

(2) Report of acreage identifying the geographic location and number of acres in the disaster-affected stand of claimed trees, bushes, and vines according to part 718 of this title;

(3) A written estimate of the number of acres of trees, bushes or vines lost or damaged which is prepared by the owner or someone who is a qualified expert, as determined by the county committee;

(4) Sufficient evidence of the loss to allow the county committee to calculate whether an eligible loss occurred.

(c) Before requests will be approved, the county committee:

(1) Must verify actual qualifying losses and the number of acres involved by on-site visual inspection of the land and trees, bushes or vines.

(2) May request additional information and may consider all relevant information in making their determination, including their members' own knowledge about the applicant's normal operations.

§ 1416.704 Payment calculation.

(a) An approved eligible producer shall be reimbursed in an amount not to exceed 75 percent of the eligible costs for the qualifying practice. The payment shall be the lesser of the 75% of actual costs for the practice or the amount calculated using rates established by the Deputy Administrator. The costs permitted shall only be approved for:

(1) Seedlings or cuttings, for trees, bushes or vine replanting;

(2) Site preparation and debris handling within normal cultural practices for the type of individual stand being re-established and necessary to ensure successful plant survival;

(3) Chemicals and nutrients necessary for successful establishment;

(4) Labor to plant seedlings or cuttings as determined reasonable by the county committee;

(5) Replacement, rehabilitation, and pruning; and

(6) Labor used to transplant existing seedlings established through natural regeneration into a productive tree stand.

(b) Costs for fencing, irrigation, irrigation equipment, protection of seedlings from wildlife, general improvements, re-establishing structures, windscreens and other costs as determined by the Deputy Administrator are not eligible for reimbursement benefits.

(c) When lost stands are replanted, the types planted may be different than those originally planted if the new types have the same general end use, as the county committee determines and approves. Payments will be based on the

lesser of rates established to plant the types actually lost or the cost to establish the eligible alternative type used. If the species of plantings, seedlings or cuttings differs significantly from the species lost then, except as the county committee determines, the costs may not be reimbursed.

(d) Eligible producers may elect not to replant or rehabilitate the entire eligible stand. If so, the county committee shall calculate payment based on the number of qualifying trees, bushes or vines actually replanted or rehabilitated.

(e) In addition to the prohibition in § 1416.6(g), and the payment limitation in § 783.6(f) of this title, producers cannot receive duplicate benefits under this subpart and subpart D of this part, the Hurricane Citrus Disaster Program, for the same loss.

§ 1416.705 Obligations of a participant.

(a) Eligible producers must execute all required documents and complete the 2005 Hurricane TAP funded practice within 12 months of application approval.

(b) If a person was erroneously determined to be eligible or becomes ineligible for all or part of a 2005 Hurricane TAP benefit, the person and successor shall refund any payment paid under this part together with interest from the date of disbursement at a rate in accordance with part 1403 of this chapter.

(c) Participants must allow representatives of FSA to visit the site for the purpose of certifying compliance with 2005 Hurricanes TAP requirements.

Subpart I—2005 Catfish Grant Program

§ 1416.800 General.

(a) CCC will administer a limited program to provide assistance to catfish producers in eligible counties. Under the Catfish Grant Program, CCC will provide grants to the State governments of States where eligible counties are located. The amount of each grant will be based on the total value of the catfish feed loss suffered in every eligible county in the subject state as determined by CCC. Available grant funds under this subpart and funds under subpart B of this part will be uniformly prorated to ensure that available funding is not exceeded. Catfish producers in eligible counties who suffered at least a 30-day catfish feed loss may be eligible for these funds. Among other conditions of these grants, assistance provided by a State under such a grant to an applicant shall not exceed \$80,000, except for general partnerships and joint ventures, in

which case assistance shall not exceed \$80,000 times the number of members that constitute the general partnership or joint venture.

(b) No producer may receive duplicate payments under this subpart and any other Federal programs for the same loss.

Signed in Washington, DC, February 2, 2007.

Thomas B. Hofeller,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 07-590 Filed 2-9-07; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1496

RIN 0560-AH39

Procurement of Commodities for Foreign Donation

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule adopts new procedures to be used by the Commodity Credit Corporation (CCC) in the evaluation of bids in connection with the procurement of commodities for foreign donation. CCC is amending the existing regulations to provide for the simultaneous review of commodity and ocean freight offers when evaluating lowest-landed cost options in connection with the procurement of commodities for foreign donation. This rule will enhance bidding opportunities for potential vendors while allowing CCC to more efficiently acquire commodities.

