APPENDIX F
TWDB CWTAP / EDAP FORMS -

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United States Environmental Protection Agency
Washington, DC 20460

ED-112
Form Approved.
7-9-96 wew
OMB No. 2090-0014
Expires 4/30/99

Preaward Compliance Review Report for All Applicants Requesting Federal Financial Assistance

Note: Read Instructions on Reverse Before Completing Form

I. A. Applicant (*Name, City, State)*	B. Recipient ***(Name, City, State)***	C. Project No.

II.	Brief Description of project, program or activity.	
III.	Are any civil rights lawsuits or complaints pending against applicant and/or recipient? If "Yes", list those complaints and disposition of each complaint.	☐ Yes ☐ No
IV.	Have any civil rights compliance reviews of the applicant and/or recipient been conducted by any Federal agency during the two years prior to this application for activities which would receive EPA assistance? If "Yes", list those compliance reviews and status of each review.	☐ Yes ☐ No
V.	Is any other Federal assistance being applied for or is any other Federal financial assistance being applied to any portion of this project, program or activity? If "Yes", list the other Federal Agency(s), describe the associated work and the dollar amount of assistance.	☐ Yes ☐ No
VI.	If entire community under the applicant's jurisdiction is not served under the existing facilities/services, or will not be served under the proposed plan, give reasons why.	

VII. Population Characteristics	Number of People
1. A. Population of Entire Service Area	
B. Minority Population of Entire Service Area	
2. A. Population Currently Being Served	
B. Minority Population Currently Being Served	
3. A. Population to be Served by Project, Program or Activity	
B. Minority Population to be Served by Project, Program or Activity	
4. A. Population to Remain Without Service	
B. Minority Population to Remain Without Service	

VIII.	Will all new facilities or alterations to existing facilities financed by this grant be designed and constructed to be readily accessible and useable by handicapped persons? If "No", explain how a regulatory exception (40 CFR 7.70) applies.	☐ Yes ☐ No
IX.	Give the schedule for future projects, programs or activities (or future plans), by which service will be provided to all beneficiaries within applicant's jurisdiction. If there is no schedule, explain why.	

A. Signature of Authorized Official	B. Title of Authorized Official	C. Date

For the U. S. Environmental Protection Agency

	Authorized EPA Official	Date
☐ Approved ☐ Disapproved		

EPA Form 4700-4 (Rev. 1/90) Previous actions are obsolete. Printed on Recycled Paper

Instructions
General

Recipients of Federal financial assistance from the U.S. Environmental Protection Agency must comply with the following statutes.

Title VI of the Civil Right Act of 1964 provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. The Act goes on to explain that the title shall not be construed to authorize action with respect to any employment practice of any employer, employment agency, or labor organization(except where the primary objective of the Federal financial assistance is to provide employment).

Section 13 of the 1972 Amendments to the Federal Water Pollution Control Act provides that person in the United States shall on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under the Federal Water Pollution Control Act, as amended. Employment discrimination on the basis of sex is prohibited in all such programs or activities.

Section 504 of The Rehabilitation Act of 1973 provides that no otherwise qualified handicapped individual shall solely by reason of handicap be excluded from participation in, be denied the benefit of or be subjected to discrimination under any program or activity receiving Federal finance assistance. Employment discrimination on the basis of handicap is prohibited in all such programs or activities.

The Age Discrimination Act of 1975 provides that no person on the basis of age shall be excluded from participation under any program or activity receiving Federal financial assistance. Employment discrimination is prohibited by the Age Discrimination in Employment Act administered by the Equal Employment Opportunity Commission.

Title IX of the Education Amendments of 1972 provides that no person on the basis of sex shall be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. Employment discrimination on the basis of sex is prohibited in all such education programs or activities. Note: an education program or activity is not limited to only those conducted by formal institution.

The information on this form is required to enable the U.S. Environmental Protection Agency to determine whether applicants and prospective recipients are developing projects, programs and activities on a nondiscriminatory basis as required by the above statutes.

Submit this form with the original and required copies of applications, requests for extensions, requests for increase of funds, etc. Updates of information are all that are required after the initial application submission.

If any item is not relevant to the project for which assistance is requested, write "NA" for "Not Applicable."

In the event applicant is uncertain about how to answer certain question, EPA program officials should be contacted for clarification.

EPA FORM 4700-4 (Rev. 1/90) Reverse

ITEMS

IA. "Applicant" means any entity that files an application or unsolicited proposal or otherwise requests EPA assistance.

IB. "Recipient" means any entity, other than applicant; which will actually receive EPA assistance.

IC. Self- Explanatory.

II. Self- Explanatory.

III. "Civil rights lawsuits" mean any lawsuit or complaint alleging discrimination on the basis of race, color national origin, sex, age or handicap pending against the applicant and / or entity which actually benefits from the grant. For example, if a city is the named applicant but the grant will actually benefit the Department of Sewage, civil rights lawsuit involving both the city and the Department of Sewage should be listed.

IV. "Civil right compliance review" mean any review assessing the applicant's and / or recipient's compliance with laws prohibiting

V. Self-explanatory

VI. The word "Community" refers to the area under the applicant's and / or recipient's jurisdiction. The "Community within might be a university or laboratory campus, or a community within a large city. If there is a significant disparity between minority and nonminority population to receive service, not otherwise satisfactorily explained, the Regional office may require a map which indicates the minority and nonminority population served by this project, program or activity.

VII. This information is required so that reviewers may determine if a disparity in the proposed provision of service will exist in the event the application is approved for funding. Give population of recipient's jurisdiction, broken out by categories as specified.

In the event the applicant cannot provide the requested information because the funds will be distributed over a wide demographic area which is yet to be determined, an explanation may be provided on a separate sheet For example, a State Revolving Fund program may not know which cities and counties will apply for, and receive, SRF loans.

VIII. Self-explanatory

IX. "Jurisdiction" means the geographical area over which applicant has the authority to provide service.

X. Self-explanatory.

"Burden Disclosure Statement"

EPA estimates public reporting burden for the preparation of this form to average 30 minutes per response. This estimate includes the time for reviewing instructions, gathering and maintaining the data needed and completing and reviewing the form. Send comments regarding the burden estimate, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-233, U.S. Environmental Protection Agency, 401 M Street, S.W. Washington. D.C. 20460; and to the Office of Information and Regulatory Affairs. Office of Management and Budget, Washington, D.C. 20503.

ASSURANCES - CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the Awarding Agency. Further, certain federal assistance awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial, and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the assistance; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. Will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure nondiscrimination during the useful life of the project.

4. Will comply with the requirements of the assistance awarding agency with regard to the drafting, review and approval of construction plans and specifications.

5. Will provide and maintain competent and adequate engineering supervision at the construction site to ensure that the complete work conforms with the approved plans and specifications and will furnish progress reports and such other information as may be required by the assistance awarding agency or State.

6. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

7. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

8. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

9. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

10. Will comply with all Federal statutes relating to non-discrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title DC of the Educational Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 16851686) which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) which prohibit discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101-6107) which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 93255), as amended, relating to non-discrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (P.L. 91616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient record; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to non-discrimination in the sale, rental, or financing of housing; (i) any other non-discrimination provisions in the specific statute(s) under which application for Federal assistance is being made, and (j) the requirements on any other non-discrimination Statute(s) which may apply to the application.

11. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provides for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal and federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

12. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

13. Will comply, as applicable, with the provisions of the Copeland Act (40 U.S.C § 276c and 18 U.S.C. § 874), the Contract Work Hours and Safety Standards Act (40 U.S.

§§ 327-333) regarding labor standards for federally assisted construction subagreements.

14. Will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 930-234 which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

15. Will comply with environmental standard which may be prescribed pursuant to the following: (1) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190 and Executive Order (EO) 11514; (b)

Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal action to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).

16. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

17. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and preservation of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).

18. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

19. Will comply with all applicable requirements of all other Federal laws, Executive Orders, regulations, and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

Adapted from Federal standard Form 424D (4-88)

Application Affidavit

THE STATE OF TEXAS§
§
COUNTY OF [County where applicant is located]§
§
[APPLICANT]§

BEFORE ME, the undersigned, a Notary Public in and for the State of Texas, on this day personally appeared [affiant, affiant's title, and official capacity], who being by me duly sworn, upon oath says that (i) to the best of his/her knowledge and belief, the facts and information contained in the Application to the Texas Water Development Board for financial assistance are true and correct, (ii) the [applicant] will comply with all representations in the Application to the Texas Water Development Board for financial assistance, all laws of the State of Texas, and all rules and published policies of the Texas Water Development Board, (iii) to the best of his/her knowledge, there is no litigation or other proceeding pending or threatened against [the applicant] before any court, agency, or administrative body wherein an adverse decision would materially adversely affect the financial condition of [the applicant] or the ability of [the applicant] to issue debt and (iv) the Application to the Texas Water Development Board for financial assistance was approved by the [city council, board of directors] in an open meeting.

(signature of affiant)_____
Name: [name of official representative]
Title: [official capacity]

SWORN TO AND SUBSCRIBED BEFORE ME, by [name of affiant, title and official capacity], this (day) day of (Month), 200(yr).

(signature of notary)_____
Notary Public, State of Texas

(NOTARY'S SEAL)

Application Filing and Authorized Representative Resolution

A RESOLUTION by the _____ of the _____requesting financial assistance from the Texas Water Development Board; authorizing the filing of an application for assistance; and making certain findings in connection therewith.

WHEREAS, the _____ hereby finds and determines that there is an urgent need for the _____ to construct and such capital improvements cannot be reasonably financed unless financial assistance is obtained from the Texas Water Development Board; now, therefore,

BE IT RESOLVED BY THE _____ OF THE _____:

SECTION 1: That an application is hereby approved and authorized to be filed with the Texas Water Development Board seeking financial assistance in an amount not to exceed $_____ to provide for the costs of .

SECTION 2: That _____ be and is hereby designated the authorized representative of the ____ for purposes of furnishing such information and executing such documents as may be required in connection with the preparation and filing of such application for financial assistance and the rules of the Texas Water Development Board.

SECTION 3: That the following firms and individuals are hereby authorized and directed to aid and assist in the preparation and submission of such application and appear on behalf of and represent the _____ before any hearing held by the Texas Water Development Board on such application, to wit:

Financial Advisor:

Engineer:

Bond Counsel:

PASSED AND APPROVED, this the __ day of _____, 200__.

ATTEST:

(Seal)

Application Affidavit - Certification of Secretary

THE STATE OF TEXAS

COUNTY OF

I, the undersigned, Secretary of the _____, Texas, DO HEREBY CERTIFY as follows:

1. That on the __ day of _____, 2000, a regular meeting of the _____ was held at a meeting place within the City; the duly constituted members of the _____ being as follows:

and all of said persons were present at said meeting, except the following:

Among other business considered at said meeting, the attached resolution entitled:

> "A RESOLUTION by the _____ of the _____ requesting financial participation from the Texas Water Development Board; authorizing the filing of an application for financial participation ; and making certain findings in connection therewith."

was introduced and submitted to the ____ for passage and adoption. After presentation and due consideration of the resolution, and upon a motion made by _____ and seconded by _____, the resolution was duly passed and adopted by the _____ by the following vote:

___ voted "For" ___ voted "Against" ___ abstained

all as shown in the official Minutes of the ___ for the meeting held on the aforesaid date.

2. That the attached resolution is a true and correct copy of the original on file in the official records of the ____; the duly qualified and acting members of the ____ on the date of the aforesaid meeting are those persons shown above and, according to the records of my office, advance notice of the time, place and purpose of said meeting was given to each member of the _____; and that said meeting, and deliberation of the aforesaid public business, was open to the public and written notice of said meeting, including the subject of the above entitled resolution, was posted and given in advance thereof in compliance with the provisions of Chapter 551 of the Texas Government Code.

IN WITNESS WHEREOF, I have hereunto signed my name officially and affixed the seal of said ___, this the of ____, 200__.

_____
Secretary

(SEAL)

Assurance of Operation and Maintenance of Treatment Works

I. Section 35.2206 of 40 CFR requires that grantees must assure economical and effective operation and maintenance (including replacement) of the treatment works.

II. Condition P of the operating agreement between Texas Water Development Board and the U.S. Environmental Protection Agency requires that the Board require as a condition of a CWTAP grant, that the recipient will assure operation and maintenance for the design life of the project.

ASSURANCE

The undersigned grant applicant/recipient assures that the economical and effective operation and maintenance (including replacement) of the treatment works funded by this grant will be implemented by the applicant/recipient for the design life of the project.

APPLICANT/RECIPIENT:

PROJECT NAME/DESCRIPTION:

_____ _____

Signature of Authorized Representative Date

_____

Typed Name and Title

Name and Address of Grantee:

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbing," in accordance with its instruction.

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less that $10,000 and not more than $100,000 for each such failure.

_____ _____

Head of Agency or Organization - Signature Date

_____

Type Name & Title

Name and Address of Agency/Organization:

Procurement System Certification

CWT-102
11-6-02

Applicants Name:	**Assistance Application Identification:**

Applicant's Address:

Section I - Instructions

The applicant must complete and submit a copy of this form with each application for TWDB Assistance. If the applicant has certified its procurement system to TWDB within the past two years and the system has not been substantially revised, complete Part A in Section II, then sign and date the form. If the system has not been certified within the past two years, complete Part B, then sign and date the form.

Section II - Certification

A. I affirm that the applicant has within the past two years certified to TWDB that its procurement system complies with 40 CFR Part 31 and that the system meets the requirements in 40 CFR Part 31. The date of the applicant's latest certification is:	Month/Year

B. Based upon my evaluation of the applicant's procurement system, I, as authorized representative of the applicant:

(Check one of the following)

____**1. <u>CERTIFY</u>** that the applicant's procurement system will meet all of the requirements of 40 CFR Part 31 including the attached subparts before undertaking any procurement action with TWDB assistance.

Please furnish citations to applicable local ordinances and regulations:

____**2. <u>DO NOT CERTIFY THE APPLICANT'S PROCUREMENT SYSTEM.</u>**

The applicant agrees to follow the requirements of 40 CFR Part 31 State, and local requirements with TWDB review and preaward approval of proposed procurement actions that will utilize TWDB financial assistance.

Typed Name and Title of Chief Executive Officer	Signature	Date

Project Name:

Continued on Reverse

Section III - Federal Requirements

Below is a list of subparts and sections of 40 CFR Part 31 and State Statutes which contain some but not all of the requirements for procurements under TWDB assistance. The purpose of this list is to assist in the evaluation of the applicant's procurement system to determine if it is certifiable and meets the basic procurement principles as articulated in Part 31. As such, this list highlights certain aspects of the regulations which the recipient shall use in its evaluation process and is not intended to replace a detailed reading of Part 31 or the state statutes.

Reference	Section Title - Summary of Requirements (40 CFR Part 31)
31.36(a)-(k)	PROCUREMENT - System must adhere to the standards listed in 31.36 (b), State and local laws, contract administration system, written code of conduct.
31.36 (c)	COMPETITION - System must have procurement transaction procedures that provide maximum open and free competition.
31.36 (d)	METHODS OF PROCUREMENT - System must have procedures for small purchase ($100,000 or less) 31.36 (d)(1), sealed bids, 31.36 (d)(2), competitive proposals, 31.36 (d)(3) noncompetitive proposals, 31.36.(d)(4)
31.36 (e)	SMALL, MINORITY, WOMEN'S AND LABOR SURPLUS AREA BUSINESSES System must provide for use of these businesses as specified in this section
31.36 (f)	COST AND PRICE CONSIDERATION - System procedures must allow for consideration of cost and price.
31.36 (g)	AWARDING AGENCY REVIEW - System must provide for awarding agency review as specified in this section.
31.36 (h)	BONDING REQUIREMENTS - System procedures and requirements must meet the requirements of this section
31.36 (I)	CONTRACT PROVISIONS - Subagreements for procurement must contain the appropriate clauses specified in this section
31.36 (j)	PAYMENTS TO CONSULTANTS - Limits certain payments to consultants to the equivalent of a GS-18 rate.
31.36 (k)	USE OF SAME ARCHITECT OR ENGINEER - System procedures for retaining and A/E .

Section IV - State Purchasing Laws

The following references apply to particular types of entities. There may be additional statutes not included here that the applicant must comply with.

