provision that authorizes the Agency to permit Head Start grantees to use grant funds to finance the construction and major renovation of Head Start facilities and to make other necessary changes.

**EFFECTIVE DATE:** June 2, 2003.

#### **FOR FURTHER INFORMATION CONTACT:**

Windy M. Hill, Associate Commissioner, Head Start Bureau, Administration on Children, Youth and Families, 330 C St., SW., Washington, DC 20447; (202) 205–8572.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Program Purpose**

Head Start is authorized under the Head Start Act (42 U.S.C. 9801 *et seq.*).

It is a national program providing comprehensive developmental services to low-income preschool children, primarily age three to the age of compulsory school attendance, and their families. To help enrolled children achieve their full potential, Head Start programs provide comprehensive health, nutritional, educational, social and other services. In addition, section 645A of the Head Start Act provides authority to fund programs serving infants and toddlers. Programs receiving funds under the authority of this section are referred to as Early Head Start programs.

Head Start programs are required to provide for the direct participation of the parents of enrolled children in the development, conduct, and direction of local programs. Parents also receive training and education to foster their understanding of and involvement in the development of their children. In fiscal year 2001, Head Start served 905,235 children through a network of over 2,000 grantees and delegate agencies.

While Head Start is intended to serve primarily children whose families have income at or below the poverty line, or who receive public assistance, Head Start policy permits up to 10 percent of the children in local programs to be from families who do not meet these low-income criteria. Tribal grantees can exceed this limit under certain conditions. The Act also requires that a minimum of 10 percent of the enrollment opportunities in each program be made available to children with disabilities. Such children are expected to participate in the full range of Head Start services and activities with their non-disabled peers and to receive needed special education and related services.

##### **II. Purpose of the Rule**

The Administration for Children and Families is establishing a final rule governing construction and renovation of Head Start facilities. The purpose of the Rule is to implement the statutory authority to permit Head Start grantees (including Early Head Start grantees) to use grant funds to construct or undertake major renovations of Head Start facilities. The authority for this Rule is section 644 (c), (f), and (g) and 645A (b)(9) of the Head Start Act (42 U.S.C. 9801 *et seq.*). Paragraph (g) of section 644 was added by Pub. L. 103–252, Title I of the Human Services Amendments of 1994. Section 644(g)(1) requires that the Secretary establish uniform procedures for Head Start programs to request approval for payments of capital expenditures

related to the construction and major renovations of facilities.

##### **III. Summary of the Major Provisions of the Final Rule**

- Defines major renovation to mean “a structural change to the foundation, roof, floor, or exterior or load-bearing walls of a facility, or extension of an existing facility to increase its floor area. Major renovation also means extensive alteration of an existing facility, such as to significantly change its function and purpose, even if such renovation does not include any structural change to the facility. Major renovation also includes a renovation of any kind which has a cost exceeding the lesser of \$200,000, adjusted annually to reflect the percentage change in the Consumer Price Index for All Urban Consumers (issued by the Bureau of Labor Statistics) beginning one year after the effective date of the amendments to these regulations, or 25 percent of the total annual direct costs approved for the grantee by ACF for the budget period in which the application is made.”

- Defines construction to mean new building, excludes renovations, alterations, additions or work of any kind to existing buildings.

- Specifies what information the grantee must provide to establish eligibility to be awarded grant funds for the construction or major renovation of a Head Start facility.

- Specifies the provisions of subordination of interest agreements between the Department and lenders.

- Requires that all construction and major renovation contracts be on a lump sum fixed-price basis.

##### **IV. Rulemaking History**

On December 1, 1994, the Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (59 FR 61575) proposing to establish a Rule to implement the statutory provision authorizing the use of Head Start grant funds to purchase facilities. The Final Rule on Purchase of Head Start Facilities was published on February 8, 1999 and became effective on March 10, 1999, with certain provisions involving information collection becoming effective when approved by the Office of Management and Budget. The Final Rule on purchase does not address construction or major renovation since the statutory change concerning construction and major renovation occurred too close to publication of the NPRM published in connection with the purchase of Head Start facilities. We recognized, however, that procedures covering the purchase,

construction and major renovation of facilities using Head Start funds should be consistent with procedures for the purchase of facilities and both should be brought together in one Rule. Therefore the Department issued a NPRM on February 9, 1999, which proposed to amend the Final Rule for Purchase of Head Start Facilities by incorporating the provisions governing construction and renovation of facilities.

#### V. Section-by-Section Discussion of the Comments Received

Seven parties submitted twenty-one comments. Only those sections on which comments were made, or to which changes were made are discussed below. The discussion of the sections follows the order of the table of contents of the Final Rule for the purchase of Head Start facilities and a notation is made wherever the section designations have been changed or deleted in the Final Rule.

##### *Section 1309.1—Purpose and Application*

This provision is being changed to make it clear that Early Head Start grantees are eligible to apply for facility funding, that the regulation implements the authority in section 644 (f) and (g), and to add the appropriate statutory citations covering the Early Head Start program. Early Head Start grantees are included as eligible for purchase funding under the definition of “grantee” under the existing regulations.

##### *Section 1309.2—Approval of the Use of Head Start Funds To Continue Purchase of Facilities*

The title and wording of this provision are being changed to make it clear that Early Head Start grantees may apply for funding to pay facility purchase costs for facilities purchased after December 31, 1986. This provision is also being changed to emphasize that applications are for the future use of funds for the continuing process of purchasing the facility rather than for approval of an earlier decision by the grantee to purchase the facility. The change is necessary to make the provision applicable to Early Head Start grantees which entered the program after 1994 and to clearly describe the activity for which funds are available. As with the current regulation, the amended regulation authorizes funds to pay facility purchase costs incurred after the responsible HHS official has approved the use of funds. The Head Start program wishes to emphasize that grant funds are available under this provision of the regulations for use in

paying off existing purchase mortgages or new mortgages which are being sought to refinance the existing debt incurred to purchase the facility. Funds are not available for payment of a new mortgage on a facility when the grantee had previously completed the purchase of the facility. The changes to this provision are being made without opportunity for public comment as permitted by 5 U.S.C. 553(b), when such opportunity is unnecessary. In this case, public comment is unnecessary because the individual changes either do not alter the substance of the provision, or are required to ensure the application of section 644(f)(1), authorizing the use of funds for continuing purchases of facilities, to Early Head Start grantees, along with the other provisions of section 644(f) and (g).

##### *Section 1309.3—Definitions—Construction*

###### Comment

We received one comment suggesting that a more precise definition of construction be established in this section. As defined in the NPRM, construction means, “new building and excludes alterations, renovations, additions, or work of any kind to an existing building.” The respondent noted that by this definition, projects which include attaching substantial additions to insignificant structures are classified as renovation projects. The respondent stated that these projects should more reasonably be defined as construction activities. The respondent also noted that projects which include the finishing of partly constructed buildings could reasonably be defined as construction projects rather than as renovation projects.

###### Response

The Head Start Act at section 644(g)(2) authorizes the Secretary, once a determination has been made that suitable facilities are not otherwise available, to authorize the use of financial assistance for “construction of facilities that are not in existence on the date of that determination.” We believe that the proposed definition of “construction” as “new building” is consistent with the statute and sufficiently clear to allow a responsible HHS official charged with making a determination about the funding of a project to make a common sense determination about the appropriate classification of a proposed project as either construction or major renovation. We are hesitant to adopt a more detailed definition because any such definition may create more uncertainty than the

proposed definition. Accordingly, we have decided not to modify the definition of “construction” in the final regulations.

###### *Grantee*

The definition of Grantee is being revised to specifically state that the definition includes agencies receiving funding to conduct Early Head Start programs.

##### *Incidental Alterations and Renovations and Major Renovations*

###### Comment

We received a comment about the distinctions provided in the proposed definitions between “incidental alteration and renovations” and “major renovations.” Incidental alterations are defined in the proposed Rule as alterations costing the lesser of \$150,000 or 25 percent of total direct costs approved for a budget period. The respondent stated that from time to time the costs of incidental alterations can exceed this dollar limit but still not meet the conditions as defined for major renovations in this section, making it difficult to classify the activity. The respondent suggests that the definition be modified to state that renovations are considered incidental if they do not meet the definition of major renovations as defined in the proposal Rule.