DATES: *Effective Date:* February 12, 2007.

FOR FURTHER INFORMATION CONTACT: Richard J. Chavez, United States Department of Agriculture (USDA), Farm Service Agency (FSA), Commodity Procurement Policy & Analysis Division (CPPAD), Room 5741-S, 1400 Independence Avenue, SW., Washington, DC 20250; Telephone: (202) 690-0194; Facsimile: (202) 690-2221; E Mail: Richard.Chavez@USDA.gov.

SUPPLEMENTARY INFORMATION:

Background

CCC procures agricultural commodities for donation overseas under various food aid authorities. These authorities include Title II of the Agricultural Trade Development and

Assistance Act of 1954 (Pub. L. 480), which is administered by the U.S. Agency for International Development (AID), and the Food for Progress and the McGovern-Dole International Food for Education and Child Nutrition Programs, which are administered by the Foreign Agricultural Service (FAS) within USDA.

Currently, CCC follows a two-step ocean freight bid evaluation process in connection with the procurement of commodities for foreign donations. First, CCC issues a public invitation soliciting bids for the sale of commodities and requests that ocean carriers provide indications of available freight rates to CCC. These "indications" of rates are not offers to CCC. In fact, CCC does not contract for ocean transportation for the donated commodities. Ocean transportation contracting is done by the Cooperating Sponsors (grantee organizations or foreign governments receiving the commodities) or by AID in the case of some Title II, Pub. L. 480 shipments.

At this point, CCC evaluates commodity bids together with the freight rate indications to identify the combination which would most likely result in the lowest-landed cost, i.e., the lowest combined cost of commodities and freight to destination. CCC will purchase the commodities to be donated overseas on that basis. Lowest-landed cost is calculated on the basis of U.S.-flag rates for that quantity of the commodities being purchased that is determined necessary and practical to meet cargo preference requirements, i.e., the tonnage to be shipped on U.S.-flag vessels. Although CCC does not contract for freight, the freight costs are borne by the U.S. Government from the same accounts as the commodity costs. Therefore, purchasing on the basis of lowest-landed cost will reduce outlays and maximize the use of funds.

CCC's commodity purchase determines the point at which the commodity is delivered to the carriers. However, as stated above, the freight rates used for this lowest-landed cost evaluation are not firm, fixed offers. Therefore, a second step is necessary that involves the Cooperating Sponsor or AID issuing invitations for firm freight offers. CCC will notify the Cooperating Sponsor(s) or AID of the location of the commodity as determined in its commodity bid evaluation and the Cooperating Sponsor or AID will issue ocean freight invitations that will lead to actual freight bookings by the Cooperating Sponsor or AID on firm, fixed ocean rates.

This two-step process has been in place for many years and was designed at the time that processed commodities were shipped at ocean carrier tariff rates that could be readily identified. Now, as rates are "submitted rates" and not tied to tariffs the process is exceedingly cumbersome and time-consuming, typically requiring 80 hours each month to analyze the first-step indications. Additionally, the process does not guarantee that commodities will be actually purchased and shipped on the basis of lowest-landed cost. One reason for this is that the U.S. Maritime Administration (MARAD), within the Department of Transportation, prioritizes U.S.-flag ocean service for purposes of cargo preference and assigns a higher priority to service that uses only U.S.-flag vessels to the final discharge point.

The current two-step process often results in commodities being purchased at locations based upon indications of service available from U.S.-flag carriers that have a lower priority. These port locations may not be cost-effective for the higher priority vessels, which can then displace the lower priority vessels and secure the cargo, often at a higher rate.

This rule will add clarity to the commodity bid evaluation process by eliminating the two-step process. A major constraint to revising this two-step process has been that computer resources available to CCC have been unable to analyze the large number of variables that comprise modern government commodity procurements and the complexities of cargo preference compliance. These include the many contract priorities that are mandated by law as well as the volume of possible commodity and freight cost variables that result from a national bidding system. CCC is now updating its computer bid-evaluation system to be able to accommodate a more unified one-step bid evaluation. The procurement for commodities using firm, fixed ocean rates to determine lowest-landed cost would be the most efficient method of procurement. Under such a system, the cargo preference requirements would be determined initially and not subject to a change of carriers. This should reduce the ocean freight costs considerably because the tonnage would be consolidated by the carriers' bids and by allowing lowest-landed cost and cargo preference requirements to determine the U.S. delivery points. The delivery time from call forward issuance to delivery abroad could be reduced because the current freight evaluation process would be streamlined.