Reference	Section Title - Summary of Requirements (Local Government Code, Government Code Property Code, and Water Code)
LGC Ch. 171	Regulation of Conflicts of Interest of Officers of Municipalities, Counties, and Certain Other Local Governments.
LGC Ch. 252	Purchasing and Contracting Authority of Municipalities: Subchapter **A** - General Provisions; Subchapter **B** - Competitive Bidding or Competitive Proposals; Subchapter **C** - Procedures to be followed; Subchapter **D** - Enforcement of statutes
LGC Ch. 253	Sale of lease of property by Cities
LGC Ch. 262	Purchasing and Contracting Authority of Counties: Subchapter **A** - General Provisions; Subchapter **B** - Purchasing Agents; Subchapter **C** - Competitive Bidding in General
LGC Ch. 371	Purchasing and Contracting Authority of Municipalities, Counties, and Certain Other Local Governments.: Subchapter **A** - Public Property Finance Act; Subchapter **B** - Competitive Bidding on Certain Public Works Projects; Subchapter **H** - Alternate Project Delivery for Certain Projects; Subchapter **Z** - Miscellaneous Provisions
GC Ch. 791	Interlocal Cooperation Act
GC Ch. 2251	Payment for Goods and Services
GC Ch. 2252	Contracts with Government Entity
GC Ch. 2253	Public Work Performance and Payment Bonds
GC Ch. 2254	Professional and Consulting Services
GC Ch. 2258	Prevailing Wage Rates
WC Ch. 49	Provisions Applicable to All Districts Subchapter I - Construction , Equipment, Materials, and Machinery Contracts;

Wastewater Project Information

A. Project Name	B. Project No.	C. County
C. Program(s)	D. Loan Amount	F. Loan Term

G. Wastewater Project Description: (multiphase project, new, expansion, expansion of collection system, etc.)

Attach map of service area affected by Project or other documentation.

H. Wastewater Receiving Stream	I. TNRCC Permit No.	J. Segment No.	K. Long. & Lat. of Discharge Location

L. Projected Wastewater Flows

1. Design Flow MGD	2. 2-Hour Peak MGD		

M. Proposed Permit Parameters

1. CBOD5 mg/l	4. NH3-N mg/l
2. BOD5 mg/l	5. DO mg/l
3. TSS mg/l	

N. Other Pertinent Planning Information (Describe)

O. Projected Population from application for 20 year period preferably in 5 year increments. Attach justification and list service area populations if different from Planning Area.	Year	Reference Year 2000	2005	2010	2015	2020	20__
	Population						

Project Design Year	20__	Design Population	

P. Current Water Supply Information

Surface Water Supply Name	Certificate No.	Annual Amount Used and Unit
Ground Water Supply Aquifer		County
Well Field Location		Annual Amount Used and Unit

Q. Proposed Water Supply Information (over loan repayment period)

Surface Water Supply Name	Certificate No.	Annual Amount Used and Unit
Ground Water Supply Aquifer		County
Well Field Location		Annual Amount Used and Unit

R. Consulting Engineer Name	S. Telephone No.	T. E-mail address
U. Applicant Contact Name, Title	V. Telephone No.	W. E-mail address

TEXAS WATER DEVELOPMENT BOARD
APPLICANT/ENTITY AFFIRMATIVE STEPS CERTIFICATION and GOALS

WRD-215

I. PROJECT INFORMATION

A. TWDB Project No.	B. Applicant/Entity Name	C. Loan/Grant Amount	D. Program Type (insert "X" for all that apply)
			☐ Drinking Water SRF (DWSRF) ☐ Clean Water SRF (CWSRF) ☐ Colonia Wastewater (CWTAP) ☐ Other _____

II. GOOD FAITH EFFORT (Applicable to all PRIME Contracts Awarded by the Applicant/Entity)

I understand that it is my responsibility to comply with all state and federal regulations and guidance in the utilization of Small, Minority, Women-Owned and Small Businesses in Rural Areas, in procurement. I certify that I will make a "good faith effort" to afford opportunities for SBE, MBE, WBE and SBRA's by:

1. Including qualified SBE, MBE, WBE and SBRA's on procurement solicitation lists;
2. Soliciting potential SBE, MBE, WBE and SBRA's;
3. Reducing contract size/quantities, when economically feasible, to permit maximum participation by SBE, MBE, WBE and SBRA's;
4. Establishing delivery schedules to encourage participation by SBE, MBE, WBE and SBRA's;
5. Using the services and assistance of the Small Business Administration, Minority Business Development Agency, U.S. Department of Commerce, Texas Marketplace;
6. Requiring all PRIME contractors to follow steps 1-5 of the "good faith effort" in employing SBE, MBE, WBE and SBRA Subcontractors;

Signature - Applicant/Entity Representative	Title	Certification Date

III. PROJECT PARTICIPATION ESTIMATES (Demonstrates maximum potential for MBE/WBE participation, based on total loan/grant amount)

Total Procurement		Potential **MBE** Participation		Potential **WBE** Participation	
Cost Category	Total	Goal	Extension	Goal	Extension
Construction	$ -	34.0%	$ -	8.0%	$ -
Supplies	$ -	18.0%	$ -	29.0%	$ -
Equipment	$ -	13.0%	$ -	13.0%	$ -
Services	$ -	22.0%	$ -	26.0%	$ -
*Other Issuance Costs (not subject to MWBE goals)	$ -	N/A		N/A	
Total Procurement (must equal loan/grant amount)	$ -		$ -		$ -

IV. TWDB APPROVAL SIGNATURES

OPFCA Engineer	Approval Date	SWMBE Coordinator	Approval Date

*Other ISSUANCE costs can include: origination fees; bond insurance; land/easement/right-of-way; attorney general fee; paying agent fee or other non-bid project costs.

TEXAS WATER DEVELOPMENT BOARD
AFFIRMATIVE STEPS SOLICITATION REPORT

WRD-216

I. PROJECT INFORMATION

A. TWDB Project No.	B. Applicant/Entity Name	C. Contract Amount	D. Program Type (insert "X" for all that apply)
			☐ Drinking Water SRF (DWSRF)
Project Description:			☐ Clean Water SRF (CWSRF)
Prime Contractor:			☐ Colonia Wastewater (CWTAP)
Solicitation By:	☐ Applicant/Entity	☐ Prime Contractor	☐ Other _____
TWDB Construction Contract Number:			

II. SOLICITATION LIST

INSTRUCTIONS

Column 1 List on this form, or provide a separate list of each business entity solicited for procurement: Full name, street address, city/state/zip, for each Small, Minority, Woman, Rural Area or Other

Column 2 Enter one of the following procurement or contract categories: **CONSTRUCTION, SUPPLIES; EQUIPMENT; SERVICES**

Column 3 **SBE, MBE, WBE, SRBA, or OTHER** **(NOTE! "OTHER" = Company or firm is Non-SBE, MBE, WBE or SBRA)**

Column 4 Evidence of **Good Faith Effort** solicitations will include a combination of the following outreach methods. Adequate backup documentation must be attached to this form for each method used.

1. Newspaper Advertisements
2. Direct Contact by Phone, Fax, Mailouts
3. Meetings or Conferences
4. Minority Media
5. Internet & Web Postings
6. Trade Association Publications
7. Other Government Publications

Column 1 Name & Address of Business Entities Solicited for Procurement	Column 2 Procurement or Contract Category	Column 3 Type of Business	Column 4 Solicitation Methods

Signature - Authorized Representative	Title	Date

III. TWDB APPROVAL SIGNATURES

OPFCA Engineer	Approval Date	SWMBE Coordinator	Approval Date

TEXAS WATER DEVELOPMENT BOARD
PRIME CONTRACTOR AFFIRMATIVE STEPS CERTIFICATION and GOALS

WRD-217

I. PROJECT INFORMATION

A. TWDB Project No.	B. Applicant/Entity	C. Loan/Grant Amount	G. Program Type (insert "X" for all that apply)
			☐ Drinking Water SRF (DWSRF) ☐ Clean Water SRF (CWSRF) ☐ Colonia Wastewater (CWTAP) ☐ Other _____
D. Contract Number	**E. Prime Contractor**	**F. Contract Amount**	

II. GOOD FAITH EFFORT (Applicable to all Sub-Agreements Awarded by the Prime Contractor)

I understand that it is my responsibility to comply with all state and federal regulations and guidance in the utilization of Small, Minority, Women-Owned and Small Businesses in Rural Areas, in procurement. I certify that I will make a "good faith effort" to afford opportunities for SBE, MBE, WBE and SBRA's by:

1. Including qualified SBE, MBE, WBE and SBRA's on procurement solicitation lists;
2. Soliciting potential SBE, MBE, WBE and SBRA's;
3. Reducing contract size/quantities, when economically feasible, to permit maximum participation by SBE, MBE, WBE and SBRA's;
4. Establishing delivery schedules to encourage participation by SBE, MBE, WBE and SBRA's;
5. Using the services and assistance of the Small Business Administration, Minority Business Development Agency, U.S. Department of Commerce, Texas Marketplace;
6. Submitting documentation to the Texas Water Development Board to verify good faith effort, steps 1-5.

EXCEPTION

As the Prime Contractor, I certify that I have reviewed the contract requirements and found no available subcontracting opportunities. I also certify that I will fulfill 100 percent of the contract requirements with my own employees & resources.

☐ (check if applicable)

Signature - Authorized Representative	Title	Certification Date

III. PROJECT PARTICIPATION ESTIMATES (Demonstrates maximum potential for MBE/WBE participation, based on total contract amount)

Total Procurement		Potential **MBE** Participation		Potential **WBE** Participation	
Cost Category	**Total**	**Goal**	**Extension**	**Goal**	**Extension**
Construction	$ -	34.0%	$ -	8.0%	$ -
Supplies	$ -	18.0%	$ -	29.0%	$ -
Equipment	$ -	13.0%	$ -	13.0%	$ -
Services	$ -	22.0%	$ -	26.0%	$ -
***Other Issuance Costs** (not subject to MWBE goals)	$ -	N/A		N/A	
Total Procurement (must equal contract amount)	$ -		$ -		$ -

IV. TWDB APPROVAL SIGNATURES

OPFCA Engineer	Approval Date	SWMBE Coordinator	Approval Date

* Other ISSUANCE costs can include: origination fees; bond insurance; land/easement/right-of-way; attorney general fee; paying agent fee or other non-bid project costs.

TEXAS WATER DEVELOPMENT BOARD
SMWBE SELF-CERTIFICATION

For Utilization of Small, Minority, Women-Owned, & Small Businesses in Rural Areas in Procurement

WRD-218

I. PROJECT INFORMATION

A. TWDB Project No.	B. Applicant/ Entity Name	C. Contract Amount	D. Program Type (insert "X" for all that apply)
			☐ Drinking Water SRF (DWSRF) ☐ Clean Water SRF (CWSRF) ☐ Colonia Wastewater (CWTAP) ☐ Other _____
E. Contractor Name and Address			

II. CERTIFICATION

I hereby certify that the above named firm is in-fact, a Small, Minority, Women-Owned or Small Business in a Rural Area, in accordance with the Texas Water Development Board guidance document (SRF-052).

Place "X" in the appropriate category

Small Business Enterprise **(SBE)**	
Minority Business Enterprise **(MBE)**	
Women-Owned Business Enterprise **(WBE)**	
Small Business in a Rural Area **(SBRA)**	

Signature - PRIME Contractor	Title	Date
Signature - APPLICANT/ENTITY Representative	**Title**	**Date**

III. NOTARIZATION

State of: _____

County of: _____

SWORN TO AND SUBSCRIBED before me on: _____

Signature *Date*

(Imprint Seal)

Printed Name: _____

My Commission Expires on: _____

IV. TWDB APPROVAL SIGNATURES

OPFCA Engineer	Approval Date	SMWBE Coordinator	Approval Date

TEXAS WATER DEVELOPMENT BOARD
LOAN/GRANT PARTICIPATION SUMMARY

SRF-373

I. PROJECT INFORMATION

A. TWDB Project Number	**B.** Applicant/Entity Name	**C.** Contract or Loan Amount	**D.** Program Type (insert "X" for all that apply)
			☐ Drinking Water SRF (DWSRF)
Project Description:			☐ Clean Water SRF (CWSRF)
Prime Contractor:			☐ Colonia Wastewater (CWTAP)
Solicitation By:	☐ Applicant/Entity ☐ Prime Contractor		☐ Other _____
TWDB Construction Contract Number: →			

II. LIST OF ACTUAL CONTRACTS / PROCUREMENTS

INSTRUCTIONS

Column 1	Enter the full name, street address, city/state/zip for each firm awarded a contract for the project
Column 2	Enter the procurement category: **CONSTRUCTION; SUPPLIES; EQUIPMENT; SERVICES**
Column 3	Enter the type of business: **SBE; MBE; WBE; SRBA; or OTHER** (OTHER = Non-SBE, MBE, WBE or SBRA)
Column 4	Enter the exact amount of the awarded contract
Column 5	Enter the exact date the contract was or will be executed
Column 6	Enter the certification type (i.e. state; federal; NCTRCA; City of Houston; Self-Certification etc.)

Column 1 Name & Address of Contracted Firm/Vendor	**Column 2** Procurement Category	**Column 3** Type of Business	**Column 4** Actual Contract Awarded ($)	**Column 5** Contract Execution Date	**Column 6** Type of SMWBE Certification

I hereby certify that all of the firms listed above were contracted to work on the specified project. I also certify that I will immediately notify the Texas Water Development Board if any of the listed small, minority, women-owned or rural firms are terminated from the project.

Signature - Authorized Representative	**Title**	**Date**

III. TWDB APPROVAL SIGNATURES

OPFCA Engineer	**Approval Date**	**SMWBE Coordinator**	**Approval Date**

Water Conservation Utility Profile

Jointly Produced by the Texas Water Development Board and the Texas Natural Resource Conservation Commission (Revised April 25, 2002)

The purpose of the Water Utility Profile is to assist an applicant with water conservation plan development and to ensure that important information and data be considered when preparing your water conservation plan and goals. This form should be used by applicants for financial assistance (submitted to the TWDB) or by an entity applying for a water right (submitted to the TNRCC). Please complete all questions as completely and objectively as possible. You may contact the Municipal Water Conservation Unit of the TWDB at 512-936-2391 for assistance, or the Resource Protection Team at 512-239-4691 if submitted to the TNRCC.

Name of Utility: _____

Address & Zip: _____

Telephone Number: _____ Fax: _____

Form Completed By: _____

Title: _____

Signature: _____ Date: _____

Name and Phone Number of Person/Department responsible for implementing a water conservation program:

_____

I. CUSTOMER DATA

A. Population and Service Area Data

1. Please attach a copy of your Certificate of Convenience and Necessity (CCN) from the TNRCC, and a service-area map.

2. Service area size (square miles): _____

3. Current population of service area: _____

4. Current population served by utility: a: water _____
   b: wastewater _____

5. Population served by water utility for the previous five years:

Year	Population
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

6. Projected population for service area in the following decades:

Year	Population
2010	_____
2020	_____
2030	_____
2040	_____
2050	_____

7. List source(s)/method(s) for the calculation of current and projected population:

_____
_____
_____
_____

B. Active Connections

1. Current number of active connections by user type. Check whether multi-family service is counted as Residential _____ or Commercial _____

Treated water users:	Metered	Not-metered	Total
Residential	_____	_____	_____
Commercial	_____	_____	_____
Industrial	_____	_____	_____
Public	_____	_____	_____
Other	_____	_____	_____

2. List the net number of new connections per year for most recent three years:

Year	_____	_____	_____
Residential	_____	_____	_____
Commercial	_____	_____	_____
Industrial	_____	_____	_____
Public	_____	_____	_____
Other	_____	_____	_____

C. High Volume Customers

List annual water use for the five highest volume retail and wholesale customers (please indicate if treated or raw water delivery)

	Customer	Use (1,000gal./yr.)	Treated/Raw Water
(1)	_____	_____	_____
(2)	_____	_____	_____
(3)	_____	_____	_____
(4)	_____	_____	_____
(5)	_____	_____	_____

II. WATER USE DATA FOR SERVICE AREA

A. Water Accounting Data

1. Amount of water use for previous five years (in 1,000 gal.):
   Please indicate : Diverted Water _____
   Treated Water _____

Year					
January					
February					
March					
April					
May					
June					
July					
August					
September					
October					
November					
December					
Total					

Please indicate how the above figures were determined (e.g., from a master meter located at the point of a diversion from a stream or located at a point where raw water enters the treatment plant, or from water sales).

_____

_____

2. Amount of water (in 1,000 gallons) delivered (sold) as recorded by the following account types (See #1, Appendix A) for the past five years.

Year	Residential	Commercial	Industrial	Wholesale	Other	Total Sold

3. List previous five years records for unaccounted-for water use (See #2, Appendix A)

Year	Amount (gal.)	%

4. List previous five years records for annual peak-to-average daily use ratio (See #3, Appendix A)

Year	Average MGD	Peak MGD	Ratio

5. Municipal per capita water use for previous five years (See #4, Appendix A):

Year	Population	Total Diverted (or Treated) (1,000 gal.)	Industrial Sales (1,000 gal.)	Municipal Per Capita Use (gpcd)

6. Seasonal water use for the previous five years (in gallons/person/day) (See #5, Appendix A):

Year	Population	Base Per Capita Use	Summer Per Capita Use	Seasonal Use

B. Projected Water Demands

Provide estimates for total water demands for the planning horizon of the utility. Indicate sources of data and how projected water demands were determined. Attach additional sheets if necessary.

