

DEPARTMENT OF COMMERCE

Billing Code 3510-FA

2 CFR Part 1326, 15 CFR Part 14, and 15 CFR Part 26

Docket No. 060830228-6311-02

RIN: 0605-AA23

Department of Commerce Implementation of OMB Guidance on
Nonprocurement Debarment and Suspension

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (Department) removes its regulations implementing the government-wide common rule on nonprocurement debarment and suspension, currently codified at Title 15, and adopts the Office of Management and Budget's (OMB) guidance at Title 2 of the Code of Federal Regulations (CFR) published as interim final guidance in the *Federal Register* on August 31, 2005, as revised by the issuance of a final rule in the *Federal Register* on November 15, 2006. This regulatory action implements the OMB's initiative to streamline and consolidate all federal regulations on nonprocurement debarment and suspension into one part of the CFR. The Department does not intend to modify any of its current policy.

DATES: This rule is effective [insert date that is 30 days after date of publication in the *Federal Register*].

FOR FURTHER INFORMATION CONTACT: For further information, please contact Gary Johnson at (202)482-1679 or by e-mail at gjohnso3@doc.gov.

SUPPLEMENTARY INFORMATION:

Background

On August 31, 2005, the Office of Management and Budget (OMB) issued an interim final guidance that implemented its Guidance for Governmentwide Debarment and Suspension (Nonprocurement), codified in Part 180 of title 2 of the Code of Federal Regulations (70 FR 51862, August 31, 2005). In addition to restating and updating its guidance on nonprocurement debarment and suspension, the interim final guidance requires all federal agencies to adopt a new approach to federal agency implementation of the guidance. OMB requires each agency to issue a brief rule that: (1) Adopts the guidance, giving it regulatory effect for that agency's activities; and (2) states any agency-specific additions, clarifications, and exceptions to the government-wide policies and procedures contained in the guidance. That guidance also requires agencies to implement the OMB guidance by February 28, 2007.

On November 15, 2006, OMB issued a final rule (71 FR 66431) revising its governmentwide guidance on nonprocurement debarment and suspension. The revisions were necessary to conform a few unintended changes in the content of the interim final guidelines to the substance of the Federal agencies' most recent update to

the common rule (68 FR 66534, November 26, 2003). The revisions also made needed technical corrections.

Pursuant to the requirements in OMB's final guidance, the Department of Commerce (Department) in this action: (1) removes 15 CFR Part 26; (2) revises the Department's debarment and suspension common rule to implement OMB's guidance and includes specific provisions to the Department; (3) co-locates the Department's part with OMB's guidance in 2 CFR along with other agencies' regulations in that title; and (4) revises references in 15 CFR Part 14 to include the citation to the Department's regulations located in Title 2, Part 1326.

This regulatory action implements the OMB's initiative to streamline and consolidate all federal regulations on nonprocurement debarment and suspension into one part of the CFR, and does not intend to modify any of the Department's current policy.

Public comment on this action was solicited as a proposed rule in a Federal Register Notice dated September 22, 2006 (71 FR 55354). No comments were received; therefore the Department adopts OMB's final guidance, and the provisions specific to the Department contained in the proposed rule without change.

Executive Order 12866

This regulatory action has been determined to be not significant for purposes of E.O. 12866.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

The Chief Counsel for Regulation at the Department of Commerce certified to the Chief Counsel for Advocacy at the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for the certification is found in the proposed rule and is not repeated here. No comments were received on the economic impacts of this rule therefore a final Regulatory Flexibility Act analysis was not prepared.

Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104-4)

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of \$100 million or more in any one year.

Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

Federalism (Executive Order 13132)

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the

relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects

2 CFR Part 1326

Administrative practice and procedure, Debarment and suspension, Grant programs, Reporting and recordkeeping requirements

15 CFR Part 26

Administrative practice and procedure, Debarment and suspension, Grant programs, Reporting and recordkeeping requirements

Issued this ____ day of _____ at Washington, D.C.

Michael S. Sade
Director for Acquisition Management
and Procurement Executive

Accordingly, under the authority of 5 U.S.C. 301; Sec.2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549 (3 CFR, 1986 Comp., p. 189); and E.O. 12689 (3 CFR, 1989 Comp., p. 235) the Department of Commerce amends the Code of Federal Regulations, Title 2, Subtitle B, Title 15 Part 14 and Title 15 Part 26, as follows:

Title 2 - Grants and Agreements

1. Add Chapter 13, consisting of Part 1326 to Subtitle B to read as follows:

Chapter 13- Department of Commerce

PART 1326 - NONPROCUREMENT DEBARMENT AND SUSPENSION

Sec.

§1326.10 What does this part do?

§1326.20 Does this part apply to me?

§1326.30 What policies and procedures must I follow?

Subpart A-General

§1326.137 Who in the Department of Commerce may grant an exception to let an excluded person participate in a covered transaction?

Subpart B-Covered Transactions

§1326.215 Which nonprocurement transactions, in addition to those listed in 2 CFR 180.215, are not covered transactions?

§1326.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?

Subpart C-Responsibilities of Participants Regarding Transactions

§1326.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

Subpart D-Responsibilities of Federal Agency Officials Regarding Transactions

§1326.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

Subparts E-H [Reserved]

Subpart I-Definitions

§1326.970 Nonprocurement transaction (Department of Commerce supplement to government-wide definition at 2 CFR 180.970).

