

## § 1000.227

### **§ 1000.227 What happens if the Secretary denies the waiver request?**

If the Secretary denies a waiver request, the Secretary issues a written decision stating:

- (a) The basis for the decision;
- (b) The decision is final for the Department; and
- (c) The Tribe/Consortium may request reconsideration of the denial.

### **§ 1000.228 What are examples of waivers prohibited by law?**

Examples of when a waiver is prohibited by Federal law include:

- (a) When the effect would be to waive or eliminate express statutory requirements;
- (b) When a statute authorizes civil and criminal penalties;
- (c) When it would result in a failure to ensure that proper health and safety standards are included in an AFA (section 403(e)(2));
- (d) When it would result in a reduction of the level of trust services that would have been provided by the Secretary to individual Indians (section 403(g)(4));
- (e) When it would limit or reduce the services, contracts, or funds to any other Indian Tribe or Tribal organization (section 406(a));
- (f) When it would diminish the Federal trust responsibility to Tribes, individual Indians or Indians with trust allotments (Section 406(b)); or
- (g) When it would violate Federal case law.

### **§ 1000.229 May a Tribe/Consortium propose a substitute for a regulation it wishes to be waived?**

Yes, where a Tribe/Consortium wishes to replace the waived regulation with a substitute that otherwise maintains the requirements of the applicable Federal law, the Secretary may be able to approve the waiver request. The Tribe/Consortium and bureau officials must negotiate to develop a suggested substitution.

### **§ 1000.230 How is a waiver approval documented for the record?**

The waiver decision is made part of the AFA by attaching a copy of it to the AFA and by mutually executing any necessary conforming amendments

## 25 CFR Ch. VI (4–1–06 Edition)

to the AFA. The decisions announcing the waiver also will be posted on the Office of Self-Governance web site and all such decisions shall be made available on request.

### **§ 1000.231 How does a Tribe/Consortium request reconsideration of the Secretary's denial of a waiver?**

(a) The Tribe/Consortium may request reconsideration of a waiver denial. To do so, the Tribe/Consortium must submit a request to:

- (1) The Director, OSG, for BIA programs; or
- (2) The appropriate bureau head, for non-BIA programs.

(b) The request must be filed within 30 days of the day the decision is received by certified mail (return receipt requested) or by hand delivery. A request submitted by mail will be considered filed on the postmark date.

(c) The request must identify the issues to be addressed, including a statement of reasons supporting the request.

### **§ 1000.232 When must DOI respond to a request for reconsideration?**

The Secretary must issue a written decision within 30 days of the Department's receipt of a request for reconsideration. This decision is final for the Department and no administrative appeal may be made.

## **Subpart K—Construction**

### **§ 1000.240 What construction programs included in an AFA are subject to this subpart?**

(a) All BIA and non-BIA construction programs included in an AFA are subject to this subpart. This includes design, construction, repair, improvement, expansion, replacement or demolition of buildings or facilities, and other related work for Federal, or Federally funded Tribal, facilities and projects.

(b) The following programs and activities are not construction programs and activities:

- (1) Activities limited to providing planning services, administrative support services, coordination, responsibility for the construction project, day-to-day on-site management on site-

management and administration of the project, which may include cost management, project budgeting, project scheduling and procurement except that all project design and actual construction activities are subject to all the requirements of subpart K, whether performed by a Tribe/Consortium, sub-contractor, or consultant.

(2) Housing Improvement Program or road maintenance program activities of BIA;

(3) Operation and maintenance programs; and

(4) Non-403(c) programs that are less than \$100,000, subject to section 403(e)(2) of the Act, other applicable Federal law, and §1000.256 of this subpart.

**§1000.241 Does this subpart create an agency relationship?**

No, a BIA or non-BIA construction program does not automatically create an agency relationship. However, Federal law, provisions of an AFA, or Federal actions may create an agency relationship.

**§1000.242 What provisions relating to a construction program may be included in an AFA?**

The Secretary and the Tribe/Consortium may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction part of an AFA. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

**§1000.243 What special provisions must be included in an AFA that contains a construction program?**

An AFA that contains a construction program must address the requirements listed in this section.

(a) The AFA must specify how the Secretary and the Tribe/Consortium must ensure that proper health and safety standards are provided for in the implementation of the AFA, including but not limited to:

(1) The use of architects and engineers licensed to perform the type of construction involved in the AFA;

(2) Applicable Federal, state, local or Tribal building codes and applicable

engineering standards, appropriate for the particular project; and

(3) Necessary inspections and testing by the Tribe.

(b) The AFA must comply with applicable Federal laws, program statutes and regulations.

(c) The AFA must specify the services to be provided, the work to be performed, and the responsibilities of the Tribe/Consortium and the Secretary under the AFA.

(d) The Secretary may require the Tribe/Consortium to provide brief progress reports and financial status reports. The parties may negotiate in the AFA the frequency, format and content of the reporting requirement. As negotiated, these reports may include:

(1) A narrative of the work accomplished;

(2) The percentage of the work completed;

(3) A report of funds expended during the reporting period; and

(4) The total funds expended for the project.

**§1000.244 May the Secretary suspend construction activities under an AFA?**

(a) The Secretary may require a Tribe/Consortium to suspend certain work under a construction portion of an AFA for up to 30 days only if:

(1) Site conditions adversely affect health and safety; or

(2) Work in progress or completed fails to substantially carry out the terms of the AFA without good cause.

(b) The Secretary may suspend only work directly related to the criteria specified in paragraph (a) of this section unless other reasons for suspension are specifically negotiated in the AFA.

(c) Unless the Secretary determines that a health and safety emergency requiring immediate action exists, before suspending work the Secretary must provide:

(1) A 5 working days written notice; and

(2) An opportunity for the Tribe/Consortium to correct the problem.

(d) The Tribe/Consortium must be compensated for reasonable costs due