The new procedures would apply to processed and bulk commodities and cover the assistance programs identified above. Under the one-step process, CCC would issue invitations for commodity bids and Cooperating Sponsors or AID would issue separate invitations for freight offers at approximately the same time. Freight invitations may call for bids to be submitted to the donee organization or AID via an Internet-based bid entry system maintained by CCC approximately 3 days prior to the time for receipt of commodity bids. Such a process would speed data input and evaluation as compared to the transmittal of written offers. Offers of commodities and freight would be invited on a "bid-point" basis, i.e., a point where the transfer of care and custody of the commodity from the vendor to the ocean carrier takes place. This point of transfer may include one or more terminals included under the specific bid point designation. CCC believes this specificity is desirable because a more general offer that designates a port area can have additional transfer costs once a specific terminal is named. CCC should be able to identify these extra costs at the time the bids are evaluated as it may impact on true lowest-landed cost calculations. The submitted freight offers will be reviewed by the donee organization, AID, and/or USDA prior to bid evaluation in order to determine the availability of service for commodities and destinations. Furthermore, the one-step bid evaluation process will be more efficient because ocean carriers are expected to offer quantity increments that are the most economical for them.

After commodity offers are received, CCC would evaluate the offers on the basis of lowest-landed cost by a comparison with offered freight rates. CCC would award the commodity bid on that basis and notify the Cooperating Sponsor of the bid accepted. The Cooperating Sponsor would be required to book freight at the rate CCC used for the lowest-landed cost determination, or a lower rate, except in circumstances where, in the opinion of the Contracting Officer and the applicable program agency's representative, extenuating circumstances (such as internal strife at the foreign destination or urgent humanitarian conditions threatening the lives of persons at the foreign destination) preclude such awards, or efficiencies and cost-savings lead to the use of different types of ocean services such as multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery Cost and Freight (C &

F), delivery Cost Insurance and Freight (CIF), and indexed ocean freight costs.

Summary of Public Comments

On December 16, 2005, CCC published a proposed rule, Procurement of Commodities for Foreign Donation, in the **Federal Register** (70 FR 74717–74721). The proposed rule proposed new procedures to be used by CCC in the evaluation of bids in connection with the procurement of commodities for foreign donation. The rule provided a 30-day public comment period ending January 17, 2006.

In response to public requests, CCC reopened and extended the comment period for 45 days to March 9, 2006, via a document published in the **Federal Register** January 23, 2006 (71 FR 3442). Further, CCC determined that a public meeting would be held at USDA on February 21, 2006, to provide for open discussion on the proposed rule. The notice of a public meeting was published in the **Federal Register** on February 8, 2006 (71 FR 6399–6400).

On April 7, 2006, a supplemental to the proposed rule was published in the **Federal Register** to clarify two points (71 FR 17767–17768). First, CCC specifically recognized its obligations under the cargo preference legislation of the Merchant Marine Act, 1936. Secondly, CCC clarified the “extenuating circumstances” that may preclude awards on the basis of lowest landed cost. CCC also reopened and extended the comment period to May 8, 2006, to accord interested parties to comment thereon.

CCC received a total of 46 responses on the proposed rule, including the supplemental to the proposed rule. Among the respondents were steamship lines or their legal representatives, ports, vendors of commodities, and trade and industry groups. A few of the respondents submitted more than one response, reiterating their points made from an earlier submission or addressing new points. Many of the responses received addressed multiple points; therefore, the number of comments discussed in this rule exceeds the number of actual responses received.

The public comments received in response to the proposed rule, and CCC’s response, are discussed below. While we considered the comments and suggestions received and understand the concerns and opinions expressed by the respondents, CCC did not change the final rule. This rule gives CCC necessary flexibility and is consistent with statutory requirements. Therefore, the proposed rule, including the

supplemental to the proposed rule, is adopted as final, without change.

General Comments

Fourteen of the comments received requested an extension of the original 30-day public comment period. CCC believed that the requests for additional time to comment on the proposed rule were reasonable and therefore on January 23, 2006, reopened and extended the comment period to March 9, 2006 (71 FR 3442). Two of the comments received after January 23, 2006, supported the extended comment period. Another comment was grateful for the extension in that it permitted time for a public meeting to discuss the proposed rule. On April 7, 2006, CCC again reopened and extended the comment period to May 8, 2006 (71 FR 17767–17768).

Nine of the comments received supported the proposed rule. Many of these agreed that the one-step procurement process, using firm, fixed freight rates, would streamline CCC’s procurement process making the actual purchases more cost efficient. CCC agrees.

