

*cement kilns.* You are not required to comply with the particulate matter standard specified under § 63.1220(b)(7)(i) until EPA takes final action with regard to the particulate matter standard pursuant to reconsideration proceedings. If you start up a new or reconstructed hazardous waste burning cement kiln as defined by this subpart, you must not emit particulate matter in excess of 0.15 kg/Mg dry feed, as determined according to the requirements under § 63.1204(b)(7)(i) through (iii).

\* \* \* \* \*

■ 3. Section 63.1220 is amended by revising paragraph (b)(7)(i) to read as follows:

**§ 63.1220 What are the replacement standards for hazardous waste burning cement kilns?**

\* \* \* \* \*

- (b) \* \* \*
- (7) \* \* \*

(i) Except as provided by § 63.1206(a)(1)(ii)(B)(3) and paragraph (b)(7)(iii) of this section, particulate matter emissions in excess of 0.0023 gr/dscf corrected to 7 percent oxygen.

\* \* \* \* \*

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**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**49 CFR Part 29**

[Docket No. OST-2005-22602]

RIN 2105-AD46

**Debarment and Suspension (Nonprocurement) Requirements**

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Department of Transportation's regulations implementing the governmentwide nonprocurement debarment and suspension requirements. Specifically, this rule adopts the optional lower tier coverage prohibiting excluded persons from participating in subcontracts at tiers lower than the first tier below a covered nonprocurement transaction.

**DATES:** *Effective Date:* This final rule is in effect November 24, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ellen Shields, Office of the Senior Procurement Executive, Office of Administration (M-61), (202) 366-4268,

400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

You may retrieve previously filed comments online through the Document Management System (DMS) at <http://dmses.dot.gov>. The DMS is available 24 hours each day, 365 days each year. Electronic retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at <http://www.nara.gov/fedreg> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

**Background**

On November 26, 2003, the Department of Transportation (DOT), along with twenty-nine other agencies, published its final rule implementing changes to the governmentwide debarment and suspension common rule (68 FR 66533). These regulations were intended to resolve unnecessary technical differences between the procurement and nonprocurement systems, revise the existing governmentwide debarment and suspension regulations in a plain language style and format, and make other improvements consistent with the purpose of the debarment and suspension system. One of the changes made to the regulations included limiting the mandatory down-tier application of an exclusion to only the first procurement level. Under the previous governmentwide regulations, all executive agencies applied suspensions and debarments to all procurement levels. However, in the revised governmentwide regulations, each agency was given the option of applying an exclusion to levels below the first procurement level. This final rule adopts the optional lower tier coverage to make the debarment and suspension regulations applicable to levels below the first procurement level. Many of the DOT programs involve billions of dollars in grants that are obligated to construction projects by States, localities and other recipients. For instance, on August 10, 2005, the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for

Users (SAFETEA-LU), Public Law 109-59. This Act authorizes funding for highways, highway safety, and public transportation totaling \$244.1 billion over five years (2005-2009) and is the largest surface transportation investment in our Nation's history. Of this \$244.1 billion, a substantial portion of these funds will be used by States and other grantees to procure construction contracts. These construction contracts could involve multiple subcontracts that would be vulnerable to misconduct and poor performance if suspended or debarred contractors are allowed to participate in these transactions.

**Discussion of Comments**

On October 5, 2005, the Office of the Secretary (OST) in the DOT published a notice of proposed rulemaking (NRPM) and requested comment on whether the DOT should adopt the lower tier coverage. In response to the NPRM, OST received two comments. These comments were submitted by the American Road and Transportation Builders Association (ARTBA) and the Wisconsin Department of Transportation (WisDOT).

ARTBA commented that the transportation construction industry has a well-deserved reputation of being comprised of highly ethical firms. However, despite this reputation, some firms betray the integrity of the whole. In these situations, ARTBA acknowledged that suspension or debarment may be appropriate. Additionally, ARTBA commented on the importance of maintaining the contractor's due process rights. ARTBA stated that the basis of due process is that everyone is deemed innocent until proven guilty and that due process is not served if contractors are suspended or debarred before being afforded an opportunity to be heard. ARTBA noted that debarment and suspension cannot be taken lightly because of the interruption in the firm's ability to work and, as such, the DOT needs to ensure that the debarment and suspension process is fair.

The DOT agrees with ARTBA that the transportation construction industry does indeed have a well-deserved reputation of being comprised of highly ethical firms. However, as ARTBA acknowledges, there are some firms within the industry that betray this reputation. The participation of these irresponsible firms and individuals in the transportation program could result in millions of dollars being wasted due to fraud. These are funds that could be used on construct more transportation projects. Also, the DOT agrees with

ARTBA on the importance of maintaining the contractor's due process rights. The debarment and suspension regulations promulgated in 2003 set out detailed procedures that must be followed whenever the Department initiates a suspension or debarment action. These procedures include both notice and an opportunity to be heard.