III. WATER SUPPLY SYSTEM

A. Water Supply Sources

List all current water supply sources and the amounts available with each:

	Source	Amount Available
Surface Water:	_____	_____MGD
Groundwater:	_____	_____MGD
Contracts:	_____	_____MGD
Other:	_____	_____MGD

B. Treatment and Distribution System

1. Design daily capacity of system: _____ MGD

2. Storage Capacity: Elevated _____ MGD, Ground _____ MGD

3. If surface water, do you recycle filter backwash to the head of the plant?
   Yes _____ No _____. If yes, approximately _____ MGD.

4. Please describe the water system. Include the number of treatment plants, wells, and storage tanks. If possible, include a sketch of the system layout.

IV. WASTEWATER UTILITY SYSTEM

A. Wastewater System Data

1. Design capacity of wastewater treatment plant(s): _____ MGD

2. Is treated effluent used for irrigation on-site _____, off-site _____, plant washdown _____, or chlorination/dechlorination _____?
   If yes, approximately _____ gallons per month. Could this be substituted for potable water now being used in these areas _____?

3. Briefly describe the wastewater system(s) of the area serviced by the water utility. Describe how treated wastewater is disposed of. Where applicable, identify

treatment plant(s) with the TNRCC name and number, the operator, owner, and, if wastewater is discharged, the receiving stream. Please provide a sketch or map which locates the plant(s) and discharge points or disposal sites.

B. Wastewater Data for Service Area

1. Percent of water service area served by wastewater system: ___%

2. Monthly volume treated for previous three years (in 1,000 gallons):

Year	_____	_____	_____
January	_____	_____	_____
February	_____	_____	_____
March	_____	_____	_____
April	_____	_____	_____
May	_____	_____	_____
June	_____	_____	_____
July	_____	_____	_____
August	_____	_____	_____
September	_____	_____	_____
October	_____	_____	_____
November	_____	_____	_____
December	_____	_____	_____
Total	_____	_____	_____

V. UTILITY OPERATING DATA

A. List (or attach) water and wastewater rates, and rate structure for all classes.

B. Other relevant data: Please indicate other data or information that is relevant to both the applicant's water management operations and design of a water conservation plan.

VI. CONSERVATION GOALS

Please use the data provided in this survey to establish conservation goals (additional data may be used).

A. Water conservation goals for municipal utilities are generally established to maintain or reduce consumption, as measured in:

1. gallons per capita per day used;
2. unaccounted-for water uses;
3. peak-day to average-day ratio; and/or
4. an increase in reuse or recycling of water.

B. TNRCC/TWDB conservation staff assess the reasonableness of water conservation goals based on whether the applicant addresses the following steps:

1. identification of a water or wastewater problem;
2. completion of the utility profile;
3. selection of goals based on the technical potential to save water as identified in the utility profile; and
4. performance of a cost-benefit analysis of conservation strategies.

If at least the first three steps have been completed and are summarized in the water conservation plan, then staff can conclude that there is substantiated basis for the goals, and that the water conservation plan is integrated into water management. Therefore, the established conservation goals can be deemed reasonable.

C. Complete the following in gallons per capita per day (gpcd) to quantify the water conservation goals for the utility's service area:

1. Estimation of the technical potential for reducing per capita water use (see Appendix B).

		Conservation Scenario
		Mostly Likely
a.	Reduction in unaccounted-for uses:	
b.	Reduction in indoor water use due to water-conserving plumbing fixtures:	20.5
c.	Reduction in seasonal use:	
d.	Reduction in water use due to public education programs:	
	TOTAL TECHNICAL POTENTIAL FOR REDUCING PER CAPITA WATER USE:	

*Subtract these totals from the dry-year per capita use to calculate the long-run planning goal.

2. Planning goal

The planning goal equals the dry year per capita water use minus the total technical potentials calculated in number one above.

Planning goal (in gpcd): _____

Goal to be achieved by year: _____

3. Needed reduction in per capita use to meet planning goal

Current per capita use: _____

Planning goal (from #2 above): _____

Difference between current use and goal: _____
(Represents needed reduction in per capita use to meet goal.)

Appendix A

Definitions of Utility Profile terms

1. **Residential** sales should include residential sales to residential class customers only.
   Industrial sales should include manufacturing and other heavy industry.
   Commercial sales should include all retail businesses, offices, hospitals, etc.
   Wholesale sales should include water sold to another utility for a resale to the public for human consumption.

2. **Unaccounted-for water** is the difference between water diverted or treated (as reported in Section IIA1, p. 4) and water delivered (sold)(as reported in Section IIA2, p. 4). Unaccounted-for water can result from:

   1. inaccurate or incomplete record keeping;
   2. meter error;
   3. unmetered uses such as firefighting, line flushing, and water for public buildings and water treatment plants;
   4. leaks; and
   5. water theft and unauthorized use.

3. The **peak-day to average-day ratio** is calculated by dividing the maximum daily pumpage (in million gallons per day) by the average daily pumpage. Average daily pumpage is the total pumpage for the year (as reported in Section IIA1, p. 4) divided by 365 and expressed in million gallons per day.

4. **Municipal per capita use** is defined as total municipal water use dividing by the population and the 365 days. Total municipal water use is calculated by subtracting the industrial sales and wholesale from the total water diverted or treated (as reported in Section IIA1, p. 4).

   Total municipal water use = Total water diverted or treated - industrial sales - wholesale
   Municipal per capita use (gpcd) = Total municipal water use/population/365 days

Note: The AWWA considers the municipal per capita use as the most representative figure to use in long-range water supply and conservation planning.

5. **Seasonal water use** is the difference between base (winter) daily per capita use and summer daily per capita use. To calculate **the base daily per capita use**, average the monthly diversions for December, January, and February, and divide this average by 30. Then divide this figure by the population. To calculate the **summer daily per capita use**, use the months of June, July, and August.

Appendix B

Estimating the Technical Potential for Reducing Per Capita Water Use

The technical potential for reducing per capita water use is the range in potential water savings that can be achieved by implementing specific water conservation measures. The bottom of the range represents the potential savings under a "most likely," or real-world conservation scenario. The top of the range represents the potential savings under an "advanced" conservation scenario. The conservation measures include:

reducing unaccounted-for water uses;
reducing indoor water use due to water-conserving plumbing fixtures;
reducing seasonal water use; and
reducing water use through public education programs.

Guidelines and examples for calculating the technical potential water savings for each of these conservation measures are given below.

I. Reducing unaccounted-for water uses

The TNRCC considers unaccounted-for water uses of 15% or less as acceptable for communities serving more than 5,000 people. Smaller, older systems that have a larger service area may legitimately experience larger losses. Losses above 15% may be an area of concern, and provide a conservation potential.

The bottom of the range for technical potential savings for unaccounted-for uses is zero. To calculate the top of the range, see the following example:

Unaccounted-for uses = 19.5%
Dry-year per capita water use = 250 gallons per capita per day (gpcd)
Potential for reduction in unaccounted-for use = (250 gpcd x 19.5%) - (250 gpcd x 15%)
= 48.75 gpcd - 37.5 gpcd
= 11.25 gpcd
Technical Potential Savings Range = 0 to 11.25 gpcd

II Reducing Indoor Water Use due to Water-Conserving Plumbing Fixtures

The TNRCC uses **20.5 gpcd** as the most reliable figure upon which to base potential water savings, which represents the "most likely" conservation scenario. This figure is based upon the estimate that by 2050, 90% of pre-1990 homes, and all new homes will have been equipped with water conserving plumbing fixtures.

The figure used for the "advanced" conservation scenario, 21.7 gpcd, is an estimate of the average savings that would result from a home equipped exclusively with water-conserving plumbing fixtures. This figure is considered "advanced" because in a typical city, 100% of the homes are not exclusively equipped with water-conserving fixtures.

III. Reducing Seasonal Water Use

The Texas Water Development Board (TWDB) has calculated seasonal use as a percentage of average annual per capita use for East Texas (20%), West Texas (25%), and a statewide average of 22.5%. Seasonal water use is calculated by multiplying the average annual per capita use in gpcd by the appropriate percentage.

The technical potential for reduction in seasonal use is then calculated by multiplying the seasonal use by 7% for the "most likely" conservation scenario, and by 20% for the "advanced" scenario. Below is an example calculation:

Average annual per capita use = 185 gpcd
Geographical location = West Texas
Seasonal use = (185 gpcd x 25%) = 46.25 gpcd
Potential reduction in seasonal use (Most Likely scenario) = (46.25 x 7%) = 3.24 gpcd
Potential reduction in seasonal use (Advanced scenario) = (46.25 x 20%) = 9.25 gpcd

Technical Potential Savings Range = 3.24 to 9.25 gpcd

IV. Reducing Water Use through Public Education Programs

The technical potential for water conservation from public education programs is estimated to be from 2% of the average annual per capita use for the "most likely" conservation scenario to 5% for the "advanced" scenario, according to the "Water Conservation Guidebook," published in 1993 by the American Water Works Association. Below is an example calculation:

Average annual per capita use = 185 gpcd
Potential reduction in water use (Most Likely scenario) = (185 x 2%) = 3.7 gpcd
Potential reduction in water use (Advanced scenario) = (185 x 5%) = 9.25 gpcd

Technical Potential Savings Range = 3.7 to 9.25 gpcd

To calculate the **total technical potential** for reducing municipal per capita water use, simply add the individual technical potential amounts calculated in items I - IV above. In this case **the total technical potential range equals 27.44 gpcd to 51.45 gpcd**.

Summary of Technical Potential Calculations		
Conservation Measure	**Calculation Procedure**	**Example Result**
Reducing unaccounted-for uses	(Dry-year demand) x (Unacc.-for percentage if more than 15%, minus 15%)	0 to 11.25 gpcd
Reducing indoor water use due to water- efficient plumbing fixtures	20.5 gpcd ("rule of thumb") to 21.7 gpcd (advanced)	20.5 to 21.7 gpcd
Reducing seasonal water use	Seasonal use (Avg. use x 22.5%) x 7% and 20%	3.24 to 9.25 gpcd
Reducing water use through public education programs	Average use x 2% and 5%	3.7 to 9.25 gpcd
	Total Technical Potential Savings	**27.44 to 51.45 gpcd**

To calculate the long-run planning goal, subtract these totals from the **dry-year water demand**. For example:

Long-run planning goal = (Dry year water demand) minus (total technical potential)
= 250 gpcd - 27.44 gpcd = 222.56 gpcd ("most likely" scenario)
= 250 gpcd - 51.45 gpcd =198.55 gpcd ("advanced" scenario)

Long-run planning goal for municipal water use = 222.56 to 198.55 gpcd

Resolution Standard Conditions for Tax Exempt Loans

1. that the bond counsel opinion must include an opinion that the interest on the obligations is excludable from gross income or is exempt from Federal income taxation. Bond counsel may rely on covenants and representations of the issuer in rendering this opinion;

2. that the bond counsel opinion must include an opinion that the obligations are not "private activity bonds." Bond counsel may rely on covenants and representations of the issuer on rendering this opinion;

3. that the ordinance/resolution authorizing the issuance of the obligations must include that the proceeds of the obligations and the facilities financed with the proceeds of the obligations will not be used in a manner that would cause the obligations to be "private activity bonds";

4. that the ordinance/resolution authorizing the issuance of the obligations must include that the issuer will comply with the provisions of Section 148 of the Internal Revenue Code of 1986 (relating to arbitrage);

5. that the ordinance/resolution authorizing the issuance of the obligations must include that the issuer will make any required rebate to the United States of arbitrage earnings;

6. that the ordinance/resolution authorizing the issuance of the obligations must include that the issuer will take no action which would cause the interest on the obligations to be includable in gross income for Federal income tax purposes;

7. that the transcript must include a No Arbitrage Certificate or similar certificate setting forth the issuer's reasonable expectations regarding the use, expenditure and investment of the proceeds of the obligations;

8. that the transcript must include evidence that the information reporting requirements of Section 149(e) of the Internal Revenue Code of 1986 will be satisfied. This requirement is currently satisfied by filing IRS Form 8038 with the Internal Revenue Service. A completed copy of IRS Form 8038 must be provided to the Development Fund Manager prior to release of funds;

9. that the City/District will not cause or permit the obligations to be treated as "Federally Guaranteed" obligations within the meaning of section 149(b) of the Internal Revenue Code;

10. that this commitment is contingent on a future sale of bonds or on the availability of funds on hand;

11. that the resolution/ordinance authorizing the issuance of obligations will state that obligations can be called for early redemption only in inverse order of maturity, and on any date beginning on or after the first interest payment date which is 10 years from the dated date of the obligations, at a redemption price of par, together with accrued interest to the date fixed for redemption;

12. that the political subdivision, or an obligated person for whom financial or operating data is presented either individually or in combination with other issuers of the political subdivision's obligations or obligated persons, will, at a minimum, covenant to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12;

CWTAP-120
(11/01/95)

OUTLAY REPORT AND REQUEST FOR ADVANCEOUTLAY REPORT AND REQUEST FOR ADVANCE

1. Borrower/Grantee Name & Address:	2. Type of Request: _____ Final _____ Interim	3. TWDB Assistance Program (Check all that apply)	**LOAN**	**GRANT**	**FOR TWDB USE ONLY**
	4. Request Number	____ SRF - State Revolving Fund	$_____		DATE RECEIVED _____
5. Name and Telephone Number of Person Completing Form		____ EDAP - Economically Distressed Areas Program Wastewater	$_____	$_____	
		Water	$_____	$_____	BY:_____
		____ WQ - Water Quality	$_____		
		____ WS - Water Supply	$_____		

6. Period Covered for Outlay Report:		9. WASTEWATER SYSTEM ACTUAL PROJECT COSTS			WATER SYSTEM ACTUAL PROJECT COSTS			10. EDAP GRANT ADVANCE ESTIMATES	
		a	b	c	d	e	f	a	b
7. Classification of Work Performed	8. % Complete	Proj.#: SRF Non-Installment	Proj.#: SRF Installment	Grant#: Loan#: EDAP	Loan#: WQ	Loan#: WS	Grant#: Loan#: EDAP	**Water** From:__/__/___ To: __/__/___	**Wastewater** From: / / To: / /
A. Construction Costs (By Contract)									
1.									
2.									
3.									
B. Engineering Costs									
C. Survey									
D. Geotechnical									
E. Inspection									
F. Testing									
G. Legal & Fiscal									
H. Administrative									
I. 1. Other									
2.									
3.									
J. Cumulative to Date: (Sum A. Thru I.3)									
K. Amount Previously Paid									
L. Amount Requested This Voucher									
11. A. TWDB Assistance									
B. Add: Investment Earnings on TWDB Assistance									
C. Less: Uses of Funds (from line J. Above)									
D. Remaining Balance									

12. Certification I certify to the best of my knowledge and belief that the billed costs and/or estimates heron are in accordance with the above mentioned grant and/or loan agreement and all work performed is in accordance with said grant/loan.

Signature and Title of Certifying Officer: _____ Date Signed: _____ Telephone Number: _____

INSTRUCTIONS OUTLAY REPORT AND REQUEST FOR ADVANCEINSTRUCTIONS OUTLAY REPORT AND REQUEST F

Type or print the information on this form to report Project Outlays on all TWDB financed projects or Request for Advances on SRF Installment loans or EDAP grants. The actual cost incurred and reported here must be supported by copies of project invoices. Request for Advances do not require documentation until funds are spent. This form must be submitted in duplicate to the Texas Water Development Board. The contractor's estimate or partial pay request must be signed by the contractor and submitted with each report.

An SRF-74 or CWTAP-74 (Contractor's Certificate of Labor Standards Compliance), signed by the contractor, must accompany each estimate submitted by the contractor(s) when compliance with the Davis Bacon Act is required.

Box 1. Enter the name of the Borrower or Grantee name and address.

Box 2. Mark the appropriate space. Mark Final only if there will be no more Outlay Reports or Request of Advance forms filed.

Box 3. Check all funding sources that apply. Enter the original amounts of the grants or loans or the most recently amended grants in the appropriate spaces.

Box 4. Enter the report or request number. Number the reports consecutively as they are submitted. Outlay reports may be submitted as often as costs are incurred. Request for Advance reports must be submitted for the periods and in accordance with the grant agreements.

Box 5. Enter the name and telephone number of the person who actually completes this form and can respond to inquiries regarding supporting documentation.

Box 6. The period covered for the Outlay Report is the project start or award date up to the report completion date.

Box 7. Line A. 1 - 3. Enter the contractor(s) name in each line provided up to a maximum of three contractors on this form. If more lines are needed list the contractor's name(s) on a separate copy of this form and enter the total in line 7.A.4

Box 7. Line J. Enter the sum of all costs in lines 7.A.1. through 7.I.3 in columns a - f. Except for Column b., SRF Installment Loan, enter these totals also in box 11 line C.

Box 7. Line K. Column b of this line applies only to SRF installment loans. Enter in this column the amounts previously received from the TWDB and enter also in box 11 line C. column b.

Box 7. Line L. For column b subtract line K from line J and enter here. This is the SRF reimbursement amount.

Box 8. Enter the percent of physical completion of the work performed to the date of this report.

Box 9. Enter in spaces provided the grant agreement numbers or loan numbers assigned to the project. In the appropriate lines enter the cumulative costs to date for each classification of work performed listed in box 7.A thru I.