One respondent noted that they were very pleased with the outcome of an interagency meeting on the proposed rule and that a consensus would be reached among the agencies before publication of the final rule. The agencies involved have met and have agreed that the one-step process will work efficiently for all interested parties.

Three comments stated that the proposed rule warranted a significant designation under Executive Order (EO) 12866 due to the expected economic impacts. However, the proposed rule was issued in conformance with EO 12866 and was determined to be not significant; therefore, it was not reviewed by the Office of Management and Budget (OMB). The projected economic impact from the implementation of a one-step bid evaluation process will arise, in part, from the savings that are derived from a truly “lowest landed” cost solution to commodity procurement. Under the current two-step process, as described in the background section of the rule, the indicative rates provided by the carriers are not firm—and the actual rates offered firm once the commodity is already purchased at a location, may bring into that procurement entirely different economics. This usually results in higher overall costs in the combination of freight and commodity. A one-step process should result in freight savings, derived in a more efficient manner in which ocean carriers

are selected, but not, however, in avoidance of cargo preference. In addition, while the proposed rule was designated not significant under EO 12866, this final rule was designated significant and was reviewed by OMB.

Two comments stated that the Regulatory Flexibility Act was applicable to the proposed rule. The Regulatory Flexibility Act (5 U.S.C. 603) only requires regulatory flexibility analysis when an agency is required to publish a proposed rule by the public notice and comment provisions of the Administrative Procedure Act (5 U.S.C. 553). Section 553(a)(2) of the Act provides an exemption for matters relating to contracts. Therefore, by law, CCC was exempt from the Regulatory Flexibility Act provisions. Although not required by the APA to publish a proposed rule, CCC published the proposed rule because it is USDA policy under a memorandum published by the Secretary of Agriculture on July 24, 1971 (36 FR 13804) to give notice of proposed rulemaking and invite the public to participate in rulemaking even where not required by law. In addition, CCC did conduct a Regulatory Flexibility Analysis for this final rule and it is available with the cost-benefit analysis from the contact person indicated above.

One comment stated that the proposed rule would significantly alter the administration of small business and Javits-Wagner-O’Day programs in the Department. Commodity procurements under this rule will comply with Federal Acquisition Regulation (FAR) and Small Business Utilization requirements.

One comment recommended that CCC incorporate Incoterms and other industry-standard terminology in food aid programs. The contract terms for ocean freight are determined by the booking agreement with the cooperating sponsor and not within the scope of this rule.

Five comments requested that a working session and/or meeting be convened as soon as possible with member U.S. ship operating companies and other interested parties to learn more and share ideas about the proposed rule and its impact on the maritime industry. Two other comments added that the proposed rule and the Freight Bid Entry System (FBES) should be made part of a cooperative effort that involves all interested parties, including AID and MARAD. Over the past few years as the one-step procurement process was under development, USDA held numerous public meetings to share information on the one-step procurement process, including FBES.

These included five meetings in 2005, starting with two in March, followed by a meeting in April, May and June. On February, 21, 2006, CCC held a public meeting to discuss the proposed rule with all interested parties. Additionally, a prototype of FBES was presented at the International Food Aid Conference (IFAC) held in Kansas City in March, 2006. During that time, all interested parties were given the opportunity to view the system and ask questions. CCC and AID have had numerous meetings with MARAD over the past several years as they have moved toward a one-step procurement process. These meetings have focused in great detail on how the software would work. Meetings are scheduled and agencies are working cohesively to achieve consensus on the new system implementation.

One comment stated that the proposed rule change had not been analyzed and/or explained in enough detail to allow stakeholders to assess the impact on their business, including changes in commodity port distribution and overall program cost benefits. Five other comments stated that not enough information was provided on the one-step procurement process, including but not limited to mechanical, programmatic and administrative changes and limitations, making it difficult to provide meaningful comments. Another comment, while supportive of a modernized system, stated that the proposed change in the procurement process deserves a full and open review by all interested parties prior to its implementation. This was shared and supported by another comment.

CCC has held numerous public meetings to share information on the one-step procurement process, including FBES, and has received extensive comments and recommendations from industry. Also, CCC intends to conduct FBES training for steamship lines and vendors in Washington, DC, and Kansas City, respectively. Training will be held to accommodate these parties during the testing period.

One comment expressed concern that implementation of the FBES system could result in programmatic errors and procedural problems. Another comment added that the FBES system will need to be highly dependable. One other comment added that they were uncertain as to when FBES testing would take place and suggested that a working group be established to develop a protocol for the testing. CCC recognizes the importance of a highly dependable system. To help identify, resolve and prevent programmatic errors

and procedural problems, CCC will continue to conduct system testing prior to implementation of the one-step procurement process. FBES testing is underway and will continue through late-2006. CCC is conducting system testing on small, medium, and large invitations.