###### Response

By classifying incidental alterations and renovations we meant to differentiate these activities from major renovations so that grantees could move easily and with speed to improve the quality and safety of Head Start child care facilities. Further, our intention was to differentiate incidental renovations from major renovation activities which would ordinarily require greater technical consultation and would require more time and funding to accomplish.

We agree with the respondent that some incidental alteration and renovation projects could exceed the \$150,000 limit presently established in the definition. The \$150,000 limit on costs has been established in grants policy for approximately 10 years. During this time there has been a steady growth of Head Start enrollment, and a corresponding increase in the number and size of centers operated by grantees. We recognize that the costs for carrying out center improvements have increased. We are therefore amending the definition of “incidental alterations and renovations” to read “improvements to a facility which do not meet the definition of major

renovation.” In order to help clarify the difference between incidental alteration and major renovations and to reflect the increase in the costs of incidental alteration and renovations we are amending the definition of “major renovation.” This definition is amended to read “Major renovations means a structural change to the foundation, roof, floor, or exterior or load-bearing walls of a facility, or extension of an existing facility to increase its floor area. Major renovation also means extensive alteration of an existing facility, such as to significantly change its function and purpose, even if such renovation does not include any structural change to the facility. Major renovation also includes a renovation of any kind which has a cost exceeding the lesser of \$200,000, adjusted annually to reflect the percentage change in the Consumer Price Index for All Urban Consumers (issued by the Bureau of Labor Statistics) beginning one year after the effective date of the amendments to these regulations, or 25 percent of the total annual direct costs approved for the grantee by ACF for the budget period in which the application is made.”

#### *Suitable Facility*

##### Comment

A “suitable facility” as defined in the NPRM is one that “is owned by a grantee or available for lease or purchase, which is usable as a Head Start facility and is not more expensive to purchase, own or lease than other comparable facilities in the grantee’s service area.” One respondent commented that the meaning of “suitable” could reasonably be conformed with what is later defined in the NPRM as a “useable” facility.

##### Response

We agree with the respondent and are revising the definition of a “suitable facility” to mean “a facility which is large enough to meet the foreseeable needs of the Head Start program and which complies with local licensing and code requirements, the access requirements of the Americans with Disabilities Act (ADA), if applicable, and section 504 of the Rehabilitation Act of 1973.”

#### *Purchase*

The definition of this term is being changed to make it consistent with the revised wording of section 1309.2.

#### *Useable Facility*

This definition will be deleted from the Final Rule and the word “suitable” will be substituted.

#### *1309.4—Eligibility—Construction*

This section describes how a grantee establishes eligibility for funding of the construction of Head Start facilities.

##### *Paragraph (b)*

We are making a change in this paragraph to make it more consistent with the wording of the statute. The proposed Rule at section 1309.49 would have required that a grantee establish eligibility to construct a facility by demonstrating that no facility is available for purchase in the grantee’s service area. We are amending paragraph (b) to read “There is a lack of suitable facilities (including public school facilities) in the grantee’s service area which will inhibit the operation of the program, as demonstrated by a statement that neither the grantee’s current facility nor any facility available for lease in the service area is suitable for use by a Head Start program. This statement must explain the factors considered, how it was determined that there is a lack of suitable facilities and be supported whenever possible by a written statement from a licensed real estate professional in the grantee’s service area.”

#### *Section 1309.10—Application for the Purchase, Construction and Major Renovation of Facilities*

##### *Section 1309.10(b), (d), (f), (i), (l) and (m)*

This section describes the information that an applicant must provide when requesting funding for the purchase, construction and major renovation of facilities.

##### Comment

Paragraph (b) requires that applicants provide a certification from a licensed engineer or architect as to the cost and technical appropriateness of the proposed renovation. One respondent stated that this requirement is vague because it does not specify which costs should be considered. This respondent stated further that the section does not indicate the form in which certification should be submitted. The respondent also stated that a technical review by an architect or engineer of the proposed project is required later at section 1309.51 of the rule and this requirement should not be duplicated in this paragraph.

##### Response

The respondent is correct in saying that section 1309.51 requires that applicants submit working drawings and specifications which have been reviewed by an architect or engineer as

to the technical appropriateness of the proposed construction or renovation project. We agree that the requirement for a technical review should be deleted from this paragraph.

Our intention when including a requirement for a certification of the project cost by an architect or engineer was to ensure that applicants had a sound basis for requesting funds for all costs associated with a renovation project and that sufficient funding could be made available upon approval of the working drawings and specifications. We realize that these costs are estimates. It is sufficient for the applicant to have a written estimate of all costs associated with the project prepared by an architect or engineer. We are making a change to this paragraph to include a cost estimate for proposed construction projects as well. Paragraph (b) has been revised to read, “In the case of a proposed major renovation or construction project, the applicant must submit a written estimate of all costs associated with the project. An architect or engineer must prepare the written estimate.”

We have dropped the requirement in section 1309.10(d) that facilities for which funding is provided must be used principally for Head Start purposes, as it would apply to new purchases, construction and major renovations of facilities. Applying this requirement to such projects would frustrate the intent of Congress expressed in section 644(g) that Head Start facilities be collocated with other programs serving low-income families whenever possible. In the case of continuing purchases of facilities, the grantee will still be required to demonstrate that the facility will be used principally as a Head Start center or a direct support facility for a Head Start program, as required by section 644(f)(2)(D) of the Head Start Act. Whenever funds are provided to purchase, construct, or make major renovation to a facility to be used in part for Head Start purposes, the proportion of the cost of the facility project will be limited to its proportional benefit to the Head Start program.

We have decided to include in the final regulations at 45 CFR 1309.10(l) a requirement that a grantee applying for funding to make major renovations to a facility it does not own must include with its application the written permission from the owner of the building for the grantee to make the planned renovation and a copy of the lease or proposed lease on the facility. The requirement for written permission is necessary to ensure that the landlord has given permission for the grantee to make the proposed major renovations

and to avoid any question of the landlord's rights having been violated by the grantee's performing the major renovation. It is necessary for the responsible HHS official to see the lease to ensure that it includes the provisions required by 45 CFR 1309.21(d)(4) and any other terms the official considers necessary. Under 45 CFR 1309.21(d), the lease on a facility to receive major renovations must be long enough to permit the Head Start program to receive the full value of the grant-supported improvements.

We are changing 45 CFR 1309.10(l) to address situations where grantees propose using grant funds to acquire a facility that is or will be sited on land not owned by the grantee. A grantee proposing to acquire a facility without also purchasing the land on which the facility is or will be situated must include in its application a copy of the existing or proposed land lease or other document ensuring the grantee's right to occupy the facility. The lease or other document, which protects the Federal interest in the facility, must ensure undisturbed use and possession of the facility by the grantee for the purpose of operating a Head Start program or other program designated by ACF. We are also adding language to 45 CFR 1309.10(l) to ensure that the term of the land lease or other similar interest in the underlying land, which is owned by a party other than the grantee and upon which the facility to be acquired or renovated is located, is long enough to allow the Head Start program to receive the full value of that improvement.

We have also included in § 1309.10(l) a requirement that a grantee seeking funding for acquisition or major renovation of a facility sited on land not owned by the grantee must establish that there is no feasible alternative to the proposed project. A feasible alternative may exist whenever there is an opportunity for the grantee to purchase or construct an appropriate facility on land available for purchase in the grantee's service area. (A grantee applying for major renovation funding for a leased facility will be providing information on facilities available for purchase in its service area under §§ 1309.4 and 1309.11.) Where such an alternative site exists, the responsible HHS official should have the grantee provide information on the cost of purchasing or constructing a facility at the alternative site as part of the cost comparison under § 1309.11. Where the cost of the alternative project is less than the proposed project and will result in the purchase or construction of a suitable facility appropriate to the

needs of the grantee, the alternative project will be considered feasible.