Box 10. (a) Enter in each line the estimated water project costs that will be incurred for the period that the advance will cover. The period covered must be in accordance with the grant agreement(s). Enter in line K any excess or shortage from the previous advance period. Enter in line L the sum of lines 7.A.1 thru I.3 plus or minus the adjustment in line K. The amount in line L is the advance requested for this period.

Box 10. (b) Enter in each line the estimated wastewater project costs that will be incurred for the period that the advance will cover. The period covered must be in accordance with the grant agreement(s). Enter in line K any excess or shortage from the previous advance period. Enter in line L. the sum of lines 7.A. 1 thru I.3. plus or minus the adjustment in line K. The amount in line L is the advance requested for this period.

Box 11. Line A. Enter in this line all TWDB assistance in the respective column a - f. The amount entered on loans should be the loan proceeds received to date. The amounts entered in columns c and f for EDAP grant/loan assistance should be the sum of grant and loan assistance received to date.

Box 11. Line B. Enter in this line and in the respective columns the cumulative investment earnings on the respective TWDB assistance.

Box 11. Line C. Enter the amounts from box 7. line J. in columns a and c - f. Enter the amount from box 7 line K in column b.

Box 12. This must be certified to by the authorized official of the Borrower or Grantee. Enter the official title and telephone number of the person certifying.

Mail this form and supporting documentation to:

Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

This form must be printed on recycled paper only. Copies of this form must also be on recycled paper**.**

ED-101
01/03/00

SITE CERTIFICATE

This is to certify that the _____

_____

(Legal Name of Applicant, i.e., City, District, etc.)

has now acquired, taken bona fide options on, or initiated formal condemnation proceedings against all property (sites, easements, rights-of-way, or specific use permits) necessary for construction, operation and maintenance of (water) (wastewater) facilities described as

_____

_____

(Proposed Contract No. and Description)

in accordance with plans and specifications approved by the Texas Water Development Board. Any deeds or documents required to be recorded to protect the title(s) held by

_____

_____

(Legal Name of Applicant)

have been recorded or filed for record wherever necessary.

In the event of conflicts with existing underground utilities, or to preserve unknown cultural or historic resources, the _____

_____

(Name of Applicant)

has the right of eminent domain and will take condemnation action, if necessary, to acquire any sites, easements or rights-of-way which may be required to change the location of any of the facilities described above; and upon acquisition of the rights-of-way and recording of documents, will submit another site certificate to that effect.

EXECUTED this _____ day of_____, 20 _____

_____
(Signature)

_____
(Title)

Note: This certificate MUST BE EXECUTED BY AN ATTORNEY OR AN ABSTRACTOR qualified to evaluate the Applicant's interest in the site and make such a determination.

Cost or Price SummaryCost or Price Summary

CWTAP-101 9/15/95
Form No. 5700-41

(See accompanying instructions before completing this form)

Part I - General

1. RECIPIENT	2. ID No.
3. NAME OF CONTRACTOR OR SUBCONTRACTOR	4. DATE OF PROPOSAL
5. ADDRESS OF CONTRACTOR OR SUBCONTRACTOR *(Include Zip Code)*	6. TYPE OF SERVICE TO BE FURNISHED
TELEPHONE NUMBER *(Include Area Code)*	

Part II - Cost Summary

7. DIRECT LABOR *(Specify Labor Categories)*	ESTIMATED HOURS	HOURLY RATE	ESTIMATED COST	**TOTALS**
		$	$	
DIRECT LABOR TOTAL:				$

8. INDIRECT COSTS *(Specify Indirect Cost Pools)*	RATE	X BASE =	ESTIMATED COST	
		$	$	
INDIRECT COSTS TOTAL:				$

9. OTHER DIRECT COSTS				
A. TRAVEL			ESTIMATED COST	
(1) TRANSPORTATION			$	
(2) PER DIEM			$	
TRAVEL SUBTOTAL:			$	
B. EQUIPMENT, MATERIALS, SUPPLIES *(Specify* Categories)	QTY	COST	ESTIMATED COST	
		$	$	
EQUIPMENT SUBTOTAL:			$	
C. SUBCONTRACTS			ESTIMATED COST	
			$	
SUBCONTRACTS SUBTOTAL:			$	
D. OTHER *(Specify Categories)*			ESTIMATED COSTS	
			$	
OTHER SUBTOTAL:			$	
E. OTHER DIRECT COSTS TOTAL:				$
10. TOTAL ESTIMATED COST				$
11. PROFIT				$
12. TOTAL PRICE				$

Part III - Price Summary

13. COMPETITOR=S CATALOG LISTINGS, INHOUSE ESTIMATES, PRICE QUOTES *(Indicate basis of price comparison)*	MARKET PRICE(S)	PROPOSED PRICE
	$	
		$

Part IV - Certifications

14. CONTRACTOR

14a. HAS A FEDERAL OR LOCAL AGENCY PERFORMED ANY REVIEW OF YOUR ACCOUNTS OR RECORDS IN CONNECTION WITH ANY OTHER FEDERAL ASSISTANCE AGREEMENT OR CONTRACT?

‘ YES ‘ NO *(If AYES@, give date of review, name, address and telephone number of reviewing office.)*

14b. THIS SUMMARY CONFORMS WITH THE FOLLOWING COST PRINCIPLES:

14c. THIS PROPOSAL IS SUBMITTED FOR USE IN CONNECTION WITH AND IN RESPONSE TO:
(1)

This is to certify to the best of my knowledge and belief that the cost and pricing data summarized herein are complete, current, and accurate as of:	(2) Date

I further certify that a financial management capability exists to fully and accurately account for the financial transactions under this project.
I further certify that I understand that the subagreement price may be subject to downward renegotiation and/or recoupment where the above cost and pricing data have been determined, as a result of audit, not to have been complete, current, and accurate as of the date above.

(3) Title of Proposer	Signature of Proposer	Date of Execution

15. RECIPIENT REVIEWER

I certify that I have reviewed the cost/price summary set forth herein and the proposed costs/price appear acceptable for the subagreement award.

Title of Reviewer	Signature of Reviewer	Date of Execution

PURPOSE AND APPLICABILITY

The purpose of this form is to provide a simple form for the display of cost and price data. 40 CFR 31.36 (f) requires the recipient to perform cost or price analysis for every procurement action, including subagreement modifications. This form is not required by TWDB, but may be used at the recipient's option. If the recipient currently uses a cost and price analysis format which accomplishes the same objectives as this form, the recipient may use its own format.

INSTRUCTIONS

If this form is used, CAREFULLY READ AND FOLLOW ALL INSTRUCTIONS. Many items are not self-explanatory. Attach additional sheets if necessary.

Use only the applicable portions of this form:

Part I is applicable to all subagreements.
Part II is applicable to all subagreements requiring a cost analysis pursuant to procurement regulations.
Part III is applicable to all subagreements where review is based on price comparison (i.e., price analysis).
Part IV certifications will be executed as required by the instructions for each block.

PART I - GENERAL

Item 1 - Enter the name of the recipient as shown on the assistance agreement.

Item 2 - Enter the assistance identification number shown on the assistance agreement (or assigned to the project, if no assistance agreement has yet been executed).

Item 3 - Enter the name of the contractor or subcontractor with whom the subagreement is proposed to be executed.

Item 4 - Enter the date of the contractor's or subcontractor's proposal to the recipient.

Item 5 - Enter the full mailing address of the contractor or subcontractor.

Item 6 - Give a brief description of the work to be performed under the proposed subagreement.

PART II - COST SUMMARY

CWTAP-101 (Form 5700-41)

This portion of the form is to be completed by the contractor (or his/her subcontractor) with whom a subagreement is a formally advertised competitively bid, fixed-price subagreement.

Nothing in the following discussions should be interpreted as recommending the inclusion as direct costs any items normally treated as overhead costs in the firm=s accounting or estimating system. 48 CFR Part 31 identifies general cost principles applicable to subagreements with profit-making commercial organizations. OMB Circulars A-122 and A-87 are cost principles for nonprofit organizations and state/local governments, respectively. Architect-engineer and construction contracts are also subject to 48 CFR Part 3 1.105.

Item 7 - Direct Labor

Direct labor-costs normally include salaries at a regular time rate. Overtime premiums should be identified separately on an attachment. Incurrence of unanticipated overtime costs requires the approval of the recipient at the time of incurrence. If significant overtime is known to be needed at the time of completion of the cost review form, the reasons therefor, labor categories, rates and hours should be identified on an attachment. Also included is the cost of partner=s or principal=s time when they are directly engaged in services to be rendered under the subagreement. In case the full time of any employee is not to be devoted to work to be performed under the subagreement, only the cost of actual time to be applied should be included. The compensation of a partner or principal shall be included as direct cost only for the time that she/he is expected to be engaged directly in the performance of work under the subagreement and only if it is the firm=s normal practice to charge such time directly to all jobs. The rate of compensation of a partner or principal shall be commensurate with the cost of employing another qualified person to do such work, but the salary portion shall not exceed the actual salary rate of the individual concerned. Distribution of profits shall not be included in the rate of compensation.

Enter in block 7 the categories of professional or technical personnel necessary to perform each major element of work under the subagreement scope of services. Estimate hours worked for each category and extend them by the wage rates to be paid during the actual performance of the work. Current rates, adjusted for projected increases, if any, should be used for the actual categories of labor contemplated. AR projected increases should be supported by recent experience or established personnel policy.

Enter in the far right column the total estimated direct labor cost.

Supporting records to be maintained by the contractor and which must be submitted or made available to the recipient or TWDB upon request include:

a. The method of estimating proposed hours worked.

b. The computation technique used in arriving at proposed labor rates.

c. The specific documents, books, or other records used as factual source material to develop proposed hours worked and labor rates.

d. Detailed rate computations which were used in computing the information submitted on the form.

If in block 14a, the contractor has checked "No," a brief narrative description of the methods used in arriving at items a through d above shall be included on an attached sheet.

Item 8 - Indirect costs

Indirect costs may consist of one or more pools of expenses which are grouped on the basis of the benefits accruing to the cost objectives represented by the distribution base or bases to which they are allocated. Since accounting practices vary, the use of particular groupings is not required. Neither is the use of any particular allocation base mandatory. However, it is mandatory that the method used results in an equitable allocation of indirect costs to cost objectives which they support.

Normally, the firm's accounting system and estimating practices will determine the method used to allocate overhead costs. The firm's established practices, if in accord with generally accepted accounting principles and PROVIDED THEY PRODUCE EQUITABLE RESULTS IN THE CIRCUMSTANCES, will generally be accepted.

CWTAP -101 (Form 5700-41)

Proposed overhead rates should represent the firm*'s best estimate of the rates to be experienced during the subagreement period. They should be based upon recent experience and be adjusted for known factors which will influence experienced trends.*

Common overhead groupings are overhead on direct labor and general and administrative expenses. The first grouping usually includes employment taxes, fringe benefits, holidays, vacation, idle time, bonuses, etc., applicable to direct labor. The second generally includes the remaining costs which because of their incurrence for common or joint objectives are not readily subject to treatment as direct costs. It is expected, however, that proposal groupings will correspond with the firm's normal method for accumulating indirect costs. (Under some accounting systems, the first grouping would be included instead under item 7). No special categorization is required provided the results are realistic and equitable.

Direct salaries are the normal distribution base for overhead costs, but in some circumstances other bases produce more equitable results. As in the case of overhead costs groupings, the method to be used will depend upon the firm's normal practices and the equity of the results produced in the circumstances.

In the case of multibranch firms, joint ventures, or affiliates, it is expected that overhead costs applicable to the specific location(s) where work is to be based on cost data from the most recent fiscal periods updated to reflect changes in volume of business or operations.

Enter in block 8 the indirect cost pools normally used by the firm for allocation of indirect costs. Enter the indirect cost rate for each pool and extend each one by the rate base to which it applies to arrive at the estimated indirect costs to be incurred during the actual performance of the work. If the direct labor total from block 7 is not used as the rate base for any of the indirect cost pools, the rate base used must be explained on an attached sheet.

Describe the firm=s policies and practices for accumulating indirect costs. The indirect cost rate changes and the method used to compute the proposed rate or rates shall accompany the form. Include comment on the firm's policies regarding the pricing and costing of principal=s time. The normal accounting treatment of principal=s salaries, the annual amounts, and the hourly charge rate, if used, should be discussed.

Enter in the far right column the total estimated indirect costs.

Supporting records to be maintained by the contractor and which must be submitted or made available to the recipient or TWDB upon request include:

a. Detailed cost data showing overhead accounts, allocation bases, and rate computations for the preceding fiscal period. If more than six months of the current fiscal period have elapsed, cost data for this period (first six months) should be included.

b. Company budgets, budgetary cost data, and overhead rate computations for future period(s).

Item 9 - Other Direct Costs

The following items are illustrative of costs normally included in this category of costs:

a. Travel costs, including transportation, lodging, subsistence, and incidental expenses incurred by personnel or consultants while in a travel status in connection with the performance of services required by the contract. The cost principles generally require the use of less than first class air accommodations and also limit the cost of private aircraft.

b. Equipment, Materials, and Supplies

(1) Long distance telephone, telegraph and cable expenses to be incurred in connection with the performance of services required in connection with the contract.

(2) Reproduction costs including blueprints, black and white prints, ozalid prints, photographs, photostats, negatives, and express charges.

(3) Commercial printing, binding, artwork, and models.

(4) Special equipment.

c. Subcontracts.

d. Other. Direct costs, if any, not included above.

Enter in blocks 9a-d all other direct costs proposed. Travel costs entered must be supported by an attachment which identifies the number of staff trips proposed and the estimated cost per staff trip for both local and long distance transportation. The number of days and the rate per day

CWTAP-101 (Form 5700-41)

must be provided to support the per diem shown. Each subcontract and consultant agreement must be identified separately in block 9c.

Enter in the far right column on line 9e the total of all other direct costs (9a-d).

Supporting data to be maintained by the contractor and which must be submitted or made available to the recipient or TWDB upon request include:

a. Basis for other direct costs proposed.

b. Factual sources of costs, rates, etc., used in computing proposed amount of each cost element.

Item 10 - Total Estimated Cost

Enter the total of all direct labor, indirect costs, and other direct costs from items 7, 8, and 9.

Item 11 - Profit

A fair and reasonable provision for profit cannot be made by simply applying a certain predetermined percentage to the total estimated cost. Rather, profit will be estimated as a dollar amount, after considering:

a. degree of risk,

b. Nature of the work to be performed,

c. Extent of firm's investment,

d. Subcontracting of work, and

e. Other criteria.

The Federal Acquisition Regulation cost principles applicable to subagreements with profit-making organizations (48 CFR Part 31.2 and 31.105) disallow certain types of costs which are sometimes incurred by firms in the normal conduct of their business. Examples of costs which are not allowed under these cost principles include, but are not limited to, entertainment, *interest on borrowed capital, and bad debts. Because the Government considers "profit" to be the excess of price over allowable costs, such computation can indicate a higher profit estimate than the firm's experienced profit as it customarily computes it. The contractor may separately disclose to the recipient its customary computations.*

Enter the dollar amount of profit in block 11.

Item 12 - Total Price

Enter the total of items 10 and 11.

PART III - PRICE SUMMARY

This portion of the form is for use by a recipient when price comparison (i.e., price analysis) is used in subagreement review. It may also be used by a contractor when price comparison **is** used as a basis for award of a subcontract.

Item 13 - Competitor=s Catalog Listings, In-House Esti-mates, Price Quotes

Enter sources of all competitive bids or quotes received, or catalogs used and their prices, or in-house estimates made, if appropriate, for comparison. Attach additional sheets if necessary, particularly for purchases of several different items.

Enter in the far right column the proposed price for the subagreement.

PART IV - CERTIFICATIONS

Item 14 - Contractor - FOR USE BY CONTRACTOR OR SUBCONTRACTOR ONLY.

a. Complete this block only if part II has been completed.

b. Complete this block only if part II has been completed.

Enter the specific cost principles with which the cost summary of Part II conforms. Cost principles applicable to sub-agreements with various types of organizations are identified in 48 CFR Part 31. Cost principles applicable to subagreements with profitmaking organizations are those at 48 CFR Part 31.2, and, for architect-engineer or construction contracts, 48 CFR Part 31.105. OMB Circulars A-122 and A-87 are cost principles for nonprofit organizations and state/local governments, respectively.

c. (1) **Describe** the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP No._____).

(2) Enter the date when the price negotiations were concluded and the contract price was agreed to. The responsibility of the subagreement is not limited by the personal knowledge of the contractor=s negotiator if the time of agreement**,** showing that the negotiated price is not based on complete, current and accurate data.

(3) **Enter** the date of signature. This date should be as close as practicable to the date when the price negotiations were concluded and the subagreement price was agreed to (not to exceed 30 days).

Item 15 - Recipient Reviewer - FOR USE BY RECIPIENT ONLY.

If required by applicable assistance regulations, the recipient must submit the signed form for TWDB review prior to execution of the subagreement.