Four comments urged that a side-by-side comparison of the current two-step procurement process versus the proposed one-step procurement process be run with results made available to the industry for evaluation and input prior to implementation. During agency meetings, it was agreed that CCC would conduct extensive internal testing followed by a period of training and opportunities for the external users of the system to gain experience using the system prior to implementation.

One comment stated that it would be very helpful for the industry to view some kind of sensitivity analysis or report which addresses how the constraints placed in the transportation part of the bids impacted the solution. The constraints that will be entered by the commodity vendors in the commodity bids, by the ocean carriers in ocean freight bids, the ports for port capacity, and KCCO for small business utilization or the MSA-17 (Great Lakes) requirements are absolute. All of these constraints will likely affect the contract and ocean freight awards as the system reviews literally billions of calculations.

One comment stated that FBES did not address two major concerns raised by cooperating sponsors. The first concern was the length of time required from the time the commodity is requested until it is available for shipment. The second concern was that the procurement process is built around a broad production schedule rather than the needs of the program for a timely arrival of the commodities in-country. The implementation of the one-step procurement process will immediately reduce the commodity time-line by two weeks. Additional improvements may be realized as we are able to take advantage of the system's capabilities. The issue of production schedules is a reality the Agency acknowledges. The new system will allow requests for food aid commodities to be handled more efficiently, both for domestic operations and for transit to the destination.

One comment stated that it was not clear how a forwarding agent would be able to access FBES, generate reports, download data, or determine if all offers submitted were reviewed for responsiveness. The system will be accessible to forwarding agents and information can be downloaded. An opportunity for training on the new

system will be offered to freight forwarders.

One comment stated that it would be improper for CCC to superimpose a new set of rules on the procurement process without identifying the terms and substance of the rule, its operational relationship to related regulations, and its impact on stakeholders. The preamble outlines the process and explains the efficiencies that are expected to be realized with the implementation of the rule. The desire to identify the impact on the stakeholders and to receive input on the design of the system was the impetus to hold the open meetings outlined in the preamble. The majority of suggestions and concerns expressed in these meetings were incorporated into the system, or are planned to be incorporated in future releases.

One comment addressed the software development and testing process, recommending that a MARAD originated cargo preference flow chart be incorporated; MARAD be designated as sole authority to validate cargo preference requirements and to authorize related system software changes; linear programs provide the optimal solution and a sensitivity report; and system testing be open and transparent to all interested parties. All agencies involved will reach consensus prior to implementing the system. Further, all interested parties will have the opportunity to be trained and experiment with the system prior to implementation.

Two comments noted that the proposed rule was only a piece of a much broader and complicated mosaic of statutes and regulations and must be considered in conjunction with these statutes and regulations. CCC intends to administer any new procurement system in a manner consistent with its obligations under the current laws and regulations governing the procurement of commodities for foreign donation, including meeting cargo preference requirements.

One comment stated that the proposed rule did not explain how it would add clarity to the process, the basis for new incentives to consolidation of the carriers' bids, the rationale behind the one-step process being more efficient due to ocean carriers expected to offer quantity increments most economical for them, and how elimination of one of the monthly load periods will reduce delivery times. The proposed rule adds clarity to the commodity bid evaluation process by allowing for the simultaneous review of commodity and ocean freight offers when evaluating

lowest-landed cost options in connection with the procurement of commodities for foreign donation. The consolidation of cargo will inherently achieve improved efficiencies due to economies of scale. There is the potential to reduce the delivery time by two weeks due to the elimination of the need for a second round of ocean freight solicitation, offering, and bid evaluation.

Three comments concluded that the rule would not seem to accommodate the flexibility and transparency required by carriers to refine their bids. The new system, as with any procurement system that awards based on firm fixed offers, will require participants to make the offers as competitive as possible, and will maintain a firm equitable environment with all information stated in the solicitation stages.

One comment expressed concerns that the new procedures may permit the return of negative business practices such as "blocking rates." Further, the respondent suggested that a provision be adopted whereby only competitive rates, not cost constructed rates, be evaluated. The new system will evaluate ocean carrier offers based on the priority of service. Priority 1 carriers will compete with priority 1 carriers for such cargoes as necessary in order to obtain compliance with cargo preference requirements. This procurement method will eliminate the negative business practices.