The intent of the new wording is that the responsible HHS official shall not approve funding for acquisition of a facility which will be sited on property not owned by a grantee unless the land lease or other document ensures the Federal interest in the facility and the undisturbed use and possession of the facility by the grantee for ACF approved purposes. This goal can be accomplished, depending on the circumstances, by including appropriate terms in the lease or other document. The necessary terms will vary from one situation to another. The term of the lease or other arrangement should in most cases be for a period of years that is at least equal to the estimated useful life of the facility. The responsible HHS official should also consider whether it is necessary for the lease or other document to provide for the lessor's compensation of the grantee for any residual value of the facility at the time the grantee ceases to occupy the facility. Such a provision would be appropriate where the lease or other document provides that the grantee's occupancy would end before the term of the facility's projected useful life. In most cases, ACF should also have the right to intervene within a period of sixty days after default under the lease to have the grantee or some other organization cure the default and prevent termination of the lease. The Head Start program will be providing responsible HHS officials with additional guidance on the terms that should be considered for inclusion in the lease or other document in order to fully protect the Federal interest and the grantee's use and occupancy of the facility. It is also the intent of HHS to ensure that the purchase, construction, and major renovation of facilities sited on land not owned by the grantee only be undertaken when there is no feasible alternative available for providing a suitable facility for conduct of the program.

We have decided to change the wording of paragraph (m) of 45 CFR 1309.10 to indicate that all requests for funding to acquire or make major renovation to a facility must be accompanied by an assessment of the environmental impact of the proposed project. The current regulation makes this requirement applicable to certain facilities proposed for purchase. The change is necessary to ensure that all projects, which may result in significant environmental impacts, are identified in the application process. The responsible HHS official already has the authority to make requests for additional information about proposed facility

purchases. The existing regulations at 45 CFR 1309.10(r) (and the amended regulations at 45 CFR 1309.10(q)) require the grantee applying for facility funding to provide "[s]uch additional information as the responsible HHS official may require." This provision authorizes the official to request the grantee to provide any additional information on the proposed facility purchase including information regarding environmental impacts of the facility proposed for purchase. In most cases, we expect that the assessment requirement can be met through completion of a questionnaire on the project.

Paragraph (f) and (i) of § 1309.10 have been revised to refer to continuing purchases rather than previous purchases to make them consistent with the revised wording of § 1309.2.

#### *Section 1309.11—Cost Comparison*

We are adding wording to § 1309.11(a) to make it clear that the responsible HHS official has authority to require a grantee to provide additional cost information, such as when the grantee is proposing to acquire or make major renovations to a facility sited on land not owned by the grantee.

We have changed the wording in § 1309.11(c)(2) to require that the grantee compare the costs of the proposed construction project to the costs of purchasing a suitable alternate facility or owning, purchasing or leasing an alternate facility which can be made suitable for use through incidental alterations and renovations or major renovations. The change is being made to make the regulations consistent with the requirements of section 644(g)(1) regarding cost comparisons for construction projects.

We have also changed the wording in § 1309.11(c)(3). That provision will read in the final regulations "A grantee proposing to undertake a major renovation of a facility must compare the cost of the proposed renovation (including the cost of purchasing the facility to be renovated if the grantee is proposing to purchase the facility) to the cost of constructing a facility of comparable size. In place of the cost comparison required in the preceding sentence, a grantee proposing to make renovations to a leased facility must show that the monthly or annual occupancy costs for the term of the lease, including the cost of the renovation, is less than, or comparable to, the cost of purchasing or leasing any other facility in the grantee's service area which can be made suitable through major renovations, if such a facility is available."

The new wording of § 1309.11(c)(3) does not require that Head Start grantees seeking funding to make major renovation to a leased facility compare the cost of constructing a facility of comparable size. We have decided to adopt this approach because it seems likely that a grantee for which construction is the cheaper alternative will apply for construction funding rather than for funding to make major renovations to a leased facility. However, a responsible HHS official will have the authority to require comparison with the costs of constructing an equivalent facility under 45 CFR 1309.10(q) when the official questions whether the proposed project is the lowest cost alternative for providing the Head Start program with a suitable facility. Section 1309.21(d)(2) is being revised to make it consistent with the revised wording of section 1309.2.

*Section 1309.21—Recording of the Federal Interest and Other Protection of the Federal Interest*

We are revising paragraph (d) of 45 CFR 1309.21 to protect the federal interest in facilities not owned by the grantee that will be undergoing major renovations paid for with Head Start funds and facilities acquired by grantees that are or will be sited on land not owned by the grantee, and to address the issue of when the Notice of Federal Interest must be filed under various circumstances. Our decision to include these provisions in the final regulations is based on the experience of the Head Start program in funding facility projects. The new wording in paragraph (d)(1) makes it clear that all facilities not owned by the grantee receiving a major renovation paid for with Head Start funds must be leased by the grantee. The lease must protect the right of the grantee, or some other organization designated by ACF in the event of the grantee's termination or withdrawal from the Head Start program, to occupy the facility for the term of the lease. The new wording of paragraph (d)(1) also imposes these requirements on projects involving the acquisition of a facility on land not owned by the grantee. We are also adding language to the same provision to ensure that the term of the land lease or other similar interest in the underlying land, which is owned by a party other than the grantee, and upon which the facility to be acquired or renovated is located, is long enough to allow the Head Start program to receive the full value of the grant supported improvements.

The final wording of paragraph (d)(2) now provides new requirements

concerning when the Notice of Federal Interest is filed. The changes are being made to cover the different circumstances under which a facility or land on which a facility is to be constructed is purchased with grants funds. The revised wording of paragraph (d)(2) also provides that in the case of a leased facility undergoing major renovations, the Notice of Federal Interest shall be a copy of the executed lease and all amendments or an affidavit describing the terms of the lease. The revised paragraph (d)(2) also establishes new requirements for facilities now sited or to be constructed on land not owned by a grantee. In such cases, the Notice of Federal Interest shall be the land lease or other document protecting the Federal interest and ensuring the right of the grantee to have undisturbed use and possession of the facility. New wording in paragraph (d)(4) establishes requirements for the contents of leases, affidavits, and other documents serving as the Notice of Federal Interest for leased facilities undergoing major renovations and facilities sited on property not owned by the grantee.

In addition to including the provision on required terms of the lease in the final regulations, we will be issuing guidance to responsible HHS officials on additional terms which are desirable to include in leases of facilities receiving major renovations and facilities sited on land not owned by the grantee.

*Section 1309.22—Rights and Responsibilities in the Event of Grantee's Default on Mortgage, or Withdrawal or Termination*

*Section 1309.22(a)*

This section describes actions, which may be taken by ACF and lenders in the event a grantee defaults on the mortgage, or is terminated or withdraws from the Head Start program.

*Comment*

Some states use an instrument called a trust deed, which is a form of mortgage. A lender commented that the words "trust deeds" should be included along with the words "mortgage" and "chattel mortgages" in this section to make it clear that this is an acceptable instrument in states where it is used.

*Response*

In using the word "mortgage" ACF intends to mean also "trust deed" if that term is recognized by the state in question as a substitute for the word "mortgage." The wording of this provision is also being changed to encompass 45 CFR 1309.2, Approval of

the Use of Head Start Funds to Continue Purchase of Facilities.

*Sections 1309.23—Insurance, Bonding and Maintenance, 1309.30—General, 1309.31—Site Description, and § 1309.33—Inspection*

We are making a change in each of these provisions to make their wording consistent with the changes in the wording of 45 CFR 1309.2.

*Section 1309.44—Independent Analysis*

This provision is being amended by the final regulation to establish that a responsible HHS official may also direct the grantee to obtain an independent analysis of its cost comparison for a construction or major renovation project and that the cost of such analysis will be an allowable expense. The responsible HHS official will have the authority to require an independent analysis under the amended regulations. The extension of coverage of this provision to construction and major renovation projects makes explicit the responsible HHS official's authority under the amended § 1309.10(q), to require such information as part of the application process for construction and major renovation projects.

*Section 1309.49—Eligibility—Construction*

*Section 1309.50—Eligibility—Major Renovation*

These sections in the proposed regulations contained conditions grantees must meet in order to be eligible to receive funding to construct or conduct major renovations of a facility.

*Comment*

One respondent commented that the rules should be better organized. The respondent suggested that since an applicant must first establish that it is eligible to receive funding for construction or renovation of a facility, the criteria to establish eligibility for funding of these activities would logically precede all other provision of the Rule.