REQUIREMENTS FOR COST SUMMARY CWTAP-101 (FORM 5700-41)

A. Subagreement (contract) costs must be presented on CWTAP-101 (Form 5700-41) if over $25,000. (Example A)

B. Cost information should include the following:

1. Direct Labor

   a. Labor categories and number of employees per category if two or more employees.

   b. Estimated work-hours for each labor category.

   c. Hourly rate for each labor category.

      1. Rates can be actual or average but must be consistent with normal policy.

      2. Rate is the midpoint rate. This rate is projected to the midpoint of the project and can include a cost of living escalation factor.

   d. Extend work-hours by rates to arrive at the estimated direct labor costs.

   e. No overtime should be included. Time should be based on an 8-hour day in determining work-hours and length of time to complete contract.

   f. Supporting records for labor classifications, work-hours and rates are to be maintained by contractor or subcontractor. **A narrative statement describing the methods and data used for determining labor rates and estimating work-hours should be included if no federal audit has been performed within the past twelve months.**

2. Indirect Costs (Examples C through E)

   a. Two commonly used overhead (indirect cost) pools are fringe benefits and general and administrative expenses.

   b. Direct salaries are the normal distribution base for overhead costs.

   c. Extend the indirect cost rate for each pool by the rate base to which it applies to arrive at the estimated indirect costs.

   d. If an indirect cost rate has been approved, a copy of the approval should be submitted with the cost proposal. The computation used in developing the rate(s) must be submitted if no indirect cost rate has been approved by an agency of the federal government.

3. Other costs (not included as indirect cost but charged to specific projects)

   a. Travel Costs

      1. Includes transportation, lodging, subsistence, and incidental expenses incurred while in contract-related travel status.

      2. Costs must be supported by number of miles, mileage rate, number of days, and per diem rates.

b. Equipment, Materials, and Supplies

1. Includes long-distance telephone, reproduction, printing, and equipment costs.

2. Extend quantity by cost of each specific category to arrive at estimated costs.

3. Supporting documentation should be submitted for these costs if the costs are significant.

c. Other

1. Includes any other costs not listed in one of the other cost categories.

2. Supporting documentation should be submitted for these costs if the costs are significant.

4. Subcontracts

a. Subcontracted services should be listed by task or work to be performed and by name of subcontractor if known.

b. For each subcontract over $25,000, a separate CWTAP-101(Form 5700-41) must be completed in the same manner and detail as the one for the prime contractor.

5. Profit (Profit-Making Commercial Organizations ONLY)

a. Profit must be fair and reasonable based on the firm's assumption of risk and input to total performance.

b. Profit should not be based on a predetermined percentage.

C. Cost or Price Summary form has to be certified by both the prime contractor and grantee on prime contracts and by both the prime contractor and subcontractor on subcontracts. (Example F)

EXAMPLE - A
Cost or Price Summary (Subagreement Costs)

Cost or Price Summary

CWTAP-101
09/15/95
Form No. 5700-41

(See accompanying instructions before completing this form)

Part I - General

1. RECIPIENT City of Colonia, Texas	2. ID No.
3. NAME OF CONTRACTOR OR SUBCONTRACTOR ANM Engineering Co., Inc.	4. DATE OF PROPOSAL February 29,1991
5. ADDRESS OF CONTRACTOR OR SUBCONTRACTOR *(Include Zip Code)* P. O. Box 33311 Laredo, Texas 72121	6. TYPE OF SERVICE TO BE FURNISHED Planning, Design and Construction for Water and Sewer Systems - Engineering Service
TELEPHONE NUMBER *(Include Area Code)* (333)456-7890	

Part II - Cost Summary

7. DIRECT LABOR *(Specify Labor Categories)*	ESTIMATED HOURS	HOURLY RATE	ESTIMATED COST	**TOTALS**
Principal	120	$ 28.00	$ 3,360	
Project Engineer	1,100	20.00	22,000	
Draftsman	500	13.00	6,500	
Secretary	610	10.00	6,100	
Engineering Technician	305	10.00	3,050	
DIRECT LABOR TOTAL:				$ 41,010.00
8. INDIRECT COSTS *(Specify Indirect Cost Pools)*	RATE	X BASE =	ESTIMATED COST	
Overhead and Fringe Benefits	.70	$ 41,010	$ 28,707	
INDIRECT COSTS TOTAL:				$ 28,707.00
9. OTHER DIRECT COSTS				
A. TRAVEL			ESTIMATED COST	
(1) TRANSPORTATION 1,600 Miles @ .28/Mile			$ 448.00	
(2) PER DIEM			$ 400.00	
TRAVEL SUBTOTAL:			$ 848.00	
B. EQUIPMENT, MATERIALS, SUPPLIES *(Specify* Categories)	QTY	COST	ESTIMATED COST	
Xerox	800	$ .05	$ 40.00	
Lab tests	40	50.00	2,000.00	
Phone (Long Distance)	24 mos.	25.00	600.00	
EQUIPMENT SUBTOTAL:			$ 2,640.00	
C. SUBCONTRACTS			ESTIMATED COST	
Curve Surveyors, Inc(MBE) (Staking)			$ 5,500.00	
Manual Makers, Inc. (WBE) (Operations Manual)			8,500.00	
SUBCONTRACTS SUBTOTAL:			$ 14,000.00	
D. OTHER *(Specify Categories)*			ESTIMATED COSTS	
			$	
OTHER SUBTOTAL:			$	
E. OTHER DIRECT COSTS TOTAL:				$ 17,488.00
10. TOTAL ESTIMATED COST				$ 87,205
11. PROFIT				$ 10,203.00
12. TOTAL PRICE				$ 97,408.00

EXAMPLE - B
Average Labor Rate Computation by Job Classification

Labor Classification	Actual Rates
Project Engineer	$21.10
Project Engineer	18.75
Project Engineer	18.44
Project Engineer	17.15
	$75.44

Average Rate $75.44 / 4 = $18.86

Cost of living increase of 4% per year, .33% per month.

Contract period is for 3 years.

Midpoint =18 months

I	I	I
$18.86	$20.00 (18.86 x 106.03%)	$21.21

EXAMPLE - C
Indirect Cost Rate Computation (Rate includes both G&A and Fringe Benefits)

Allowable Direct Labor Costs (excluding release time)*$143,000

Category	**Non-Allowable Indirect Cost**	Allowable Indirect Cost
Indirect Salaries		46,200
Vacation Leave		10,200
Sick Leave		4,900
Military Leave		800
Holiday Leave		1,200
Group Insurance		1,500
FICA Tax		10,000
TEC Unemployment Tax		1,200
Profit Sharing		9,900
Supplies		2,600
Telephone		1,200
Rent		4,800
Utilities		1,500
Indirect Trave		l1,000
Depreciation		3,000
Business Promotion	2,000	
Contributions	1,400	
Entertainment	6,000	
Interest Expense	7,000	
	$16,000	$100,000

Computation: Allowable Indirect Cost - Allowable Direct Labor Costs

$100,000/$143,000 = Indirect Cost Rate of 70% of Direct Labor

*Release time includes vacation, sick, military, and holiday leave.

EXAMPLE - D
General & Administrative Overhead Computation

Allowable Direct Labor Costs (excluding release time)* $143,000

Category	**Non-Allowable Indirect Cost**		Allowable Indirect Cost
Indirect Salaries			46,200
Indirect Fringe Benefits		1)	9,700
Supplies			2,600
Telephone			1,200
Rent			4,800
Utilities			1,500
Indirect Trave			l1,000
Depreciation			3,000
Business Promotion	**2,000**		
Contributions	**1,400**		
Entertainment	**6,000**		
Interest Expense	**7,000**		
	$16,400		$70,000

Computation:Allowable Indirect Cost + Allowable Direct Labor Costs

$70,000/ $143,000 = **G & A Rate of 49%** of Direct Labor

1) Fringe Benefit rate of 21% x indirect salaries.

*Release time includes vacation, sick, military, and holiday leave.

EXAMPLE - E
Fringe Benefit Rate Computation

Allowable Total Labor Costs (Excluding release time) = *$189,000

Category	Allowable Fringe Benefit Cost
Vacation Leave	$10,200
Sick Leave	4,900
Military Leave	800
Holiday Leave	1,200
Group Insurance	1,500
FICA Tax	10,000
TEC Unemployment Tax	1,200
Profit Sharing	9,900
	Total = $39,700

Computation: Allowable Fringe Benefit Costs + Allowable Total Labor Costs

$39,000/$189,000 =Fringe Benefit Rate of 21%

*Release time includes vacation, sick, military, and holiday leave.

EXAMPLE - F
Cost or Price Summary (Certifications)

Part III - Price Summary

13. COMPETITOR S CATALOG LISTINGS. INHOUSE ESTIMATES. PRICE OUOTES *(Indicate basis of price comparison)*	MARKET PRICE(S)	PROPOSED PRICE
	$	
		$

Part IV - Certifications

14. CONTRACTOR

14a. HAS A FEDERAL OR LOCAL AGENCY PERFORMED ANY REVIEW OF YOUR ACCOUNTS OR RECORDS IN CONNECTION WITH ANY OTHER FEDERAL ASSISTANCE AGREEMENT OR CONTRACT?

☐ YES : NO *(If YES , give date of review, name, address and telephone number of reviewing office.)*

SEE ATTACHED DETAILS ON INDIRECT COST AND LABOR RATE CALCULATIONS

14b. THIS SUMMARY CONFORMS WITH THE FOLLOWING COST PRINCIPLES:

48 CFR Part 31

14c. THIS PROPOSAL IS SUBMITTED FOR USE IN CONNECTION WITH AND IN RESPONSE TO:
(1) City of Colonia Request for Engineering Services

This is to certify to the best of my knowledge and belief that the cost and pricing data summarized herein are complete, current, and accurate as of:	(2) Date 2/29/94

I further certify that a financial management capability exists to fully and accurately account for the financial transactions under this project.
I further certify that I understand that the subagreement price may be subject to downward renegotiation and/or recoupment where the above cost and pricing data have been determined, as a result of audit, not to have been complete, current, and accurate as of the date above.

(3) Title of Proposer	Signature of Proposer	Date of Execution
PARTNER	/ S / J. Wayne	2/29/94

15. RECIPIENT REVIEWER

I certify that I have reviewed the cost/price summary set forth herein and the proposed costs/price appear acceptable for the subagreement award.

Title of Reviewer	Signature of Reviewer	Date of Execution
DIRECTOR OF PUBLIC WORKS	/ S / Aaron Water	4/1/94

Sample Grant Agreement Contract

*** ***

TEXAS WATER DEVELOPMENT BOARD

and

CITY OF _____ , TEXAS

_____ WATER AND WASTEWATER PROJECT
_____ COUNTY, TEXAS

TWDB CONTRACT NO. GNNNNN
(TWDB BOARD COMMITMENT NO. NN-NNN)

*** ***

CITY OF _____, TEXAS
_____ WATER AND WASTEWATER PROJECT
_____ COUNTY, TEXAS
(TWDB BOARD COMMITMENT NO. NN_NNN)

TABLE OF CONTENTS

EXHIBITS

TWDB CONTRACT NO. GNNNNN/GNNNNN

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

TEXAS WATER DEVELOPMENT BOARD
and
CITY OF _____, TEXAS

Under the authority granted by the provisions of Chapters 6 and 17, TEXAS WATER CODE, and 31 Texas Administrative Code, Chapter 363, and subject to the provisions thereof and any amendments made thereto or which may from time to time hereafter be made, as well as the provisions of Colonia Wastewater Treatment Assistance Program, United States Public Law 102-389, October 6, 1992, as amended, and other applicable federal law, this contract and agreement to provide financial assistance to City of _____, _____ County, Texas, for the design and construction of water distribution system improvements and wastewater collection and treatment facilities to serve the City of _____, Texas, and certain adjacent economically distressed areas of unincorporated _____ County (hereinafter "this Agreement"), is entered into by and between the Texas Water Development Board, an agency of the State of Texas, and City of _____, a political subdivision of the State of Texas organized under the laws of the State of Texas and operating under the provisions of the said laws and its charter. Pursuant to the authority granted by and in compliance with the provisions of §6.190, *et seq.*, TEX. WATER CODE ANN. (Vernon 2000), and the rules and resolutions of the Texas Water Development Board, the Executive Administrator of the Texas Water Development Board has been authorized to enter this Agreement by and on behalf of the Texas Water Development Board.

ARTICLE I. DEFINITIONS1I. DEFINITIONS

For the purposes of this Agreement, the following terms or phrases shall have the meaning ascribed therewith:

1.01. "BOARD" shall mean the Texas Water Development Board, an agency of the State of Texas, created pursuant to Texas Constitution, Article III, Section 49-c and defined by §6.001, TEX. WATER CODE ANN. (Vernon 2000).

1.02. "CITY" shall mean the City of _____, _____ County, Texas, a political subdivision of the State of Texas, duly organized and existing under the laws of the State of Texas, and providing utility services to residents of the CITY and economically distressed areas and other rural areas in unincorporated _____ County, Texas, acting by and through its authorized and designated officials and representatives of its Water Works System.

1.03. "Contract documents" shall mean the contract documents prepared by the CITY for either the Water Project or the Wastewater Project component of the Project described herein, which documents shall be as detailed as would be required for submission to contractors bidding on the work and shall contain the information and documentation and otherwise fully comply with the requirements set forth in 31 Texas Administrative Code Section 363.41 and federal regulations 40 Code of Federal Regulations (CFR) Part 31.

1.04. "CWTAP" shall mean the Colonia Wastewater Treatment Assistance Program, a program designed to utilize federal grant funds and state matching funds to provide financial assistance for planning, design, and construction of adequate water and wastewater treatment systems to serve unincorporated economically distressed areas or other areas as approved by the U.S. Environmental Protection Agency (EPA), authorized by United States Public Law 102-389, October 6, 1992, as thereafter amended, and implemented by the grant and operating agreements, as amended, by and between EPA and the BOARD.

1.05. "Economically distressed area" shall mean an area that meets the requirements of an economically distressed area as that term is defined pursuant to §17.921, TEX. WATER CODE ANN. (Vernon 2000).

1.06. "Eligible expense" shall mean an expense of the Project for which BOARD provided funds may be lawfully used by the CITY for such Project pursuant to Texas statutes (with particular reference to Chapter 17 of

the Texas Water Code), Texas Administrative Code (TAC) (with particular reference to the BOARD rules in Title 31, TAC), or pursuant to CWTAP and applicable federal regulations, and this Agreement.

1.07. "EPA" shall mean the Environmental Protection Agency, an agency of the government of the United States of America, acting by and through its authorized and designated representatives.

1.08. "Executive Administrator" or "EA" shall mean the Executive Administrator of the BOARD or his designated representative.

1.09. "PARTIES" shall mean the collective signatory parties to this Agreement which are the BOARD and the CITY.

1.10. "Utility System Improvements Project" or "Project" shall mean collectively the Water Project and Wastewater Project, independent projects intended to design and construct the respective utility system improvements described in the CITY's application for financial assistance, submitted to and accepted by the BOARD, to provide improvements to the water and wastewater services of residents of the CITY and certain unincorporated areas of _____ County, Texas, as generally depicted or described on Exhibits A-1, A-2, A-3 and A-4, attached hereto and incorporated herein by this reference. A reference herein to the "Regional Project" shall mean the Project for which the BOARD approved funding by adoption of Resolution No. NN-NNN considered in conjunction with the Project for which the BOARD approved funding by adoption of Resolution No. NN-NN. The elements of the Regional Project and the source of funding for each are set forth in Exhibit A-5 which is attached hereto and incorporated herein by this reference.

1.11. "Utility System Improvement Loan" shall mean collectively:

A. The $_____loan to the CITY which the BOARD by its Resolution No. NN-NNN committed to fund from the Texas Water Development Funds (WDF) through purchase of: (i) City of _____, Texas, Waterworks and Sewer System Revenue Bonds, Proposed Series 200_C, in the amount of $_____for the Wastewater Project and (ii) City of _____, Texas, Waterworks and Sewer System Revenue Bonds, Proposed Series 200_, in the amount of $_____for the combined Water and Wastewater Project.

B. The $33,520,000 loan to the CITY which the BOARD by its Resolution No. NN-NN committed to fund from the Drinking Water State Revolving Fund (DWSRF) through the purchase of: (i) City of _____ Waterworks and Sewer System Revenue Bonds, Proposed Series 200_A, in the amount of $_____; (ii) City of _____ Waterworks and Sewer System Revenue Bonds, Proposed Series 200_B, in the amount of $_____; and (iii) DWSRF Disadvantaged Communities loan forgiveness in the amount of $_____.

1.12. "Wastewater Project" shall mean the project to design and construct wastewater system improvements to serve residents of the CITY and certain economically distressed areas of unincorporated _____ County, Texas, described generally as a new 2 MGD wastewater treatment plant (WWTP) to be located in the _____area, together with necessary collection and transport components, to provide first time central sewer service to residents of the _____Water Supply Corporation area and to _____ and more specifically described in Attachment A-4 and A-5, attached hereto and incorporated herein by this reference.