Another comment expressed concern that the new process would not permit U.S.-flag ocean carriers to link discharge ranges utilizing multiple Kansas City Commodity Office (KCCO) trade routes. Ocean carriers will be able to offer multiple discharge port ranges on one bid. Multiple bids may be entered if needed.

Two comments express concern over the one-step procurement process and its impact on the Great Lakes set-aside. The one-step procurement process will comply with the Great Lakes mandate that up to 25 percent of commodities purchased for Title II will be considered for delivery to the Great Lakes. The new system will evaluate the same as the previous system with regard to the MSA-17 provisions for the Great Lakes. The bid evaluation system will calculate the lowest-landed cost without cargo preference consideration, and up to the 25 percent maximum of the commodities purchased in the Great Lakes will be awarded to the Great Lakes.

One comment noted that references in the proposed rule to the possible use of alternative procurement procedures was confusing. On April 7, 2006, a

supplemental to the proposed rule was published in the **Federal Register** (71 FR 17767-17768). The supplemental to the proposed rule clarified the meaning of alternative procurement procedures and when they would be utilized. The supplemental to the proposed rule provided examples for utilizing other than "lowest-landed cost" to award contracts for the procurement of commodities. The examples were internal strife at the foreign destination, or urgent humanitarian conditions threatening the lives of persons at the foreign destination.

One comment recommended that all factors be accommodated in the determination of courses of action, including a single bid process that may impose excessive bid submission windows. The new system will require ocean carriers to offer service in the future because of the transit times required to move the commodities from inland locations to the domestic delivery points.

Several comments addressed specific sections of the proposed rule.

Section 1496.5 Consideration of Bids

One comment noted that CCC must require that all vessel carriers specify the maximum cargo that they can transport under a specific invitation for bid. Additionally, vessels must be required to offer freight rates for all bid points from which they can provide service and when a properly offered cargo preference freight rate is used to establish the lowest-landed cost for a particular cargo transport, the procedures must require that the cargo be shipped using the carrier that offered the applied rate. The FBES system will allow ocean carriers to enter minimum and maximum tonnage constraints to their bids.

One comment expressed concern that port designations under the proposed one-step bid evaluation process would include ports that could not handle both containerized and bulk cargoes thereby urging USDA to only designate ports that could handle and load both types of cargo. No carrier will be required to move cargo out of a port for which they do not bid. Carriers bid the port they wish to use.

One comment added that CCC should continue to require commodity suppliers to include bid-points within ocean ports. Under the proposed one-step process, offers of commodities and freight would be invited on a bid-point basis, which may include one or more ocean "port" terminals under the specific bid point designation. CCC will be using the same approved ports and terminals that we currently use.

Section 1496.7 Final Contract Determinations

Section 1496.7(b) Combination of Bids

One of the comments received noted that the proposed rule included an unexplained reference to the use of other types of ocean services. On April 7, 2006, a supplemental to the proposed rule was published in the **Federal Register** to clarify "extenuating circumstances" and, in which case, the Contracting Officer may determine that such circumstances preclude awards on the basis of lowest-landed cost, or efficiency and cost savings justify the use of types of ocean service that would not involve an analysis of freight bids for each of CCC's commodity purchases (71 FR 17767-17768). Other types of services may include, but are not limited to, multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery Cost and Freight (C&F), delivery Cost Insurance and Freight (CIF), and indexed ocean freight costs.

One of the comments stated that only American ships should deliver American goods. Four other comments received found the proposed rule unclear as to CCC's adherence to existing cargo preference requirements. Another comment added that the rule should be part of an effort that looks at all pieces of cargo preference requirements as well as the procurement of commodities for foreign donation. CCC will, of course, comply with cargo preference requirements, including the use of U.S.-flag ships, and administer any new procurement system in a manner consistent with its obligations under the cargo preference legislation of the Merchant Marine Act, 1936.

Three other comments stated that CCC needed to explain how cargo preference requirements will be applied and complied with under the proposed system before a final rule is published. Another comment was not quite sure how lowest-landed cost and cargo preference mix. The proposed system is about improving efficiencies in the commodity procurement process to realize saving and not about cargo preference. All CCC is proposing is that vessels actually bid and that CCC base its lowest landed-cost calculation on that bid. The cargo preference legislation requires that CCC use a certain percentage of U.S.-flag vessels to the "extent such vessels are available at fair and reasonable rates * * *." CCC consults with MARAD as to "fair and reasonable rates" after we have vessel and offers and a tentative vessel fixture. This will not change. The proposed rule addresses only the process of

procurement up to a determination of "lowest-landed cost."