*Response*

We agree with this suggestion and § 1309.49 is re-designated as § 1309.4 and § 1309.50 is re-designated as § 1309.5.

*Section 1309.50—Eligibility—Major Renovations*

*Paragraph (b)*

This paragraph states that when a grantee requests funds to conduct major renovations of a leased facility the lease

must provide a term of occupancy of at least five years.

#### Comment

We received two comments in which the respondents stated that a minimum lease term of five years was not sufficient to protect the Federal interest in the case of high cost major renovations and that this provision should be more stringent. We agree that, depending on the cost of the renovation, it would be a prudent business practice to require that grantees negotiate lease terms in excess of five years. As provided in the policies of the Department of Health and Human Services, the responsible HHS official will only agree to expenditure of Head Start funds for major renovation of a leased facility when the lease is long enough for the full value of the grant-supported improvements to benefit the grant activity. We have shifted the statement on the requirement for the length of the lease to § 1309.21(d)(1).

#### *Section 1309.51—Approval of Drawings and Specifications*

##### *Paragraph (a)*

This paragraph requires that grantees submit final working drawings and specifications to the responsible HHS official for approval before advertising for bids and contracting for construction or major renovation work.

#### Comment

One respondent commented that requiring HHS approval of final drawings would add a delay in the construction or renovation process. The respondent added that since technical drawings had to be approved by local officials it should not be necessary for HHS to also approve final drawings. The respondent suggested that the Rule be written to state that HHS should require a written statement by an architect or engineer that final drawings meet all Head Start and local licensing requirements.

#### Response

By reserving the right to approve final construction and renovation working drawings, HHS is reserving the right to determine that the final plans remain within the scope and costs of the project for which funding has been or will be made available. In order to make our intention clear on this point we have revised the wording of § 1309.51 to read:

(a) The grantee may not advertise for bids or award a contract for any part of the construction or major renovation funded by grant funds until the grantee has submitted to the responsible HHS official final working drawings and

written specifications for the project, a written certification by a licensed engineer or architect as to the technical appropriateness of the proposed construction or renovation and the conformity of the project as shown in the final working drawings and specifications with Head Start programmatic requirements, and a written estimate of the costs of the project by a licensed architect or engineer.

(b) The responsible HHS official may authorize the grantee to advertise bids or award a contract after receiving the information provided under paragraph (a) and determining that sufficient funding is, or will be, available to cover the costs of the project as estimated by the architect or engineer, and that the scope of the project as described in the drawings and specifications is appropriate to the needs of the grantee.

The revised wording of the regulation clarifies what the grantee must provide before the responsible HHS official can authorize the issuance of bids or the signing of a contract. Paragraph (b) clarifies the role of the responsible HHS official as being concerned with whether the scope of the project is appropriate to the grantee's needs and whether Head Start funding is available to meet the estimated costs of the project.

#### *Section 1309.52—Procurement Procedures*

##### *Paragraph (b)*

This paragraph requires that the HHS official approve contracts for construction and renovation of acquired facilities.

#### Comment

In reviewing this requirement a respondent stated that this provision did not require the approval of contracts for all construction and major renovation including those in leased facilities or facilities not owned or acquired by the grantee.

#### Response

It was our intention to require written approval by the HHS official for any use of Head Start funds for renovation and construction activities whether or not the Head Start grantee owns the property to be improved. We are making a change in this provision and paragraph (b) is being amended to read "All contracts for construction or major renovation of a facility to be paid for in whole or in part with Head Start funds require the prior, written approval of the responsible HHS official and shall be on a lump-sum fixed-price basis."

##### *Paragraph (c)*

This paragraph requires grantees to obtain written approval for unsolicited modifications that would materially alter the costs of a project or increase the amount of grant funds needed to complete a project.

#### Comment

We received one comment from a respondent who stated that this paragraph was not clear. The respondent was concerned that the Rule implies that routine "change orders" which are normally encountered when conducting renovation and construction projects would need to be approved which would cause delays in the implementation of projects.

#### Response

Our intention in this provision is to ensure that funds would be available to complete projects and that the responsible HHS officials would be notified of significant changes which could result in project cost increases. It is not our intention to require grantees to submit routine change orders to the responsible HHS official for prior approval. In order to make this intention clear we are rewording section (c) to state that "Prior written approval of the responsible HHS official is required for modifications that would change the scope or objective of the project or would materially alter the costs of the project by increasing the amount of grant funds needed to complete the project."

#### *Section 1309.54—Davis-Bacon Act*

This section conforms with the statute in requiring that all laborers and mechanics employed by contractors and subcontractors in the construction or renovation of Head Start facilities be paid wages as determined by the Secretary of Labor in accordance with 40 U.S.C. 276a (*et seq.*), commonly referred to as the Davis-Bacon Act.

#### Comment

We received two comments from two respondents suggesting that wages paid for incidental alterations and renovations should be excluded from the requirements of the Davis-Bacon Act.

#### Response

We cannot adopt this recommendation because the statute provides no authority for exempting from the Davis-Bacon Act any class of construction or renovation activities.

## VI. Impact Analysis

### *Executive Order 12866*

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this Rule is consistent with these priorities and principles. This Rule implements the statutory authority for Head Start grantees to apply to use grant funds to construct or make major renovations to facilities.

This Rule was determined to be significant and was reviewed by the Office of Management and Budget.

### *Executive Order 13132*

Executive Order 13132 on Federalism applies to policies that have federalism implications, defined as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, on the distribution of power and responsibilities among the various levels of government.” This rule does not have federalism implications as defined in the Executive Order.

### *Family Well-Being Impact*

As required by section 654 of the Treasury and General Government Appropriations Act of 1999, we have assessed the impact of this final Rule on family well being. By allowing Head Start grantees to purchase, renovate or construct facilities our assessment is that this Rule will have a positive impact on child and family well being by improving the quality and availability of Head Start child care facilities in low income communities.

### *Compliance With the National Environmental Policy Act (NEPA)*

Pursuant to regulations of the Council on Environmental Quality (40 CFR 1500–1508), ACF published an environmental assessment of these regulations, and placed a Notice in the **Federal Register** on November 9, 2000 (65 FR 67377) which invited public comment on the assessment. ACF received no comments and published a Preliminary Finding of No Significant Impact on January 25, 2001 (66 FR 7768). After receiving no comments on this preliminary finding, ACF published a Final Finding of No Significant Impact on March 26, 2001 (66 FR 16478). ACF found that these rules will not have a significant impact on the quality of the human environment and that the preparation of an Environmental Impact Statement would not be necessary.

### *Regulatory Flexibility Act of 1980*

The Regulatory Flexibility Act (5 U.S.C. Chapter 6) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses. For each rule with a “significant economic impact on a substantial number of small entities” an analysis must be prepared describing the rule’s impact on small entities. Small entities are defined by the Act to include small businesses, small non-profit organizations and small governmental entities. While these regulations would affect small entities, they would not affect a substantial number. Furthermore, the cost of the application process and other activities undertaken as a result of these regulations will not have a significant economic impact because the Head Start program covers 80 percent of the allowable costs of grantees under the program. The remaining costs associated with compliance are part of the share of cost grantees agree to meet from their own resources when they enter the Head Start program. For these reasons, the Secretary certifies that this rule will not have a significant impact on substantial numbers of small entities.

### *Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation). This rule does not impose any mandates on State, local, or tribal governments, or the private sector that will result in an annual expenditure of \$100,000,000 or more.

### *Congressional Review*

This rule is not a major rule as defined in 5 U.S.C., Chapter 8.

### *Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (Pub. L. 104–13), all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or record-keeping requirement inherent in a proposed or final rule. This Rule contains information collection and record-keeping requirements in section 1309.10 (Application), 1309.4 as re-designated (Eligibility—construction), and 1309.5 as re-designated, (Eligibility—major renovation) which will be submitted to OMB for review and approval in

accordance with the Paperwork Reduction Act.

The respondents to the information collection requirements in the Rule are Head Start grantees. Forty percent of these grantees include local non-profit or for profit agencies, thirty-three percent are Community Action Agencies and sixteen percent are school districts. The balance represents Tribes and municipal entities. The Department needs to require this collection of information in order to assure that grantees that apply for approval to construct or make major renovations to a facility with Head Start funds have followed certain necessary legal and administrative procedures. Also, the requirement for this collection of information is necessary for monitoring purposes.