1.13. "Water Project" shall mean the project to design and construct a new NN MGD regional water treatment plant and water system improvements and associated valves, fittings, and appurtenances to serve residents of the CITY and economically distressed areas and other rural areas of unincorporated _____ County, Texas.

1.14. The "economically distressed areas" to be served by this Project shall mean the areas that are generally depicted on Exhibit A-2 and more specifically depicted and described on Exhibits A-3 and A-4. Exhibits A-1, A-2, A-3 and A-4 are incorporated as if fully set forth herein for the purpose of identifying the areas to be served by this Project.

ARTICLE II. RECITALSII. RECITALS

The PARTIES agree that the following representations are true and correct and form the basis of this Agreement:

2.01. The CITY filed an application with the BOARD requesting that the BOARD provide financial assistance to the CITY for the construction of the Utility System Improvements Project.

2.02. At its _____, 200_, meeting, the BOARD, by adoption of Resolution No. NN-NNN, approved the application for financial assistance of the CITY and made a commitment to provide additional financial assistance to the CITY in the amount of $_____, the BOARD assistance consisting of the funding of the Utility System Improvement Loan, in the amount of $_____, and additional funding in the amount of $_____for which repayment is not required, for the purpose of completing the CITY's regional Utility System Improvements Project. This assistance is in addition to financial assistance approved on _____, 200_ in the amount of $_____to be provided from the Drinking Water State Revolving Fund, as provided by the adoption of Resolution No. NN-NNN by the BOARD.

2.03. The financial assistance provided by the BOARD for the Project in Resolution No. NN-NNN, and as amended by Resolution No. NN-NN, for which repayment is not required is jointly provided by the BOARD and EPA from CWTAP, administered by the BOARD through the Economically Distressed Areas Program, Subchapter K, Chapter 17, Texas Water Code. CWTAP is a matching program between the federal and state government such that the contribution of EPA is deemed to be 80% of the eligible expenses of $_____for the Project, or $_____, and the remaining 20% of the financial assistance for the eligible expenses of the Project, or $_____, constitutes the State's share under CWTAP; provided, however, pursuant to the terms of the agreement between the EPA and the BOARD, since the actual source of the funds disbursed to the CITY is to be determined by the EA on a project-by-project basis, the funds disbursed may be from either source as determined by the EA.

2.04. The terms and conditions for the loan to the CITY are set forth in the respective bond ordinances and accompanying documentation, BOARD Resolutions No**.** NN-NN, NN-NNN, and MM-MMM, the Texas Water Code, and the rules of the BOARD.

2.05. The terms and conditions for the portion of the financial assistance for which repayment is not required are set forth in BOARD Resolutions No**.** NN-NN and NN-NNN, the Texas Water Code, the rules of the BOARD, the related Disadvantaged Communities Program loan subsidy agreement and this Agreement.

ARTICLE III. BOARD OBLIGATIONSIII. BOARD OBLIGATIONS

In consideration of the performance of the mutual agreements set forth in this Agreement, the BOARD agrees as follows:

3.01. PRE-RELEASE CONDITIONS.A. PRE-RELEASE CONDITIONS. Pursuant to the commitment for financial assistance made by the BOARD in Resolution NN-NNN, prior to the BOARD incurring any obligation to release funds to the CITY, the CITY shall have fulfilled the conditions and requirements of Section 4.02 of this Agreement; however, it is mutually agreed that the list of conditions for the release of funds in this Section 4.02 is not exhaustive.

3.02. PRE-CONSTRUCTION EXPENDITURESB. PRE-CONSTRUCTION EXPENDITURES. Pre-construction expenditures for the Project shall be reimbursed as follows:

A. Wastewater Project. The EA shall reimburse the CITY, in accordance with the terms of this Agreement, for the eligible expenses actually incurred for the Wastewater Project activities identified as "Pre-Construction Activities" in the column identified as "Activity Categories" on Exhibit B an amount not to exceed the budgeted amount associated with each such activity in the column identified as "Activity Budget-Wastewater Project" on Exhibit B. Exhibit B is attached hereto and incorporated herein for all purposes. The EA shall not release any funds for the pre-construction activities of the Wastewater Project until the following conditions have been met:

1. The CITY shall have provided the EA with documentation establishing that the procurement procedure used in selecting the design engineer and in preparing a draft design engineer agreement for the Wastewater Project complies with statutory requirements applicable to the CITY and that such procurement procedure is consistent with the procedure set out in §2254.001, *et seq.*, TEX. GOV. CODE ANN. (Vernon 2000) and 40 CFR Part 31, as appropriate;

2. The CITY shall receive the written approval of the EA prior to executing the contract with the design engineer;

3. The CITY shall receive prior written approval of the EA for all changes in scope or budget for the design engineer contract for which funds are being requested. This requirement shall apply to all amendments and requests for "Additional Services" to be provided by the design engineer.

B. Water Project. The EA shall reimburse the CITY, in accordance with the terms of this Agreement, for the eligible expenses actually incurred for the Water Project activities identified as "Pre-Construction Activities" in the column identified as "Activity Categories" on Exhibit B an amount not to exceed the budgeted amount associated with each such activity in the column identified as "Activity Budget-Water Project" on Exhibit B. Exhibit B is attached hereto and incorporated herein for all purposes. The EA shall not release any funds for the pre-construction activities of the Water Project until the following conditions have been met:

1. The CITY shall have provided the EA with documentation establishing that the procurement procedure used in selecting the design engineer and in preparing a draft design engineer agreement for the Water Project complies with statutory requirements applicable to the CITY and that such procurement procedure is consistent with the procedure set out in §2254.001, *et seq.*, TEX. GOV. CODE ANN. (Vernon 2000);

2. The CITY shall receive the written approval of the EA prior to executing the contract with the design engineer;

3. The CITY shall receive prior written approval of the EA for all changes in scope or budget for the design engineer contract for which funds are being requested. This requirement shall apply to all amendments and requests for "Additional Services" to be provided by the design engineer.

C. The CITY shall provide evidence satisfactory to the EA that the CITY is closing on Project loans funded from DWSRF or WDF in a manner and on a schedule that will assure that the non-EDAP components of the Project are designed concurrently with the EDAP components in accordance with the schedule approved by the PARTIES.

3.03. CONSTRUCTION EXPENDITURESC. CONSTRUCTION EXPENDITURES. Construction expenditures for the Project shall be reimbursed as follows:

A. Wastewater Project. The EA shall reimburse the CITY, in accordance with the terms of this Agreement, for the eligible expenses actually incurred for the Wastewater Project activities identified as "Construction Activities" in the column identified as "Activity Categories" on Exhibit B an amount not to exceed the budgeted amount associated with each such activity in the column identified as "Activity Budget-Wastewater Project" on Exhibit B. The EA shall not release any funds for the construction of the Wastewater Project until the CITY shall have submitted and obtained approval from the EA of the plans and specifications and contract documents, which have been executed contingent on the release of BOARD funds, for the Wastewater Project.

B. Water Project. The EA shall reimburse the CITY, in accordance with the terms of this Agreement, for the eligible expenses actually incurred for the Water Project activities identified as "Construction Activities" in the column identified as "Activity Categories" on Exhibit B an amount not to exceed the budgeted amount associated with each such activity in the column identified as "Activity Budget-Water Project" on Exhibit B. The EA shall not release any funds for the construction of the Water Project until the CITY shall have submitted and obtained approval from the EA of the plans and specifications and contract documents, which have been executed contingent on the release of BOARD funds, for the Water Project.

C. The CITY shall comply with the same conditions required for the release of pre-construction activity funds set forth above in this Article III as such conditions are applied to construction engineering expenditures, in particular, the submission of evidence satisfactory to the EA that the CITY is closing on Project loans funded from DWSRF or WDF in a manner and on a schedule that will assure that the non-EDAP components of the Project are constructed concurrently with the EDAP components in accordance with the schedule approved by the PARTIES.

3.04. CONTINGENCY.D. CONTINGENCY. The amount associated with the activity identified on Exhibit B as "Contingency" may be allocated by the EA for use by the CITY for eligible expenses actually incurred within the categories identified on Exhibit B as "Pre-Construction Activities" or "Construction Activities" in the event that the CITY

can establish to the satisfaction of the EA that the actual costs incurred by the CITY for such Pre-Construction or Construction Activities exceeds the amount budgeted for such activity and that such costs are eligible expenses.

3.05. CONDITION OF PAYMENTE. CONDITION OF PAYMENT. Before the EA is obligated to remit funds to the CITY for any eligible expense incurred by the CITY pursuant to the terms of this Agreement:

A. The CITY shall submit to the EA, for each succeeding thirty day period (hereinafter a "month") until the completion of the Project, a monthly progress report on project activities and a written request for advance of grant funds, on the forms provided by the EA, which shall identify for such month the estimated cash expenditure of the CITY for anticipated eligible expenses for the Water Project, identifying the Water Project expense category with reimbursable expense or anticipated expense activity for such month, and for the Wastewater Project, identifying the Wastewater Project expense category with reimbursable expense or anticipated expense activity for such month. Each such form shall be filled in by the CITY to adequately identify the particular Water Project or Wastewater Project expense category, each activity within such category, and the anticipated expenditure for such month for such activity.

B. After the submission of the first monthly advance request, the CITY shall, within thirty days of the submission of a request for advance for which the CITY received funds from the EA and concurrently with the succeeding month's request for advance, submit all invoices or other documentation of eligible expenses actually paid by the CITY with funds delivered by the BOARD to the CITY for the preceding month. This documentation shall include a listing of actual expenses incurred and evidence of the CITY's payment to any subcontractor for such work during the month (satisfactory in form and substance to the EA), which may be a copy of the CITY's check to a contractor or any subcontractor(s).

C. Upon the submission of a request for advance of grant funds adequately identifying the estimated expenditures for the succeeding month together with the invoices and other documentation as required, the EA shall promptly review such request. Upon the determination by the EA that the budget and the request are in accord with the laws of this state, the rules of the BOARD, and the purposes and intent of this Agreement, the EA shall pay the amount requested by the CITY for that month to the extent the request has been determined by the EA to be consistent with the laws of this state, the rules of the BOARD, and the purposes and intent of this Agreement. Concurrently with the payment, the BOARD shall deliver to the CITY a statement identifying the total amount of funds delivered, the amount of CWTAP funds delivered, and the amount of non-CWTAP funds delivered. All unexpended monthly advance payments to the CITY shall be maintained by the CITY in a separate bank account which shall be secured and collateralized in a manner consistent with the laws of this state. In accordance with 40 CFR Section 31.21(h)(2)(I), the CITY shall promptly, but at least quarterly, remit to the BOARD any interest earned on the unexpended monthly advances provided under this Agreement.

D. In the event that the estimated monthly expenses requested of and paid by the EA to the CITY for the preceding month exceed the total actual expenditures of the CITY for the month, the difference between the monthly advance payment made by the EA to the CITY and the actual expenditures made by the CITY shall be deducted from the amount of the next request for advance of grant funds submitted by the CITY and paid by the EA.

E. In the event that the estimated monthly expenses requested of and paid by the EA to the CITY for the preceding month were less than the total actual expenditures of the CITY for the month, the difference between the monthly advance payment made by the EA to the CITY and the actual expenditures made by the CITY shall be added to the amount of the next request for advance of grant funds submitted by the CITY and paid by the EA.

F. In the event that the CITY determines or is notified by the EA that an ineligible expense has been paid with BOARD funds, the CITY shall:

1. Promptly deposit to the appropriate account in which BOARD advance funds are maintained non-BOARD funds equal to the cost of the ineligible expense that were used by the CITY; and

2. Promptly notify the EA of the expense that was incurred and provide evidence satisfactory to the EA that funds equal to the cost of the ineligible expense that were used by the CITY have been deposited to the appropriate account in which BOARD advance funds are maintained.

G. Upon determination by or receipt of notification by the EA that an ineligible expense has been paid with funds advanced to the CITY for the purpose of paying eligible expenses, the EA shall discontinue all payments under this Agreement to the CITY until such time as the EA has determined that CITY has deposited funds equal to the cost of the ineligible expense that were inappropriately used by the CITY to the appropriate account in which BOARD advance funds are maintained.

3.06. EARLY RELEASE OF GRANT FUNDS. F. EARLY RELEASE OF GRANT FUNDS. In the sole discretion of the EA, the BOARD may release all or part of the funds for which repayment is not required for the construction of the Wastewater Project or the Water Project prior to the closing of the applicable loan financing for the respective projects.

ARTICLE IV. CITY'S RESPONSIBILITIESIV. CITY'S RESPONSIBILITIES

In consideration of the performance of the mutual agreements set forth in this Agreement, the CITY agrees as follows:

4.01. COMPLIANCE WITH APPLICABLE LAWSA. COMPLIANCE WITH APPLICABLE LAWS. The CITY shall comply with all applicable provisions of federal and state law with particular reference to the Texas Water Code, the rules of the BOARD, and federal regulations 40 CFR Parts 31, 32, and 34.

4.02. PRE-RELEASE CONDITIONS.B. PRE-RELEASE CONDITIONS. Pursuant to the commitment for financial assistance made by the BOARD in Resolution No. NN-NNN, the CITY must fulfill the following conditions prior to release of EDAP funds provided by the BOARD under this Agreement:

A. The CITY shall take all actions necessary to receive and maintain a designation from the Texas Commission on Environmental Quality (formerly the Texas Natural Resource Conservation Commission) as an authorized agent for the implementation and enforcement of commission rules under and as required by Chapter 366 of the Texas Health and Safety Code.

B. The CITY shall provide evidence satisfactory to the EA that the CITY has requisite authority to provide services in the areas outside the CITY which are to be served by the Project.

C. The CITY shall provide evidence satisfactory to the EA that the CITY has adopted and effectively enforces the authority granted to the CITY pursuant to Texas Water Code Ann., Sec. 17.934(a)(2) to require and insure that all property owners capable of receiving sewer service from the Project are actually connected to the wastewater collection system within a reasonable period of time not to exceed ninety (90) days from the date of the completion of the Wastewater Project.

D. Consistent with Section 3.02 and Section 3.03, the CITY shall close on Project loans funded from DWSRF or WDF in a manner and on a schedule that will assure that the non-EDAP components of the regional Project are developed concurrently with the EDAP components in accordance with the schedule approved by the PARTIES.

E. Prior to release of funds for planning and design, the CITY shall submit evidence satisfactory in form and substance to the EA that the CITY has a reasonable expectation that it will have the necessary water rights authorizing it to appropriate and use the water that the water supply project will provide.

F. Prior to release of funds for Construction Activities, the CITY shall:

1. Perform the archeological testing activity required pursuant to Subsections 4.04.A.1–4 and 4.04.B.1-3; and

2. Have designed the _____project elements and the _____pipeline route to avoid significant cultural resources requirement have submitted or and obtained approval of any data recovery plan for cultural resources which is determined to be necessary pursuant to the provisions of Subsection 4.04.A.5 and 4.04.B.4, as applicable.

G. Prior to the release of funds budgeted for Construction Activities, the CITY shall submit documentation it has obtained (i) the necessary water right authorizing the appropriation and use of the water to be provided by the Water Project and (ii) approval of plans and specifications and any permit from the Texas Commission on Environmental

Quality (formerly the Texas Natural Resource Conservation Commission) necessary for construction and operation of any treatment works included in the Wastewater Project.

H. Prior to the release of funds budgeted for sewer connection hookups, if any, the CITY shall submit documentation acceptable to the EA that the CITY has submitted timely applications to other available funding sources and has been unable to obtain funding for the sewer connection hookups from a source other than the BOARD.

4.03. PLANS AND SPECIFICATIONS.C. PLANS AND SPECIFICATIONS.

A. Preparation. The CITY shall cause to be prepared the final design, engineering plans and specifications, and all necessary contract documents for the Project, by a qualified and competent engineer or engineers, licensed in the State of Texas, and selected in accordance with this applicable law, BOARD rules, and this Agreement. The CITY hereby agrees to be solely responsible and liable for all payments to its engineering contractors and any subcontractors thereof and shall:

1. Select the design engineer for either the Water Project or Wastewater Project, or the respective components thereof, if design and construction of either project is to proceed apart from the other, in compliance with Texas Government Code, Sec. 2254.001, *et seq.* (the Professional Services Procurement Act) (Vernon Supp. 2000) and 40 CFR Part 31;

2. Provide the EA with the following:

(a) Documentation establishing that the proper procurement procedure was used in selecting a proposed design engineer or engineers;

(b) The cost and pricing data for the Project provided by the prospective contractor and considered by the CITY, in compliance with 40 CFR Part 31; and

(c) A draft agreement to retain the services of selected design engineers or engineering firms; and

3. Obtain the approval of the procurement process and the selected contractor from the EA prior to executing a contract with a proposed design engineer or engineering firm.

B. Approval. The CITY shall obtain approval of the EA of the final design and the engineering plans and specifications for the Water Project and the Wastewater Project, either together or separately if one is to proceed apart from the other, prior to advertising for bids for contractors to perform construction of such project. As soon as the CITY obtains approval of plans and specifications from the EA and prior to advertising for bids, the CITY shall submit a minimum of four sets of the plans and specifications approved by the EA for application of the TWDB "APPROVED" stamp and for distribution to authorized parties.