Section 1496.7(c) Notification of Awards

One of the comments stated that the new CCC procedures should require that commodity prices and freight rates for each invitation be made publicly available within seven days after the bid award and freight fixtures. The party submitting the accepted commodity procurement bid will be notified of the acceptance of the bid by CCC. Also, CCC's Purchase Contract Awards (PCAs) for foreign food aid donations are published within seven days of an award on the Internet at <http://www.fsa.usda.gov/daco/>. AID or the grantee organization, or its shipping agent, will be notified of the vessel freight rate used in determining the commodity contract award. Both FAS and AID publish freight awards for foreign food aid donations at <http://www.fas.usda.gov/food-aid.asp> and <http://www.AID.gov/business/ocean/solicitation.logon.html>, respectively.

Executive Order 12866

This final rule was issued in conformance with Executive Order 12866. This final rule was determined to be significant under Executive Order 12866 and was reviewed by OMB. A cost-benefit analysis was completed and is available from the contact person shown above.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule. Nonetheless, a Regulatory Flexibility Analysis was completed and is available from the contact person shown above.

Environmental Evaluation

The environmental impacts of this rule have been determined to be consistent with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulations for compliance with NEPA, 7 CFR part 799. FSA concluded that the rule requires no further environmental review because it is categorically excluded. No extraordinary circumstances or other unforeseeable factors exist which would require preparation of an environmental assessment or environmental impact statement.

Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988. The provisions of this rule preempt State laws to the extent such laws are inconsistent with the provisions of this final rule.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3014, subpart V, published at 48 FR 29115 (June 24, 1983).

Unfunded Mandates Reform Act of 1995

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Paperwork Reduction Act

The information collection required by this rule has been approved by OMB under the Paperwork Reduction Act of 1995 and assigned control number 0560–0258.

Government Paperwork Elimination Act

FSA is committed to compliance with the Government Paperwork Elimination Act, which requires Federal Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. CCC is updating its computer bid-evaluation system that would accommodate a more unified one-step bid evaluation. Freight invitations would call for bids to be submitted through a web-based entry system.

Most of the information collections required by this rule are fully implemented for the public to conduct business with FSA electronically. However, a few may be completed and saved on a computer, but must be printed, signed and submitted to FSA in paper form.

Executive Order 12612

This rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 7 CFR Part 1496

Agricultural commodities, Exports, Food Assistance Programs, Foreign aid, Government procurement.

■ Accordingly, CCC amends 7 CFR part 1496 as follows:

PART 1496—PROCUREMENT OF COMMODITIES FOR FOREIGN DONATION

■ 1. The authority citation for part 1496 is revised to read as follows:

Authority: 7 U.S.C. 1431(b), 1721–1726a, 1731–1736g–2, 1736o, 1736o–1; 15 U.S.C. 714b and 714c; 46 U.S.C. 55305 and 55314.

■ 2. The heading for part 1496 is revised to read as set forth above.

■ 3. Section 1496.1 is revised to read as follows:

§ 1496.1 General statement.

This subpart sets forth the policies, procedures and requirements governing the procurement of agricultural commodities by CCC to be donated for assistance overseas under Title II of the Agricultural Trade Development and Assistance Act of 1954 (Pub. L. 480); the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other program under which CCC is authorized to provide agricultural commodities for assistance overseas.

■ 4. In § 1496.2, paragraph (a) is amended by removing the last sentence and paragraph (b) is revised to read as follows:

§ 1496.2 Administration.

* * * * *

(b) Purchases are made to fulfill commodity requests received from AID in the administration of Public Law 480 and from a grantee organization receiving commodities under the other authorities set forth in § 1496.1 of this part.

■ 5. In § 1496.4, the first sentence is revised to read as follows:

§ 1496.4 Issuance of invitations.

From time to time, CCC will issue invitations to purchase or process agricultural products for utilization in the foreign assistance programs enumerated in § 1496.1 of this part.

* * *

■ 6. In § 1496.5, paragraph (b) is revised, paragraph (c) is removed and reserved, and paragraph (d) is revised to read as follows:

§ 1496.5 Consideration of bids.

* * * * *

(b) *Availability of ocean service.* (1) In determining lowest-landed cost as

specified in paragraph (a) of this section, CCC will use vessel rates offered in response to invitations issued by AID or grantee organizations receiving commodities under the authorities set forth in § 1496.1 of this part. If CCC or AID, in the case of Title II, Public Law 480, determines that it is not practicable to evaluate lowest-landed cost on the basis of a competitive ocean freight bid process, CCC may use other methods of soliciting freight rates that USDA or AID may approve for the foreign assistance programs that they respectively administer.