The grantees who will be affected by these requirements will be those who request approval and are approved to construct or make major renovations to a facility for the purpose of operating a Head Start program. More than half of grantee agencies (sixty-one percent) enroll less than 300 children and are relatively small entities. Less than twenty-five percent of all programs enroll more than 500 children and would be expected to engage in relatively large scale facility development projects if they qualified for funding of such projects. In total, the estimated annual number of grantees that will be affected is 200, based on the average number of grantees who requested approval from the Department since the statutory authority became effective.

The actual submittal of an application under section 1309.10 from a grantee to construct or make a major renovation to a facility is a one-time activity, which is preceded by a number of preparatory activities. We estimate the time it will take to prepare the application in accordance with the requirements of this Rule is 40 hours per grantee, calculated over a period of time. On an annual basis, the total estimate for the preparation of applications by grantees is 8,000 hours. Based upon the Head Start program manager’s average annual salary, we estimate the cost of the preparation of an application to be approximately \$960.00. Eighty percent of these costs are borne directly through the provision of federal funds. In addition, all other costs related to the development of projects affected by this Rule are provided directly by grant funds or through required non-federal match as provided for by this Rule. No impacts are expected on either employees or clients of the Head Start program or its operation.

The Administration for Children and Families (ACF) will consider comments by the public on these proposed collections of information in:

- Evaluating whether the proposed collections are necessary for proper performance of the functions of ACF, including whether the information will have practical utility;
- Evaluating the accuracy of ACF's estimate of the burden of the proposed collections of information;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond.

OMB is required to make a decision concerning the collection of information contained in this Final Rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having all its full effect if OMB receives it within 30 days of publication. Written comments to OMB for the proposed information collection should be sent to: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503, Attn: Brenda Aguilar.

#### List of Subjects in 45 CFR Part 1309

Education of disadvantaged, Grant programs-social programs, Head Start, Real property acquisition.

(Catalog of Federal Domestic Assistance Program Number 93.600, Project Head Start)

Dated: December 24, 2002.

**Wade F. Horn,**

*Assistant Secretary for Children and Families.*

Approved: January 21, 2003.

**Tommy G. Thompson,**  
*Secretary.*

■ For the reasons set forth in the Preamble, 45 CFR part 1309 is amended as follows:

■ 1. The authority citation for part 1309 continues to read as follows:

**Authority:** 42 U.S.C. 9801 *et seq.*

■ 2. The heading of Part 1309 is revised to read as follows:

#### **PART 1309—HEAD START FACILITIES PURCHASE, MAJOR RENOVATION AND CONSTRUCTION**

■ 3. Section 1309.1 is revised to read as follows:

##### **§ 1309.1 Purpose and application.**

This part prescribes regulations implementing sections 644(c), (f) and (g) and 645A(b)(9) of the Head Start Act, 42 U.S.C. 9801 *et seq.*, as they apply to

grantees operating Head Start programs (including Early Head Start grantees) under the Act. It prescribes the procedures for applying for Head Start grant funds to purchase, construct, or make major renovations to facilities in which to operate Head Start programs. It also details the measures which must be taken to protect the Federal interest in such facilities purchased, constructed or renovated with Head Start grant funds.

■ 4. Section 1309.2 is revised to read as follows:

##### **§ 1309.2 Approval of the use of Head Start funds to continue purchase of facilities.**

Head Start grantees (including Early Head Start grantees) which purchased facilities after December 31, 1986, and which are continuing to pay costs of purchasing those facilities, may apply to receive Head Start funds to meet those costs by submitting applications which conform to the requirements of this part and the Act. A grantee may only use grant funds to pay facility purchase costs incurred after the responsible HHS official approves its application.

■ 5. Section 1309.3 is amended by revising the definitions "acquire," "grant funds," "grantee," and "purchase" and adding four new definitions to read as follows:

##### **§ 1309.3 Definitions.**

*Acquire* means to purchase or construct in whole or in part with Head Start grant funds through payments made in satisfaction of a mortgage agreement (both principal and interest), as a down payment, and for professional fees, closing costs and any other costs associated with the purchase or construction of the property that are usual and customary for the locality.

*Construction* means new buildings, and excludes renovations, alterations, additions, or work of any kind to existing buildings.

*Grant funds* means Federal financial assistance received by a grantee from ACF to administer a Head Start or Early Head Start program pursuant to the Head Start Act.

*Grantee* means any agency designated to operate a Head Start program (including an agency designated to operate an Early Head Start program) pursuant to section 641 or 645A of the Head Start Act.

*Incidental alterations and renovations* means improvements to facility which

do not meet the definition of major renovation.

*Major renovation* means a structural change to the foundation, roof, floor, or exterior or load-bearing walls of a facility, or extension of an existing facility to increase its floor area. Major renovation also means extensive alteration of an existing facility, such as to significantly change its function and purpose, even if such renovation does not include any structural change to the facility. Major renovation also includes a renovation of any kind which has a cost exceeding the lesser of \$200,000, adjusted annually to reflect the percentage change in the Consumer Price Index for All Urban Consumers (issued by the Bureau of Labor Statistics) beginning one year after June 2, 2003, or 25 percent of the total annual direct costs approved for the grantee by ACF for the budget period in which the application is made.

*Purchase* means to buy an existing facility, either outright or through a mortgage. Purchase also refers to an approved use of Head Start funds to continue paying the cost of purchasing facilities begun after December 31, 1986 as permitted by the Head Start Act and by § 1309.2.

*Suitable facility* means a facility which is large enough to meet the foreseeable needs of the Head Start program and which complies with local licensing and code requirements and the access requirements of the Americans with Disabilities Act (ADA), if applicable, and section 504 of the Rehabilitation Act of 1973.

■ 6. Section 1309.4 is added to read as follows:

##### **§ 1309.4 Eligibility—Construction.**

Before submitting an application under § 1309.10 for construction of a facility, the grantee must establish that:

- (a) The Head Start program serves an Indian Tribe; or is located in a rural or other low-income community; and
- (b) There is a lack of suitable facilities (including public school facilities) in the grantee's service area which will inhibit the operation of the program, as demonstrated by a statement that neither the grantee's current facility nor any facility available for lease in the service area is suitable for use by the Head Start program. This statement must explain the factors considered, how it was determined that there is a lack of suitable facilities and be supported whenever possible by a written statement from a licensed real



estate professional in the grantee's service area.

■ 7. Section 1309.5 is added to read as follows:

**§ 1309.5 Eligibility—Major Renovations.**

Before submitting an application under § 1309.10, the grantee must establish that:

(a) The Head Start program serves an Indian Tribe, or is located in a rural or other low-income community; and

(b) There is a lack of suitable facilities (including public school facilities) in the grantee's service area which will inhibit or prevent the operation of the program, as demonstrated by a statement that neither the grantee's current facility nor any facility available for lease or purchase in the service area is suitable or could be made suitable without major renovation. This statement must explain the factors considered, how it was determined that there is a lack of suitable facilities and be supported, whenever possible, by written statement from a licensed real estate professional in the grantee's service area.

■ 8. Section 1309.10 is removed and a new § 1309.10 is added to read as follows:

**§ 1309.10 Applications for the purchase, construction and major renovation of facilities.**

A grantee which proposes to use grant funds to purchase a facility, or a grantee found eligible under § 1309.4 to apply for funds to construct a facility, or § 1309.5 to undertake major renovation of a facility, including facilities purchased for that purpose, must submit a written application to the responsible HHS official. The application must include the following information:

(a) A legal description of the site of the facility, and an explanation of the appropriateness of the location to the grantee's service area, including a statement of the effect that acquisition or major renovation of the facility has had or will have on the transportation of children to the program, on the grantee's ability to collaborate with other child care, early education programs, social services and health providers, and on all other program activities and services.