4.04. ARCHEOLOGICAL TESTING. Prior to the commencement of construction, the CITY shall cause to be performed the following archeological resource management activities:

A. _____ testing. The CITY shall cause to be performed subsurface probing and testing of the construction sites involving the construction of the _____Interceptor, new _____Wastewater Treatment Plant, and the outfall pipeline from the selected Wastewater Treatment Plant site to its designated discharge points, by performing the following:

1. Obtain an antiquities permit from the Texas Historical Commission (THC);

2. Pursuant the scope of work provided by the EA after consultation with the THC, have the work performed by a qualified archeologist;

3. After completion of the fieldwork under the scope of work, provide the information from such work to the BOARD, CITY and its design engineer. The information being provided must be sufficient for the THC, in consultation with the EA, to determine whether any significant cultural resource exists within the proposed site for the project element;

4. If the initial site or sites selected by the design engineer are tested and determined by the THC in consultation with the EA to affect significant cultural resources, then the design engineer shall attempt to avoid significant cultural resources so identified. If the design engineer can avoid the significant cultural resources by relocating the project element then the CITY shall perform the testing and probing on the new proposed sites. This process of identifying potential impacts and redesigning the affected project element changes to avoid the significant cultural resources shall continue until either the project element will not impact significant cultural resources or it is determined by the CITY and the EA that the significant cultural resources cannot be avoided.

5. If the CITY and the EA determine that design of a project element cannot avoid significant cultural resources, then the CITY will prepare a draft mitigation plan. The CITY shall:

(a) obtain the services of a qualified consultant following the procedure identified in paragraph E of this section;

(b) submit a draft data recovery plan to the EA and THC;

(c) obtain an antiquities permit from THC to implement the proposed data recovery plan;

(d) amend the draft date recovery plan as required by the EA or THC and submit a final data recovery plan; and

(e) upon approval of the final data recovery plan by the EA and THC, implement the data recovery plan.

B. _____testing. The CITY shall cause to be performed pre-construction testing on those sections of the pipeline route which pass through the archeological site known as 41MXXXX, which is depicted on Exhibit A-6, and any other areas that may be required by THC based on information developed during pre-construction testing in the 41MXXXY. In order to perform the pre-construction testing for 41MXXXX, the CITY shall:

1. Obtain an antiquities permit from the Texas Historical Commission (THC);

2. Pursuant the scope of work provided by the EA after consultation with the THC, have the work performed by a qualified archeologist;

3. If the initial locations selected by the design engineer for the pipeline route are determined by the THC in consultation with the EA to affect significant cultural resources, then the design engineer shall attempt to avoid significant cultural resources so identified. If the design engineer can avoid the significant cultural resources by relocating the pipeline route then the CITY shall perform the pre-construction testing on the new proposed pipeline location. This process of identifying potential impacts and relocating the pipeline route to avoid the significant cultural resources shall continue until either the pipeline route will not impact significant cultural resources or it is determined by the CITY and the EA that the significant cultural resources cannot be avoided.

4. If the CITY and the EA determine that design of the pipeline route cannot avoid significant cultural resources, then the CITY will prepare a draft data recovery plan. The CITY shall:

(a) submit the draft data recovery plan to the EA and THC;

(b) obtain an antiquities permit from THC to implement the proposed data recovery plan;

(c) amend the draft data recovery plan as required by the EA or THC and submit a final data recovery plan; and

(d) upon approval of the final data recovery plan by the EA and THC, implement the data recovery plan.

C. Archeological Contractor. The CITY shall have the probing and testing of the El Indio/Rosita Valley Interceptor, new Rosita Valley Wastewater Treatment Plant, and the outfall pipeline construction sites and the Elm Creek pre-construction testing performed by a qualified and competent archeologist or archeologists. The CITY shall:

1. select the archeologist in compliance with the laws of the State of Texas, the procurement procedures of the CITY, and 40 CFR Part 31;

2. be solely responsible and liable for all payments to such archeologist(s) and any subcontractors thereof;

3. provide the Executive Administrator with:

(a) documentation establishing the procurement procedure used in selecting the archeologist(s);

(b) the cost and pricing data as required in compliance with 40 CFR Part 31;

(c) provide the EA with a draft of the agreement with the archeologist(s) which, at a minimum, shall:

(i) require performance of the scope of work provided by the EA;

(ii) require the acquisition of the appropriate antiquities permit from the THC and completion of the terms of the permit by the archeologist;

(iii) provide that time is of the essence of the agreement and that any time extension must be approved by the EA; and

(iv) receive the approval of the EA prior to executing the contract with the archeologists.

4.05. LOAN CLOSING.D. BOND SALE. Upon approval by the EA of the contract documents for either the Water Project or the Wastewater Project, or for the combined Project, with sufficient estimated costs of construction to use all of the proceeds from a loan or loans approved and budgeted for the Project approved by the EA, the CITY shall comply with the terms and conditions as set out in Resolutions No. NN-NN and/or NN-NNN which are necessary to authorize and complete the closing of the particular loan or loans to be funded by the BOARD and shall be prepared and willing to proceed with the authorization and closing of such loan or loans from the BOARD.

4.06. LOAN PROCEEDS.E. BOND PROCEEDS. Upon the delivery of the funds from the BOARD for the funding of a loan to the CITY, the CITY shall use all the proceeds received therefrom, as well as all investment earnings on proceeds therefrom, to commence and continue construction of the Project or components of a Project for which plans and specifications have been approved until all such loan proceeds have been expended by the CITY for the construction of the approved Project or Project component. The CITY shall demonstrate to the satisfaction of the EA that the loan proceeds allocated to the Project and any associated investment earnings are being expended or will be expended as required by Section 4.02(E) prior to submitting requests to the BOARD for monthly advances of grant funds pursuant to this Agreement for continued construction of the Project.

4.07. CONSTRUCTION.F. CONSTRUCTION. Upon closing of the CITY's loan and approval of the engineering plans and specifications and the proposed contract documents by the EA, the CITY shall cause to be constructed the Project or components of projects for which approval has been obtained, according to the terms of the approved plans and specifications, the approved contract documents, and applicable law. The CITY shall subcontract for completion of the construction projects. In order to subcontract the performance of construction projects, the CITY shall:

A. Submit three (3) copies of executed contract documents to the EA for approval upon completion of the preparation of contract documents;

B. Upon receipt of written approval of the contract documents from the EA, submit each construction project for bid, and otherwise have such construction work performed in accordance with and as provided by Chapter 252 of the Texas Local Government Code, §17.183 of the Texas Water Code, and federal regulations 40 CFR Parts 31, 32, and 34;

C. Agree to be solely responsible for all payments made to, as well as the negotiation of the terms and conditions of the contract with, the contractor selected by the CITY for the performance of the construction project;

D. Insure that all construction shall be performed in accordance with the contract documents approved by the EA unless a change in the scope of work identified in the contract documents has received prior written approval by the EA; and

E. To the extent authorized by law, require in all contracts and subcontracts the use of labor from the area to be served by the Project.

4.08. TERM.G. TERM. The CITY shall perform its obligations undertaken pursuant to the terms of this Agreement within the time periods specified in the Project Schedule attached hereto and identified as Exhibit C, said schedule being incorporated herein as if set forth in full.

4.09. ENVIRONMENTAL AND CULTURAL RESOURCE PROTECTION.H.ENVIRONMENTAL AND CULTURAL RESOURCE PROTECTION.

A. During all periods of construction, the CITY shall require its contractors or subcontractors to periodically wet or water the construction area, promptly backfill all trenches, and make a reasonable effort to protect soil stockpiles in order to reduce the amount of dust in the area of construction.

B. The CITY will ensure that the wastewater interceptor crossings of lower ___ Creek and _____Creek are accomplished by boring beneath the creeks and their riparian vegetation zones from bore pits located outside of the riparian vegetation zones. The CITY further understands and agrees that if any threatened or endangered species are encountered or if adverse impacts to sensitive areas are anticipated to occur during Project construction, work will be stopped immediately, and the CITY shall notify EPA at telephone number (214) 655-2260 and the EA at telephone number (512) 463-8516 so that the CITY, TWDB, and EPA can undertake protective and mitigative measures in accordance with the Endangered Species Act of 1973, as amended.

C. The CITY understands and agrees that if any historic or prehistoric archeological sites are discovered during Project construction, work shall be stopped or moved to another location immediately. The discovery site shall be protected from further disturbance. The CITY shall notify the State Historic Preservation Officer and the Texas Antiquities Committee at the Archeology Division of the Texas Historical Commission at telephone number (512) 463-6098, the EA at telephone number (512) 463-8516, and EPA at telephone number (214) 655-2260. The CITY, with any necessary assistance from the BOARD or EPA, shall then proceed only in accordance with Section 106 of the National Historic Preservation Act, with the rules of the Advisory Council on Historic Preservation, as set forth in 36 CFR Part 800, and/or with the Texas Antiquities Code, as appropriate, prior to taking any action which would affect the cultural resource so discovered.

D. The CITY shall comply with all federal laws and regulations ("cross-cutters") applicable to the Project, as identified on Exhibit D attached hereto and incorporated herein, as well as the applicable rules of the EPA as set forth in 40 CFR Parts 31, 32 and 34.

E. The CITY shall design and construct the Project in a manner that will ensure that proper consideration is given to the need to minimize potential flood hazard to life and property. Short-term water and sewer pipeline construction impacts to streams will be mitigated by implementation of U.S. Army Corps of Engineers "best construction management practices," such as minimizing the width of cleared areas, preservation of topsoil, avoidance of injury to cover vegetation, and restoring bottom contours, and by otherwise complying with the terms and conditions of a Nationwide Permit 12, which the U.S. Army Corps of Engineers has determined applicable to this project pursuant to Section 404 of the Clean Water Act. The CITY will comply with the terms and conditions of the applicable Corps of Engineers permit.

4.10. EQUIPMENT PURCHASESI. EQUIPMENT PURCHASES. The CITY shall obtain prior BOARD approval for the purchase of equipment and supplies (items having an acquisition cost of $5,000.00 or more per unit and a useful life of one year or more) acquired with BOARD funds provided for the Project under this Agreement. Equipment and supplies acquired with BOARD funds for the Project under this Agreement shall be managed, used, and disposed of, in accordance with
state laws and procedures and federal regulations set out in 40 CFR Sections 31.32 and 31.33. EPA reserves the right to transfer title to equipment purchased with funds for the Project under this Agreement in accordance with federal regulation 40 CFR Section 31.32(g).

4.11. RECORDSJ. RECORDS. The CITY, and its contractors and subcontractors, shall maintain financial accounting documentation in a manner acceptable to the BOARD, consistent with generally accepted accounting principles and 40 CFR Part 31.40 through 31.45. Upon request, all books, documents, papers, and records of the CITY that are directly pertinent to this Agreement shall be made available for audit, examination, excerption, and/or transcription by the staff of the BOARD. All records of the CITY which are required to be maintained herein shall be retained in accordance

with 40 CFR 31.42. The CITY understands and agrees that the projects for which these funds are being made available to the CITY are subject to state and federal laws and regulations and that acceptance of any funds pursuant to this Agreement constitutes an agreement by the CITY that the amount received shall be properly accounted for and expended for a public purpose in accordance with all applicable state and federal laws and regulations.

4.12. INSPECTIONS AND AUDITSK. INSPECTIONS AND AUDITS. The standards of administration, property management, audit procedures, procurement and financial management, and the records and facilities of the CITY, its contractors, or subcontractors, are subject to audit and inspection by the BOARD, the Comptroller General of the United States, and EPA in accordance with United States Office of Management and Budget (OMB) Circular A-102 and 40 Code of Federal Regulations (CFR) Part 31. Procurement of services or materials by the CITY shall be in accordance with OMB Circular A-102 and 40 CFR Part 31.

A. The BOARD and EPA shall have the unlimited right to inspect the Project sites before, during, and after the receipt of a certificate of completion of construction as hereinafter defined.

B. The CITY shall certify project performance as required by 40 CFR Section 35.2218(c) and shall obtain Certificates of Approval as required by 31 TAC §371.88 (water) and §375.104 (wastewater).

C. The CITY shall certify, by executing an assurance on the form provided by the BOARD, that economical and effective operation and maintenance (including replacement) of the Wastewater Project will be provided by the CITY for the design life of the Project.

D. At the end of the term of this Agreement, the BOARD shall perform a final accounting review which shall include a review of the expenditures made by the CITY pursuant to this Agreement and the payments made by the BOARD to the CITY to determine that the payments made by the BOARD to the CITY do not exceed the Project expenditures made by the CITY. The CITY shall reimburse the BOARD for all payments made by the BOARD to the CITY, including related investment earnings, which exceed the total Project expenditures by the CITY.

4.13. PRESS RELEASESL. PRESS RELEASES. When issuing statements or press releases, or preparing requests for proposals, bid solicitations, signs located at Project sites, and other documents describing the Project, the CITY shall clearly state:

A. The percentage and dollar amount of the total cost of the Project which will be funded with Federal money; and

B. The percentage and dollar amount of the total costs of the Project that will be financed by non-federal sources.

4.14. DISADVANTAGED BUSINESS ENTERPRISE GOALSM. DISADVANTAGED BUSINESS ENTERPRISE GOALS. In compliance with 42 United States Code Section 4307d, the CITY is required to assist the state in reaching the Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) utilization "fair share" goals for all CWTAP funds spent for construction, supplies, equipment, and services contracts in connection with the Project.

A. EPA has established fair share goals based on the total Project cost, as shown below, to promote the participation of small, minority and women's business enterprises (SMWBE) in projects which receive CWTAP funds:

Category	MBE Goal	WBE Goal
Construction	10.3%	5.9%
Supplies	5.0%	7.6%
Equipment	5.0%	7.6%
Services	11.5%	14.5%

B. The CITY shall make a good faith effort in offering fair opportunity for SMWBE participation (including engineering, contracting, legal, and fiscal firms) in the Project. TWDB document SRF-52 *Small, Minority and Women's Business Enterprise Guidance* describes the requirements of this program. To make a good faith effort, the CITY shall take, but is not limited to, the following actions:

1. Include qualified small, minority and women's businesses on solicitation lists;

2. Assure that participation of minority and women's businesses is solicited and encouraged whenever they are potential sources;

3. Divide total requirements, when legally and economically feasible, into phases, tasks, or quantities which permit maximum participation of minority and women's businesses;

4. Establish delivery schedules, where requirements of the work permit, which will encourage participation by minority and women's businesses;

5. Use services and assistance of the Small Business Administration and Office of Minor Business Enterprise of , as appropriate; and

6. Require any consultant or contractor who awards sub-agreements to take affirmative steps required in sub-paragraphs (1) – (5) hereinabove.

C. Prior to execution by the CITY of a contract for the performance of any activity listed under "Construction Activity" on Exhibit B, attached hereto and incorporated herein, the prime contractor must submit *Prime Contractor Affirmative Steps Certification and Goals* (WRD-217) with the bid, to demonstrate the Prime Contractor's understanding and commitment to taking affirmative steps and the CITY shall submit to the BOARD a properly completed *SMWBE Certification and Participation Summary* (SRF-373) and documentation of the good faith effort to secure such participation (WRD-216) which shall:

1. Identify the SMWBE firms to be used by the CITY;

2. Certify that the firms are bona fide minority or women's business enterprises;

3. Certify that all consultants or contractors shall be required to comply with the six affirmative steps outlined in this section; and

4. Be accompanied by the supporting documents such as contracts, solicitation documents, letters of intent, or other documentation deemed appropriate by the EA.

D. The Contractor shall submit to the CITY required information on utilization of SMWBE within 30 days of entering into an agreement with a small, minority or women business enterprise. The information shall include reporting called for in SRF-052. The Contractor shall maintain a documentation file on all efforts to obtain SMWBE participation.

E. If the CITY does not meet the above SMWBE goals, the CITY shall provide documentation to the EA establishing the good faith efforts of the CITY to meet the goals by providing certified letters to bona fide SMWBE firms, correspondence with SMWBE associations, evidence that adequate SMWBE solicitation was included in invitations for bids, or other documentation acceptable to the EA. Failure to adequately document an adequate good faith effort by the CITY to achieve the SMWBE goals may result in the termination of all or a part of the funds provided by this Agreement for the Project.

4.15. CERTIFICATIONSN. CERTIFICATIONS. The CITY, by executing this Agreement, certifies that:

A. No federal appropriated funds have been paid or will be paid, by or on behalf of the CITY, to any person or agency, a Member of the United States Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with the making of any federal contract, grant, loan or cooperative agreement;

B. Prior to the award of the funds for the Project and prior to the expenditure of any funds associated therewith, the CITY submitted the "Certification Regarding Lobbying" required by Public Law 101-121 and OMB implementing guidance, in a format provided by the EPA, including the necessary "Disclosure of Lobbying Activities" report, if any; and

C. The CITY shall require that the language of this "Certification" be included in the award documents for all Project sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall so certify and disclose accordingly.