(2) In order to be considered in lowest-landed cost commodity bid evaluations, ocean freight rates must be submitted to grantee organizations or AID in response to an invitation for bids issued by grantee organizations or AID. All such freight invitations for bids must:

(i) Specify a closing time for the receipt of written freight offers and state that late written freight offers will not be considered;

(ii) Provide that written freight offers are required to have a canceling date no later than the last contract lay day specified in the invitation for bids;

(iii) Provide the same deadline for receipt of written freight offers from both U.S. flag vessel and non-U.S. flag vessels; and

(iv) Must be received and opened prior to receipt of written freight offers for the sale of commodities to CCC. The extent to which offered rates may be made public will depend upon regulations or guidelines applicable to the specific foreign assistance program involved.

(3) CCC may require donee organizations or AID to specify in their freight invitations that the ocean carriers submit bids electronically through a web-based system maintained by CCC. In the event of any discrepancy between information furnished to CCC electronically and the written offers submitted to grantee organizations or AID, the offers submitted to the grantee organization or AID will prevail. Copies of all written freight offers received in response to invitations for bids must be promptly furnished to CCC and CCC may require the grantee organization or its shipping agent to submit a written certification that all non-electronic offers received were transmitted to CCC.

(c) [Reserved].

(d) *Port performance.* (1) CCC may contact any port prior to bid evaluation to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors which will be considered in this

determination will include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. CCC will require that capacity information be submitted electronically by the port and or the terminal prior to bid evaluation.

(2) If CCC determines that: A port is congested; facilities are overloaded; a vessel would not be able to dock and load cargo without delay; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or other similar situation exists that may adversely affect the ability of CCC to have the commodity delivered in a timely manner, CCC may consider the use of another coastal range or port. In considering another combination of commodity offers and vessel rate offers, CCC will adhere as closely as possible to the principal of lowest-landed cost.

* * * * *

■ 7. Section 1496.7 is revised to read as follows:

§ 1496.7 Final contract determinations.

(a) *Commodity awards.* (1) Invitations for the procurement of commodities and the evaluation of bids submitted in response to such invitations shall be performed as provided in the Federal Acquisition Regulations (FAR) and Department of Agriculture's procurement regulations set forth in chapter 4 of title 48 of the Code of Federal Regulations (the AGAR).

(2) If more than one bid for the sale of commodities is received and more than one delivery point has been designated in such bids, in order to achieve a combination of a freight rate and commodity award that produces the lowest-landed cost for the delivery of the commodity to the foreign destination, CCC may evaluate bids submitted for the sale of commodities on a delivery point-by-delivery point basis. In such cases, all bids submitted with respect to a specific delivery point will be evaluated under the provisions of the FAR, AGAR, and the solicitation, and CCC will determine the lowest bid for each delivery point.

(b) *Combination of bids.* CCC will determine which combination of commodity bids and bids for ocean freight rates result in the lowest-landed cost of delivery of the commodity to the foreign destination. CCC will award the contract for the purchase of the commodity that results in the lowest-landed cost and would be transported in compliance with cargo preference requirements under regulations prescribed by the Secretary of

Transportation. The Contracting Officer may determine that extenuating circumstances preclude awards on the basis of lowest-landed cost, or efficiency and cost-savings justify use of types of ocean service that would not involve an analysis of freight bids for each of CCC's commodity purchases; however, in all such cases, commodities would be transported in compliance with cargo preference requirements under regulations prescribed by the Secretary of Transportation. Examples of extenuating circumstances are events such as internal strife at the foreign destination or urgent humanitarian conditions threatening the lives of persons at the foreign destination. Other types of services may include, but are not limited to, multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery Cost and Freight (C & F), delivery Cost Insurance and Freight (CIF), and indexed ocean freight costs. Before contracts are awarded for other than a lowest-landed cost, the Contracting Officer shall consult with the applicable program agencies, and set forth, in writing, the reasons the contracts should be awarded on other than a lowest-landed cost.

(c) *Notification of awards.* (1) The party submitting the accepted commodity procurement bid will be notified of the acceptance of the bid by CCC.

(2) AID or the grantee organization, or its shipping agent, will be notified of the vessel freight rate used in determining the commodity contract award. The grantee organization or AID will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate so used.

Signed at Washington, DC, on February 6, 2007.

Glen L. Keppy,

Acting Executive Vice President, Commodity Credit Corporation.

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