WisDOT commented that the language was not user friendly and suggested that the DOT adopt a definition of procurement as well as revise the proposed language by essentially substituting the word "nonprocurement" with "procurement." The current regulations are based on a governmentwide common rule that was adopted by numerous agencies and were drafted to be more consistent with the debarment and suspension rules in the Federal Acquisition Regulation (FAR). Thus, the DOT is hesitant to make any changes that may deviate from the consistency these rules are intended to create among Executive Branch agencies as well as the FAR. However, the DOT notes this suggestion and will work with the Office of Management and Budget, which is the lead agency on the governmentwide common rule, in this endeavor.

The DOT feels that the language should be adopted as proposed in the NPRM. First, the alternate language proposed by WisDOT would apply to procurement transactions at the first procurement level. These types of transactions have unique rules already established in section 29.220(b) of 49 CFR. Second, the language proposed by the NPRM makes it clear that the provision applies to contracts awarded by contractors under a nonprocurement transaction. Thus, the DOT is adopting the language proposed in the NPRM.

#### **Rulemaking Analyses and Notices**

##### **Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

The DOT has determined preliminarily that this action is not a significant regulatory action within the meaning of Executive Order 12866 and is not significant within the meaning of Department of Transportation regulatory policies and procedures. It is anticipated that the economic impact of this rulemaking would be minimal, since it would bring the DOT's regulations concerning the effect of a debarment and suspension back in line with the regulations that were in effect prior to November 26, 2003. These changes would not adversely affect, in a material way, any sector of the

economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

#### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612) the DOT has evaluated the effects of this action on small entities and has determined that the action would not have a significant economic impact on a substantial number of small entities. This action brings the DOT's regulations concerning the effect of a debarment and suspension back in line with the regulations that were in effect prior to November 26, 2003 by excluding persons who have been debarred or suspended from participating in transactions beneath the first procurement level under a non-procurement transaction. For these reasons, the DOT certifies that this action does not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1532). This final rule provides for the exclusion of debarred or suspended persons from participating in transactions beneath the first procurement level under a non-procurement transaction, therefore, this action is not considered an unfunded mandate.

#### **Executive Order 13132 (Federalism Assessment)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the DOT has determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism assessment. The DOT has also determined that this action does not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

#### **Executive Order 13175**

This final rule has been analyzed in accordance with the principles and

criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The DOT has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

#### **National Environmental Policy Act**

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and has determined that this action does not have any effect on the quality of the environment.

#### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

#### **List of Subjects in 49 CFR Part 29**

Administrative practice and procedure, Government contracts, Grant programs, Loan programs, Reporting and recordkeeping requirements.

Issued on: October 6, 2006.

**Maria Cino,**

*Acting Secretary of Transportation.*

■ In consideration of the foregoing, the DOT proposes to amend, title 49, Code of Federal Regulations, part 29, as set forth below:

#### **PART 29—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)**

■ 1. The authority citation for part 29 continues to read as follows:

**Authority:** Sec. 2455, Pub. L. 103-355, 108 Stat. 3327 31 U.S.C. 6101 note); E.O. 11738 3 CFR, 173 Comp., p. 799); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235).

■ 2. In § 29.220, add paragraph (c) to read as follows:

**§ 29.220 Are any procurement transactions included as covered transactions?**

\* \* \* \* \*

(c) The contract is awarded by any contractor, subcontractor, supplier, consultant or its agent or representative in any transaction, regardless of tier, to be funded or provided by the DOT under a nonprocurement transaction that is expected to equal or exceed \$25,000. [See optional lower tier coverage shown in the diagram in the appendix to this part.]

**§ 29.520 [Amended]**

■ 3. In § 29.520, in paragraph (d), remove the references: “United States Coast Guard [DOT-USCG]” and “Research and Special Programs [DOT-RSPA]” and insert the references “Research and Innovative Technology Administration [RITA]” and “Pipeline and Hazardous Materials Safety Administration [DOT-PHMSA]” in their place, respectively.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

[Docket No. 060216045-6045-01; I.D. 101906D]

**Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Processor Vessels Using Hook-and-line Gear in the Bering Sea and Aleutian Islands Management Area**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific cod by catcher processor vessels using hook-and-line gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2006 directed fishing allowance (DFA) of Pacific cod specified for catcher processor vessels using hook-and-line gear in the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), October 21, 2006, until 2400 hrs, A.l.t., December 31, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Hogan, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2006 Pacific cod DFA specified for catcher processor vessels using hook-and-line gear in the BSAI is 70,619 metric tons as established by the 2006 and 2007 final harvest specifications for groundfish in the BSAI (71 FR 10894, March 3, 2006) and the adjustment on March 14, 2006 (71 FR 13777, March 17, 2006).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS, has determined that the 2006 Pacific cod DFA specified for catcher processor vessels using hook-and-line gear in the BSAI has been reached. Therefore, the Regional Administrator is

prohibiting directed fishing for Pacific cod by catcher processor vessels using hook-and-line gear in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher processor vessels using hook-and-line gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 19, 2006.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: October 19, 2006.

**Alan D. Risenhoover,**

*Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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