Subpart J [Reserved]

Authority: 5 U.S.C. 301; Sec. 2455, Pub. L. 103-355, 108 Stat. 3327; E.O. 12549, 3 CFR, 1986 Comp., p. 189; E.O. 12689, 3 CFR, 1989 Comp., p. 235.

§1326.10 What does this part do?

This part adopts the Office of Management and Budget (OMB) guidance in Subparts A through I of 2 CFR part 180, as supplemented by this part, as the Department of Commerce policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, ``Debarment and Suspension'' (3 CFR 1986 Comp., p. 189), Executive Order 12689, ``Debarment and Suspension'' (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103-355, 108 Stat. 3327).

§1326.20 Does this part apply to me?

This part and, through this part, pertinent portions of the OMB guidance in Subparts A through I of 2 CFR part 180 (see table at 2 CFR 180.100(b)) apply to you if you are a--

(a) Participant or principal in a "covered transaction" (see Subpart B of 2 CFR part 180 and the definition of "nonprocurement transaction" at 2 CFR 180.970, as supplemented by Subpart B and §1326.970 of this part).

(b) Respondent in a Department of Commerce suspension or debarment action.

(c) Department of Commerce debarment or suspension official;

(d) Department of Commerce grants officer, agreements officer, or other official authorized to enter into any type of nonprocurement transaction that is a covered transaction;

§1326.30 What policies and procedures must I follow?

The Department of Commerce policies and procedures that you must follow are the policies and procedures specified in each applicable section of the OMB guidance in Subparts A through I of 2 CFR part 180, as that section is supplemented by the section in this part with the same section number. The contracts that are covered transactions, for example, are specified by section 220 of the OMB guidance (i.e., 2 CFR 180.220) as supplemented by section 220 in this part (i.e., §1326.220). For any section of OMB guidance in Subparts A through I of 2 CFR 180 that has no corresponding section in this part, Department of Commerce policies and procedures are those in the OMB guidance.

Subpart A—General

§1326.137 Who in the Department of Commerce may grant an exception to let an excluded person participate in a covered transaction?

Within the Department of Commerce, the Secretary of Commerce or designee has the authority to grant an exception to let an excluded person participate in a covered transaction, as provided in the OMB guidance at 2 CFR 180.135.

Subpart B—Covered Transactions

§1326.215 Which nonprocurement transactions, in addition to those listed in 2 CFR 180.215, are not covered transactions?

(a) For purposes of the Department of Commerce, a transaction that the Department needs to respond to a national or agency-recognized emergency or disaster includes the Fisherman's Contingency Fund.

(b) For purposes of the Department of Commerce, an incidental benefit that results from ordinary governmental operations includes:

(1) Export Promotion, Trade Information and Counseling, and Trade policy.

(2) Geodetic Surveys and Services (Specialized Services).

(3) Fishery Products Inspection Certification.

(4) Standard Reference Materials.

(5) Calibration, Measurement, and Testing.

(6) Critically Evaluated Data (Standard Reference Data).

(7) Phoenix Data System.

(8) The sale or provision of products, information, and services to the general public.

(c) For purposes of the Department of Commerce, any other transaction if the application of an exclusion to the transaction is prohibited by law includes:

(1) The Administration of the Anti-dumping and Countervailing Duty Statutes.

(2) The export Trading Company Act Certification of Review Program.

(3) Trade Adjustment Assistance Program Certification.

(4) Foreign Trade Zones Act of 1934, as amended.

(5) Statutory Import Program.

§1326.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?

In addition to the contracts covered under 2 CFR 180.220(b) of the OMB guidance, this part applies to a subcontract that is awarded by a participant in a procurement transaction covered under 2 CFR 180.220(a), if the amount of the subcontract exceeds or is expected to exceed \$25,000. This extends the coverage of the Department of Commerce nonprocurement suspension and debarment requirements to one additional tier of contracts under covered nonprocurement transactions, as permitted under the OMB guidance at 2 CFR 180.220(c) (see optional lower tier coverage in the figure in the Appendix to 2 CFR part 180).

Subpart C—Responsibilities of Participants Regarding Transactions

§1326.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

You as a participant must include a term or condition in lower-tier transactions requiring lower-tier participants to

comply with Subpart C of the OMB guidance in 2 CFR Part 180, as supplemented by this subpart.

Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions

§1326.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

To communicate to a participant the requirements described in 2 CFR 180.435 of the OMB guidance, you must include a term or condition in the transaction that requires the participant's compliance with subpart C of 2 CFR part 180, as supplemented by Subpart C of this part, and requires the participant to include a similar term or condition in lower-tier covered transactions.

Subparts E–H [Reserved]

Subpart I—Definitions

§1326.970 Nonprocurement transaction (Department of Commerce supplement to government-wide definition at 2 CFR 180.970).

For purposes of the Department of Commerce, nonprocurement transaction includes the following:

- (a) Joint project Agreements under 15 U.S.C. § 1525.
- (b) Cooperative research and development agreements.
- (c) Joint statistical agreements.
- (d) Patent licenses under 35 U.S.C. § 207.
- (e) NTIS joint ventures, 15 U.S.C. § 3704b.

Subpart J [Reserved]

Title 15, Commerce and Foreign Trade

Part 26 - Department of Commerce

2. Remove and reserve Part 26.

Title 15, Commerce and Foreign Trade

Part 14 - Department of Commerce

3. The authority citation for Part 14 continues to read as follows:

Authority: 5 USC 301; OMB Circular A-110 (64 FR 54926, October 8, 1999)

4. Section 14.13 is amended by removing the citation "15 CFR Part 26" and adding in its place the citation "2 CFR Part 1326".