(b) Plans and specifications of the facility to be acquired, including information on the size and type of structure, the number and a description of the rooms, and the lot on which the building is located or will be located (including the space available for a playground and for parking). If incidental alterations and renovations or major renovations are being proposed to

make a facility suitable to carry out the Head Start program, a description of the renovations, and the plans and specifications submitted, must also describe the facility as it will be after renovations are complete. In the case of a proposed major renovation or construction project, the applicant must submit a written estimate of all costs associated with the project. An architect or engineer must prepare the written estimate.

(c) The cost comparison described in § 1309.11.

(d) The intended use of the facility proposed for acquisition or major renovation, including information showing the percentage of floor space that will be used as a Head Start center or a direct support facility for a Head Start program. As provided under section 644(f)(2)(D) of the Act, in the case of a request regarding funding for the continuing purchase of a facility, the application must include information demonstrating that the facility will be used principally as a Head Start center, or a direct support facility for a Head Start program.

(e) An assurance that the facility complies (or will comply when constructed or after completion of the renovations described in paragraph (b) of this section) with local licensing and code requirements, the access requirements of the Americans with Disabilities Act (ADA), if applicable, and section 504 of the Rehabilitation Act of 1973. The grantee will also assure that it has met the requirements of the Flood Disaster Protection Act of 1973, if applicable.

(f) If the grantee proposing to purchase a facility without undertaking major renovations is claiming that the lack of alternative facilities will prevent or would have prevented operation of the program, a statement of how it was determined that there is or was a lack of alternative facilities. This statement must be supported, whenever possible, by a written statement from a licensed real estate professional in the grantee's service area. If a grantee requesting approval of the use of Head Start funds to continue purchase of a facility is unable to provide such statements based on circumstances which existed at the time the purchase began, the grantee and the licensed real estate professional may use present conditions as a basis for making the determination.

(g) The terms of any proposed or existing loan(s) related to acquisition or major renovation of facility and the repayment plans (detailing balloon payments or other unconventional terms, if any), and information on all other sources of funding of the

acquisition or major renovations, including any restrictions or conditions imposed by other funding sources.

(h) A statement of the effect that the acquisition or major renovation of the facility would have on the grantee's meeting the non-Federal share requirement of section 640(b) of the Head Start Act, including whether the grantee is seeking a waiver of its non-Federal share obligation under that section of the Act.

(i) Certification by a licensed engineer or architect that the building proposed to be purchased or for which Head Start funds will be used to continue to purchase is structurally sound and safe for use as a Head Start facility. The applicant must certify that, upon completion of major renovation to a facility or construction of a facility, that an inspection by a licensed engineer or architect will be conducted to determine that the facility is structurally sound and safe for use as a Head Start facility.

(j) A statement of the effect that the acquisition or major renovation of a facility would have on the grantee's ability to meet the limitation on development and administrative costs in section 644(b) of the Head Start Act. One-time fees and expenses necessary to the acquisition or major renovation, such as the down payment, the cost of necessary renovation, loan fees and related expenses, and fees paid to attorneys, engineers, and appraisers, are not considered to be administrative costs.

(k) A proposed schedule for acquisition, renovation and occupancy of the facility.

(l) Reasonable assurance that the applicant will obtain, or has obtained, a fee simple or such other estate or interest in the site of the facility to assure undisturbed use and possession for the purpose of operating a Head Start program. A grantee seeking funding for acquisition or *major renovation* of a facility that is sited on land not owned by the grantee must establish in its application that there is no other feasible alternative to acquisition or *leasing* of the facility for providing a suitable facility appropriate to the needs of the Head Start program. If the grantee proposes to acquire a facility without also purchasing the land on which the facility is or will be situated, the application must include a copy of the existing or proposed land lease or other document which protects the Federal interest in the facility and ensures undisturbed use and possession of the facility by the grantee, or other organization designated by ACF, for the purpose of operating a Head Start program or other program designated by

ACF. A grantee applying for funding to make major renovations to a facility it does not own must include with its application written permission from the owner of the building projected to undergo major renovation and a copy of the lease or proposed lease for the facility. A grantee receiving funds for acquisition or the major renovation of a facility, on land belonging to another party, must have a land lease or other similar interest in the underlying land which is long enough to allow the Head Start program to receive the full value of those permanent grant-supported improvements.

(m) An assessment of the impact of the proposed project on the human environment pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) and its implementing regulations (40 CFR parts 1500 through 1508), as well as a report showing the results of tests for environmental hazards present in the facility, ground water, and soil (or justification why such testing is not necessary). In addition, such information as may be necessary to comply with the National Historic Preservation Act of 1966 (16 U.S.C. 470f) must be included.

(n) Assurance that the grantee will comply with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.* and 49 CFR part 24), and information about the costs that may be incurred due to compliance with this Act.

(o) A statement of the share of the cost of acquisition or major renovation that will be paid with grant funds.

(p) For a grantee seeking approval of the use of Head Start funds to continue purchase of a facility, a statement of the extent to which it has attempted to comply and will be able to comply with the provision of § 1309.22.

(q) Such additional information as the responsible HHS official may require.

■ 9. Section 1309.11 is revised to read as follows:

**§ 1309.11 Cost comparison for purchase, construction and major renovation of facilities.**

(a) A grantee proposing to acquire or undertake a major renovation of a facility must submit a detailed estimate of the costs of the proposed activity and compare the costs of the proposed activity as provided under paragraph (c) of this section and provide any additional information requested by the responsible HHS official.

(b) All costs of acquisition, renovation and ownership must be identified,

including, but not limited to, professional fees, purchase of the facility to be renovated, renovation costs, moving expenses, additional transportation costs, maintenance, taxes, insurance, and easements, rights of way or land rentals. An independent appraisal of the current value of the facility proposed to be purchased, or which the grantee will continue to purchase with Head Start funds or to receive major renovation, made by a professional appraiser, must be included.

(c)(1) Grantees proposing to purchase a facility, without requesting funds for major renovations to the facility, must compare costs of the proposed facility to the cost of the facility currently used by the grantee, unless the grantee has no current facility, will lose the use of its current facility, intends to continue to use its current facility after it purchases the new facility, or has shown to the satisfaction of the responsible HHS official that its existing facility is inadequate. Where the grantee's current facility is not used as the alternate facility, the grantee must use for comparison a facility (or facilities) available for lease in the grantee's service area and suitable for use as a Head Start facility or which can be made suitable through incidental alteration or renovations, the cost of which shall be included in the cost comparison. In the case of an application for approval of the use of Head Start funds to continue purchase of a facility, the cost of the present facility must be compared to the cost of the facility used by the grantee before purchase of its current facility. If the facility used by the grantee before the purchase of its present facility was deemed inadequate by the responsible HHS official, or the grantee had no previous facility, the alternative facility shall be an available, appropriate facility (or facilities) of comparable size that was available for rent in the grantee's service area at the time of its purchase of the current facility. Grantees which have established under § 1309.10(f) that there is a lack of alternative facilities that will prevent or would have prevented operation of the program are not required to provide a cost comparison under this paragraph.

(2) Grantees proposing to construct a facility must compare the costs of constructing the proposed facility to the costs of purchasing a suitable alternate facility or owning, purchasing or leasing an alternative facility which can be made suitable for use through incidental alterations and renovations or major renovations. The alternative facility is one now owned by the grantee or

available for lease or purchase in the grantee's service area. If no such facility is available, this statement must explain how this fact was determined and the claim must be supported, whenever possible, by a written statement from a licensed real estate professional in the grantee's service area.

(3) A grantee proposing to undertake a major renovation of a facility must compare the cost of the proposed renovation (including the cost of purchasing the facility to be renovated, if the grantee is proposing to purchase the facility) to the costs of constructing a facility of comparable size. In place of the cost comparison required in the preceding sentence, a grantee proposing to make major renovations to a leased facility must show that the monthly or annual occupancy costs for the term of the lease, including the cost of the major renovations, is less than, or comparable to, the costs of purchasing or leasing any other facility in the grantee's service area which can be made suitable through major renovations, if such a facility is available.

(d) The grantee must separately delineate the following expenses in the application:

(1) One-time costs, including but not limited to, costs of purchasing the facility to be renovated, the down payment, professional fees, moving expenses, the cost of site preparation; and

(2) Ongoing costs, including, but not limited to, mortgage payments, insurance premiums, maintenance costs, and property taxes. If the grantee is exempt from the payment of property taxes, this fact must be stated.

(e) The period of comparison for purchase, construction or major renovation of a facility is twenty years, except that for the purchase of a modular unit the period of comparison is ten years and the period of comparison for major renovation of a leased facility is the period of the lease remaining after the renovations are completed. For approvals of the use of Head Start funds to continue purchase of the facility the period of comparison begins on the date the purchase began.

(f) If the facility is to be used for other purposes in addition to the operation of the Head Start program, the cost of use of that part of the facility used for such other purposes must be allocated in accordance with applicable Office of Management and Budget cost principles.

■ 10. Section 1309.21 is amended by revising paragraphs (a), (d) and (f) introductory text to read as follows:

**§ 1309.21 Recording of Federal interest and other protection of Federal interest.**

(a) The Federal government has an interest in all real property and equipment acquired or upon which major renovations have been undertaken with grant funds for use as a Head Start facility. The responsible HHS official may subordinate the Federal interest in such property to that of a lender, which financed the acquisition or major renovation costs subject to the conditions set forth in paragraph (f) of this section.

\* \* \* \* \*

(d)(1) A grantee receiving funds to acquire or make major renovations to a facility that is or will be sited on land not owned by the grantee must have a lease or other arrangement which protects the Federal interest in the facility and ensures the grantee's undisturbed use and possession of the facility. The lease or document evidencing another arrangement shall include provisions to protect the right of the grantee, or some other organization designated by ACF in the place of the grantee, to occupy the facility for the term of the lease or other arrangement and such other terms required by the responsible HHS official. The designation of an alternate tenant or occupant of the facility by ACF shall be subject to approval by the Lessor, which will not be withheld except for good reason, not including the willingness of another party to pay a higher rent. A grantee receiving funds for the major renovation or acquisition of a facility, on land belonging to another party, must have a land lease or other similar interest in the underlying land which is long enough to allow the Head Start program to receive the full value of those permanent grant-supported improvements.

(2) Except as required under § 1309.31 for certain modular units, the grantee must record the Notice of Federal Interest in the appropriate official records for the jurisdiction where a facility is or will be located immediately upon: purchasing a facility or land on which a facility is to be constructed; receiving permission to use funds to continue purchase of a facility; commencing major renovation of a facility or construction of a facility. In the case of a leased facility undergoing major renovations, the Notice of Federal Interest shall be a copy of the executed lease and all amendments. In the case of a facility now sited or to be constructed on land not owned by the grantee, the Notice of Federal Interest shall be the land lease or other document protecting the Federal interest. The lease or other

document must ensure the right of the grantee to have undisturbed use and possession of the facility. In the event that filing of a lease is prohibited by State law, the grantee shall file an affidavit signed by the representatives of the grantee and the Lessor stating that the lease includes terms which protect the right of the grantee, or some other organization designated by ACF in the place of the grantee, to occupy the facility for the term of the lease.

(3) The Notice of Federal Interest for property sited on land not owned by the grantee shall include the following information:

(i) The date of the award of grant funds for the acquisition or major renovation of the property to be used as a Head Start facility, and the address and legal description of the property to be acquired or renovated;

(ii) That the grant incorporated conditions which included restrictions on the use of the property and provide for a Federal interest in the property;

(iii) That the property may not be used for any purpose inconsistent with that authorized by the Head Start Act and applicable regulations;

(iv) That the property may not be mortgaged or used as collateral, sold or otherwise transferred to another party, without the written permission of the responsible HHS official;

(v) That these grant conditions and requirements cannot be altered or nullified through a transfer of ownership; and

(vi) The name (including signature) and title of the person who completed the Notice for the grantee agency, and the date of the Notice.

(4) A lease, serving as a Notice of Federal Interest, an affidavit filed in the land records as a substitute for the lease, or other document protecting the Federal interest in a facility acquired with grant funds and sited on land not owned by the grantee, shall include the following information:

(i) The address and legal description of the property;

(ii) That the grant incorporated conditions which include restrictions on the use of the property and provide for a Federal interest in the property for the term of the lease or other arrangement; and

(iii) That the property may not be used for any purpose during the lease or other arrangement that is inconsistent with that authorized by the Head Start Act and applicable regulations.

\* \* \* \* \*

(f) In subordinating its interest in a facility acquired or upon which major renovations have been undertaken with

grant funds, the responsible HHS officials does not waive application of paragraph (d) of this section and § 1309.22. A written agreement by the responsible HHS official to subordinate the Federal interest must provide:

\* \* \* \* \*

■ 11. Section 1309.22(a) is revised to read as follows:

**§ 1309.22 Rights and responsibilities in the event of grantee's default on mortgage, or withdrawal or termination.**

(a) The mortgage agreement, or security agreement in the case of a modular unit which is proposed to be purchased under a chattel mortgage, shall provide in the case of default by the grantee or the withdrawal or termination of the grantee from the Head Start program that ACF may intervene. In the case of a default, the mortgage agreement or security agreement must provide that ACF may intervene to ensure that the default is cured by the grantee or another agency designated by ACF and that the lender shall accept the payment of money or performance of any other obligation by ACF's designee, for the grantee, as if such payment of money of performance had been made by the grantee. The agreement shall also provide that ACF will have a period of 60 days after notification by the grantee of default in which to intervene to attempt to cure the default. The agreement shall further provide that in the event of a default, or the withdrawal or termination of the grantee the mortgage may be assumed by an organization designated by ACF. The mortgage or creditor will have the right to approve the organization designated to assume the mortgage, but such approval will not be withheld except for good reason. The required provisions must be included in the mortgages of facilities funded as continuing purchases pursuant to §1309.2 unless a convincing justification for not doing so is shown by the Head Start grantee.

\* \* \* \* \*

■ 12. Section 1309.23 is amended by revising paragraph (a) introductory text to read as follows:

**§ 1309.23 Insurance, bonding and maintenance.**

(a) At the time of acquiring or undertaking a major renovation of a facility or receiving approval for the use of Head Start funds to continue purchase the grantee shall obtain insurance coverage for the facility which is not lower in value than coverage it has obtained for other real property it owns, and which at least meets the requirements of the coverage

specified in paragraphs (a)(1) and (2) of this section. For facilities, which have been constructed or renovated, insurance coverage must begin at the commencement of the expenditure of costs in fulfillment of construction or renovation work.

\* \* \* \* \*

■ 13. Introductory language and paragraph (a) of § 1309.30 are revised to read as follows:

**§ 1309.30 General.**

In addition to the special requirements of §§ 1309.31 through 1309.34, the proposed purchase or request for approval of continuing purchase of a modular unit is subject to all of the requirements of this part with the following exceptions:

(a) The requirements of §1309.33 apply rather than the requirement of §1309.10(i); and

\* \* \* \* \*

■ 14. Section 1309.31 is amended by revising paragraph (a) to read as follows:

**§ 1309.31 Site description.**

(a) An application for the purchase or approval of a continuing purchase of a modular unit pursuant to § 1309.2 must state specifically where the modular unit is or will be installed, and whether the land on which the modular unit will be installed will be purchased by the grantee. If the grantee does not propose to purchase the land on which to install the modular unit or if the modular unit the grantee is continuing to purchase with Head Start funds is located on land not owned by the grantee, the application must state who owns the land on which the modular unit is or will be situated and describe the easement, right-of-way or land rental it will obtain or has obtained to allow it sufficient access to the modular unit.

\* \* \* \* \*

■ 15. Section 1309.32 is amended by revising paragraph (b) to read as follows:

**§ 1309.32 Statement of procurement procedure for modular units.**

\* \* \* \* \*

(b) This statement must include a copy of the specifications for the unit which is proposed to be purchased and assurance that the grantee will comply with procurement procedures in 45 CFR parts 74 and 92, including assurance that all transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. A grantee requesting approval for the use of Head Start funds for continued purchase of a modular unit must also include a copy of the specifications for the unit.

■ 16. Section 1309.33 is revised to read as follows:

**§ 1309.33 Inspection.**

A grantee which purchases a modular unit with grant funds or receives approval of a continuing purchase must have the modular unit inspected by a licensed engineer or architect within 15 calendar days of its installation or approval of a continuing purchase, and must submit to the responsible HHS official the engineer's or architect's inspection report within 30 calendar days of the inspection.

■ 17. Section 1309.40 is removed and a new §1309.40 is added to read as follows:

**§ 1309.40 Copies of documents.**

Certified copies of the deed, lease, loan instrument, mortgage, and any other legal documents related to the acquisition or major renovation of the facility or the discharge of any debt secured by the facility must be submitted to the responsible HHS official within ten days of their execution.

■ 18. Section 1309.41 is removed and a new §1309.41 is added to read as follows:

**§ 1309.41 Record retention.**

All records pertinent to the acquisition or major renovation of a facility must be retained by the grantee for a period equal to the period of the grantee's ownership (or occupancy, in the case of leased facilities) of the facility plus three years.

■ 19. Section 1309.42 is revised to read as follows:

**§ 1309.42 Audit of mortgage.**

Any audit of a grantee, which has acquired or made major renovations to a facility with grant funds, shall include an audit of any mortgage or encumbrance on the facility. Reasonable and necessary fees for this audit and appraisal are payable with grant funds.

■ 20. Section 1309.43 is revised to read as follows:

**§ 1309.43 Use of grant funds to pay fees.**

Consistent with the cost principles referred to in 45 CFR part 74 and 45 CFR part 92, reasonable fees and costs associated with and necessary to the acquisition or major renovation of a facility (including reasonable and necessary fees and costs incurred to establish preliminary eligibility under §§ 1309.4 and 1309.5, or otherwise prior to the submission of an application under § 1309.10 or acquisition of the facility) are payable with grant funds,

and require prior, written approval of the responsible HHS official.

■ 21. Section 1309.44 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 1309.44 Independent analysis.**

(a) The responsible HHS official may direct the grantee applying for funds to acquire or make major renovations to a facility to obtain an independent analysis of the cost comparison submitted by the grantee pursuant to § 1309.11, or the statement under 1309.10(f) of this part, or both, if, in the judgment of the official, such an analysis is necessary to adequately review a proposal submitted under this part.

(b) The analysis shall be in writing and shall be made by a qualified, disinterested real estate professional in the community in which the property to be purchased or renovated is situated.

\* \* \* \* \*

■ 22. A new Subpart F is added to read as follows:

**Subpart F—Construction and Major Renovation**

Sec.

1309.51 Submission of drawings and specifications.

1309.52 Procurement procedures.

1309.53 Inspection of work.

1309.54 Davis-Bacon Act.

**Subpart F—Construction and Major Renovation**

**§ 1309.51 Submission of drawings and specifications.**

(a) The grantee may not advertise for bids or award a contract for any part of construction or major renovation funded by grant funds until the grantee has submitted to the responsible HHS official final working drawings and written specifications for the project, a written certification by a licensed engineer or architect as to technical appropriateness of the proposed construction or renovation and the conformity of the project as shown in the final working drawings and specifications with Head Start programmatic requirements, and a written estimate of the costs of the project by a licensed architect or engineer.

(b) The responsible HHS official may authorize the grantee to advertise bids or award a contract after receiving the information provided under paragraph (a) of this section and determining that sufficient funding is, or will be, available to cover the costs of the project as estimated by the architect or engineer, and that the scope of the project as described in the drawings and

specifications is appropriate to the needs of the grantee.

#### **§ 1309.52 Procurement procedures.**

(a) All facility construction and major renovation transactions must comply with the procurement procedure in 45 CFR parts 74 or 92, and must be conducted in a manner to provide, to the maximum extent practical, open and free competition.

(b) All contracts for construction or major renovation of a facility to be paid for in whole or in part with Head Start funds require the prior, written approval of the responsible HHS official and shall be on a lump sum fixed-price basis.

(c) Prior written approval of the responsible HHS official is required for unsolicited modifications that would change the scope or objective of the project or would materially alter the costs of the project by increasing the amount of grant funds needed to complete the project.

(d) All construction and major renovation contracts for facilities acquired with grant funds shall contain a clause stating that the responsible HHS official or his or her designee shall have access at all reasonable times to the work being performed pursuant to the contract, at any stage of preparation or progress, and require that the contractor shall facilitate such access and inspection.

#### **§ 1309.53 Inspection of work.**

(a) The grantee must provide and maintain competent and adequate architectural or engineering inspection at the work site to insure that the completed work conforms to the approved plans and specifications.

(b) The grantee must submit a final architectural or engineering inspection report of the facility to the responsible HHS official within 30 calendar days of substantial completion of the construction or renovation.

#### **§ 1309.54 Davis-Bacon Act.**

Construction and renovation projects and subcontracts financed with funds awarded under the Head Start program are subject to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) and the Regulations of the Department of Labor, 29 CFR part 5. The grantee must provide an assurance that all laborers and mechanics employed by contractors or subcontractors in the construction or renovation of affected Head Start facilities shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 300

[Docket No. 021016236-3089-02; I.D. 082002A]

RIN 0648-AP74

#### **Antarctic Marine Living Resources; CCAMLR Ecosystem Monitoring Permits; Vessel Monitoring System; Catch Documentation Scheme; Fishing Season; Registered Agent; and Disposition of Seized AMLR**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to: lengthen the duration of the permit required to enter a Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) Ecosystem Monitoring Program (CEMP) site from 1 year to up to 5 years; define the CCAMLR fishing season and require the use of an automated satellite-linked vessel monitoring system (VMS) for U.S. vessels harvesting Antarctic marine living resources (AMLR) in the area of the Convention on the Conservation of Antarctic Marine Living Resources (Convention); require foreign entities to designate and maintain a registered agent within the United States; prohibit the import of *Dissostichus* species (toothfish) identified as originating from certain high seas areas outside the Convention Area; incorporate into the Code of Federal Regulations the prohibition on the import of toothfish issued a Specially Validated *Dissostichus* Catch Document (SVD/CD); and institute a preapproval system for U.S. receivers and importers of *Dissostichus eleginoides* (Patagonian toothfish) and *Dissostichus mawsoni* (Antarctic toothfish). This final rule is intended to implement U.S. obligations as a Member of CCAMLR and to conserve Antarctic and Patagonian toothfish by preventing and discouraging unlawful harvest and trade in these species and streamlining the administration of the *Dissostichus* Catch Document (DCD) scheme.

**DATES:** This final rule is effective June 2, 2003, except that amendments to §§ 300.107 and 300.113 are effective June 16, 2003.

**ADDRESSES:** Copies of the Environmental Assessment and Regulatory Impact Review/Final

Regulatory Flexibility Analysis (EA and RIR/FRFA) supporting this action may be obtained from Dean Swanson, International Fisheries Division, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Send comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule to Dean Swanson at the above address and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 (Attention: NOAA Desk Officer).

**FOR FURTHER INFORMATION CONTACT:** Dean Swanson at 301-713-2276, fax 301-713-2313.

**SUPPLEMENTARY INFORMATION:** Antarctic fisheries are managed under the authority of the Antarctic Marine Living Resources Convention Act of 1984 (Act) codified at 16 U.S.C. 2431 *et seq.* NMFS implements conservation measures developed by CCAMLR and adopted by the United States, through regulations at 50 CFR part 300, subparts A and G. Background information about the need for revisions to the Antarctic fisheries regulations was provided in the preamble to the proposed rule (67 FR 64853, October 22, 2002) and is not repeated here.

Fees will be charged for reviewing and processing preapproval DCDs. A system of calculating fees and billing for fees was discussed in the proposed rule. NMFS will use a much simpler procedure already in use by an unrelated permitting system by specifying the application fee in the instructions accompanying each application form for DCD preapproval. The methodology for calculating the fee is in accordance with procedures specified in the NOAA Finance Handbook for determining administrative costs of special products and services. "Instructions for Completing the NOAA Product/Service Cost Computation Form" from Chapter 9, Section 10 of the NOAA Finance Handbook, may be obtained by contacting NMFS (see **ADDRESSES**). This action will simplify the DCD application process for applicants and DCD program personnel without affecting the amount of the fee.

#### **Comments and Responses**

NMFS received written comments during the 30-day comment period on the proposed rule. When drafting the final regulations and the final EA and RIR/FRFA, NMFS considered all comments received. Comments were received on the proposed rule from