4.16. CONSTRUCTION COMPLETIONO.CONSTRUCTION COMPLETION. Within ten (10) days of the completion of the entire Project, regardless of the number of subcontracts executed, the CITY shall deliver to the BOARD notice executed and sealed by a professional engineer certifying that the Project has been completed pursuant to the plans and specifications previously approved by the EA in the contract documents or with change orders, if any.

ARTICLE V. GENERAL PROVISIONSV. GENERAL PROVISIONS

In consideration of the performance of the mutual agreements set forth in this Agreement, the PARTIES, by and through their designated and authorized representatives or employees, agree as follows:

5.01. NOTICESA. NOTICES. All notices, notifications, or requests required or permitted to be given under this Agreement, unless otherwise specified, shall be in writing and addressed as set forth below (or to such other address as either party may designate by like notice), and shall be given by personal delivery or transmitted by United States certified mail return receipt requested, postage prepaid, to the addresses of the PARTIES shown below. Notice shall be effective when received by the party to whom notice is sent, as follows:

Texas Water Development Board	City of _____
Attn: _____	_____, General Manager
1700 N. Congress Ave.	_____ (organization unit)
P.O. Box 13231	_____(address)
Austin, Texas 78711-3231	_____, Texas NNNNNNN
Telephone (512) 463-8271	Telephone (NNN) NNN-NNNN
Telefacsimile (512) 463-9980	Telefacsimile (NNN) NNN-NNNN

5.02. INSURANCE, LICENSE, AND PERMITSB. INSURANCE, LICENSE, AND PERMITS. The CITY is and shall be considered an independent contractor and, therefore, solely responsible for liability resulting from negligent acts or omissions of the CITY, its employees or agents. The CITY shall obtain such insurance as is considered necessary in the judgment of the CITY to protect itself, the BOARD, and employees and officials of the BOARD from liability arising out of this Agreement. The CITY shall indemnify and hold the BOARD and the State of Texas harmless, to the extent that the CITY may do so in accordance with State law, from any and all losses, damages, liability or claims therefor, on account of personal injury, death, or
property damage of any nature whatsoever caused by the CITY, its agents, employees, servants, or representative arising out of activities under this Agreement. The CITY shall be solely and entirely responsible for procuring all appropriate property rights, real or personal, easements, licenses and permits which may be lawfully required by any competent authority for the CITY to perform the subject work.

5.03. MODIFICATION AND WAIVERC. MODIFICATION AND WAIVER. This Agreement constitutes the entire agreement between the BOARD and the CITY and no prior or contemporaneous oral or written promises or representations shall be binding as to any of the PARTIES. No modification of any provision of this Agreement shall be effective unless such modification is in writing and signed by authorized representatives of each party and is expressly stated to be a modification of this Agreement. The failure of any party to insist upon the strict performance of any of the terms, provisions or conditions of this Agreement shall not be construed as a waiver or relinquishment for the future of any such term, provision or condition or any other term, provision, or condition.

5.04. EXTENSIONSD. EXTENSIONS. The PARTIES agree that upon sixty (60) days prior notice, the CITY may request an extension of any of the time periods set pursuant to the terms of this Agreement. The PARTIES further agree that the EA, in his sole discretion, can grant or deny such requested extensions.

5.05. TITLESE. TITLES. The titles of the Articles, Sections, Subsections, Paragraphs, or Subparagraphs of this Agreement are intended strictly for the convenience of the PARTIES and shall have no effect and shall neither limit nor amplify the provisions of this Agreement itself.

5.06. NON-PERFORMANCE.F. NON-PERFORMANCE.

A. Each of the following occurrences shall be considered an instance of non-performance by the CITY under this Agreement and its amendments:

1. Failure of the CITY to complete the construction of the Project according to the plans and specifications or the contract documents to the satisfaction of the EA or the BOARD, other than for lack of funding from the BOARD as provided herein or from occurrence of *force majeure*; or

2. Failure of the CITY to complete any other term or condition of this Agreement or its amendments as required herein.

B. The EA shall provide notice to the CITY of the occurrence of any circumstances deemed by the BOARD or the EA to be an instance of non-performance by the CITY. The CITY shall effectively remedy, or shall provide written notification to the EA of the methods it has taken to remedy, the circumstances for which notification was provided within thirty (30) days of the notice by the EA. If the EA or the BOARD, in their sole discretion, determine that the actions of the CITY are inadequate to remedy the circumstance of non-performance as identified in the notice from the EA, the CITY shall repay to the BOARD all funds provided to the CITY by the BOARD pursuant to the terms of this Agreement.

5.07. TERMINATIONG. TERMINATION. This Agreement may be terminated at any time by the BOARD for reasons other than non-performance as specified herein, said termination to be effective thirty (30) days after notice of the intent to terminate to the CITY. Upon receipt of such notice, the CITY shall immediately discontinue all work in connection with the performance of this Agreement unless the notice directs otherwise and shall proceed to promptly cancel all existing orders or other financial commitments chargeable to funding provided pursuant to this Agreement. The CITY, upon receiving a termination notice, shall submit a statement showing in detail the work performed, any payments received by the CITY, and any payments made by or due from the CITY to any contractor pursuant to the terms of this Agreement prior to the date of termination. The CITY shall re-pay to the BOARD any funds received from the BOARD which the CITY has not expended.

5.08. STOP WORK ORDERSH. STOP WORK ORDERS. The EA may issue a Stop Work Order to the CITY at any time. Upon receipt of such order, the CITY shall discontinue all work under this Agreement and cancel all orders pursuant to this Agreement, unless the order directs otherwise. If the EA does not issue a Restart Order within sixty (60) days after receipt by the CITY of the Stop Work Order, the CITY shall regard this Agreement terminated in accordance with the foregoing provisions.

5.09. LAW.I. LAW. The validity, operation, and performance of this Agreement shall be governed and controlled by the laws of the State of Texas and applicable federal regulations, and the terms and conditions of this Agreement shall be construed and interpreted in accordance with the law of said State. The PARTIES understand and agree that this contract is for the provision of financial assistance for the construction of the Project and as such all or part of the performance of the terms and obligations of this Agreement will be performed in Travis County, Texas. Consequently, the PARTIES understand and agree that any proceeding brought for any breach of this Agreement involving the BOARD shall be in Travis County, Texas.

5.10. NO DEBT CREATED.J. NO DEBT CREATED. Each party agrees and understands that by this Agreement neither the State of Texas nor the CITY is lending its respective credit to any entity nor in any other manner creating a debt on behalf of the State of Texas or the CITY.

5.11. SEVERANCEK. SEVERANCE. Should any one or more provisions of this Agreement be held to be null, void, voidable, or for any reasons whatsoever, of no force and effect, such provision(s) shall be construed as severable from the remainder of this Agreement and shall not affect the validity of any other provisions of this Agreement which shall remain of full force and effect.

5.12. NON-ASSIGNABILITY. 5.12. NON-ASSIGNABILITY The terms and conditions of the financial assistance provided by this Agreement may not be assigned, transferred, or subcontracted in any manner without the express written consent of the BOARD.

This Agreement is effective as of the ___th day of _____, 200_.

CITY OF _____

The Honorable _____, .
Mayor

TEXAS WATER DEVELOPMENT BOARD

Ignacio Madera, Jr.
Deputy Executive Administrator
Office of Project Finance and Construction Assistance

EXHIBIT A-1

_____GENERAL AREA MAP

TWDB CONTRACT NO. G15800/G15900
(TWDB BOARD COMMITMENT NO. NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____ COUNTY, TEXAS

****

EXHIBIT A-2

ECONOMICALLY DISTRESSED AREAS MAP

TWDB CONTRACT NO. GNNNNN/NNNNN
(TWDB BOARD COMMITMENT NO. NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

****

EXHIBIT A-3

LISTING OF ECONOMICALLY DISTRESSED AREAS

TWDB CONTRACT NO. GNNNNN/NNNNN
(TWDB BOARD COMMITMENT NO. NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

****

EXHIBIT A-4

PROJECT MAP

TWDB CONTRACT NO. GNNNNN/NNNN
(TWDB BOARD COMMITMENT NO. NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

EXHIBIT A-5

FUNDING SOURCES FOR REGIONAL PROJECT COMPONENTS

TWDB CONTRACT NO. GNNNNN/NNNNN
(TWDB BOARD COMMITMENT NO. NN-NN ANS NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

****

EXHIBIT A-6

ARCHEOLOGICAL SITE 41MXXXX

TWDB CONTRACT NO. NNNNN/NNNNN
(TWDB BOARD COMMITMENT NO. NN-NN AND NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

****

EXHIBIT B

PROJECT BUDGET

TWDB CONTRACT NO. GNNNNN/NNNNN

(TWDB BOARD COMMITMENT NO. NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

Activity Categories	Activity Budget	
	Wastewater	Water
Pre-Construction Activities Planning Design Administration Surveying Archeology Investigation/Mitigation Water Rights Acquisition Easements/Land Acquisition Rural Dev. Debt Buy-out	$	$
Pre-Construction Total	**$**	**$**
Construction Activities Construction Engineering Inspection Testing Geotechnical O & M Manual Service Connections	$	$
Construction Total	**$**	**$**
Contingency	**$**	**$**
Activity Total	**$**	**$**
Project Total (Grant Funds Only)	**$**	

EXHIBIT C

PROJECT SCHEDULE

TWDB CONTRACT NO. NNNNN/NNNNN

(TWDB BOARD COMMITMENT NO. NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

ACTIVITY	DATE
Execute Grant Agreement	_____, 200_
Begin design for first contract	_____, 200_
TWDB approval of P & S for first contract	_____, 200_
Award of first contract	_____, 200_
Notice to proceed for first contract	_____, 200_
Complete construction of last contract	_____, 200_
Final inspection and project close out	_____, 200_

EXHIBIT D

LIST OF FEDERAL LAWS AND AUTHORITIES

TWDB CONTRACT NO. NNNNN/NNNNN

(TWDB BOARD COMMITMENT NO. NN-NNN)

CITY OF _____
_____WATER AND WASTEWATER PROJECT
_____COUNTY, TEXAS

ENVIRONMENTAL

- National Environmental Policy Act of 1969, PL 91-190
- Archeological and Historic Preservation Act 86-523, as amended
- Clean Air Act, PL 84-159, as amended
- Coastal Barrier' Resources Act, PL 97-348
- Coastal Zone Management Act, PL 92-583, as amended
- Endangered Species Act, PL 93-205, as amended
- Executive Order 11593, Protection and Enhancement of the Cultural Environment
- Executive Order 11988, as amended by Executive Order 12148, Floodplain Management
- Executive Order 11990, Protection of Wetlands
- Farmland Protection Policy Act, PL 97-98
- Fish and Wildlife Coordination Act, PL 85-624, as amended
- National Historic Preservation Act, PL 89-665, as amended
- Safe Drinking Water Act, section 1424(e), PL 92-523, as amended
- Wild and Scenic Rivers Act, PL 90-542, as amended

ECONOMIC

- Demonstration Cities and Metropolitan Development Act of 1966, PL 89-754, as amended, Executive Order 12372
- Section 306 of the Clean Air Act and Section 508 of the Clean Water Act, including Executive Order 11738, Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans

SOCIAL AUTHORITIES

- Age Discrimination Act, PL 94-135
- Civil Rights Act of 1964, PL 88-352
- Drug-Free Workplace Act of 1988, PL 100-690
- Section 13 of PL 92-500; Prohibition against sex discrimination under the Federal Water Pollution Control Act
- Section 504 of the Rehabilitation Act, PL 93-112 (including Executive Orders 11914 and 11250)
- Executive Order 11246, Equal Employment Opportunity
- Executive Orders 11625 and 12138, Women's and Minority Business Enterprise

MISCELLANEOUS AUTHORITIES

- Uniform Relocation and Real Property Acquisition Policies Act of 1970, PL 91-646
- Executive Order 12549 - Debarment and Suspension

CONTRACTOR'S ACT OF ASSURANCE

STATE OF TEXAS

COUNTY OF _____

BEFORE ME, _____, a Notary Public duly commissioned and qualified in and for the County of _____ in the State of Texas came and appeared _____, as represented by _____, the corporation's _____, who declares he/she is authorized to represent _____ pursuant to provisions of a resolution adopted by said corporation on the _____ day of _____, 20 _____ (a duly certified copy of such resolution is attached to and is hereby made a part of this document).

_____, as the representative of _____, declares that _____ assures the Texas Water Development Board that it will construct _____ project at _____, Texas, in accordance with sound construction practice, all laws of the State of Texas, and the rules of the Texas Water Development Board.

GIVEN UNDER MY HAND and seal of office this _____ day of _____, 200___ A.D.

_____

_____
Printed Name

My Commission expires _____

CONTRACTOR'S RESOLUTION ON AUTHORIZED REPRESENTATIVE

_____
Name or Names

I hereby certify that it was RESOLVED by a quorum of the directors of the

_____, meeting
name of corporation

on the day of _____, 20__, that _____, _____,

_____, and _____, be, and hereby is,

authorized to act on behalf of _____, as its
name of corporation

representative, in all business transactions conducted in the State of Texas, and;

That all above resolution was unanimously ratified by the Board of Directors at said

meeting and that the resolution has not been rescinded or amended and is now in full forces

and effect; and;

In authentication of the adoption of this resolution, I subscribe my name and

affix the seal of the corporation this _____ day of _____, 20__.

_____
Secretary

(seal)

Instructions on use of the

EDAP/CWTAP Special Contract Conditions

These Special Contract Conditions contain provisions that are worded to comply with certain statutes and regulations which specifically relate to the Economically Distressed Area Program (EDAP) and the Colonia Wastewater Treatment Assistance Program (CWTAP). They are to be utilized in conjunction with the EPA's Supplemental Conditions (Pink Sheets) and the TWDB Minority and Women Business Enterprise requirements (WRD-52v3).They should be incorporated into the other General and Special Conditions that are normally in the construction contract documents.

Conditions 10 (Archeological Discoveries and Cultural Resources) and 11 (Endangered Species) may be superseded or modified by project specific conditions established during the application process. Please check with the TWDB for any modifications.

Condition number 16, Minority and Women Business Enterprise Requirements include information that needs to be included with the Notice to Bidders.

These documents may confer certain duties and responsibilities on the consulting engineer that are beyond, or short of, what the Applicant intends to delegate. The Applicant should ensure that the contractual agreement with the engineer provides for the appropriate services. Otherwise the Applicant should revise the wording in these special conditions to agree with actually delegated functions.

There may be other applicable Federal and State statutes and regulations which are not included here, and it is the Loan/Grant Applicant's responsibility to ensure that the project and all contract provisions are consistent with the relevant statutes and regulations. The Applicant may need to modify parts of these provisions to better fit the other provisions of the construction contract. The Applicant and the consulting engineer should carefully study these provisions before incorporating them into the construction contract documents. In particular, applicants which are districts should be aware of statutes relating to their creation and operation which may affect the application of these conditions.

All proposed modifications to these conditions should be brought to the attention of and discussed with the appropriate TWDB area engineer. The TWDB engineer can also answer any questions regarding these conditions. The questions and proposed modifications can be sent to the following address.

Texas Water Development Board
Office of Project Finance & Construction Assistance
P. O. Box 13231, Capitol Station
Austin, Texas 78711-3231
(512) 463-8499, FAX (512) 475-2086

TABLE OF CONTENTS

SPECIAL CONTRACT CONDITIONS

1. LAWS TO BE OBSERVED.

In the execution of the Contract, the Contractor must comply with all applicable Local, State and Federal laws, including but not limited to laws concerned with labor, safety, minimum wages, and the environment. The Contractor shall make himself familiar with and at all times shall observe and comply with all Federal, State, and Local laws, ordinances and regulations which in any manner affect the conduct of the work, and shall indemnify and save harmless the Owner, the United States Environmental Protection Agency (U.S. EPA), Texas Water Development Board, and their representatives against any claim arising from violation of any such law, ordinance or regulation by himself or by his subcontractor or his employees.

2. PRIVITY OF CONTRACT.

Funding for this project is expected to be provided in part by the Texas Water Development Board through its Economically Distressed Areas Program. Neither the State of Texas, nor any of its departments, agencies or employees is, or will be, a party to this contract or any lower tier contract.

3. DEFINITIONS.

The term "TWDB" means the Executive Administrator of the Texas Water Development Board, or other person who may be at the time acting in the capacity or authorized to perform the functions of such Administrator, or the authorized representative thereof.

4. PROGRESS AND PAYMENT SCHEDULE.

(a) The Contractor shall submit for approval immediately after execution of the Agreement, a carefully prepared Progress Schedule, showing the proposed dates of starting and completing each of the various sections of the work, the anticipated monthly payments to become due the Contractor, and the accumulated percent of progress each month.

(b) The following paragraph applies only to contracts awarded on a lump sum contract price:

COST BREAKDOWN - The Contractor shall submit to the Owner a detailed breakdown of his estimated cost of all work to be accomplished under the contract, so arranged and itemized as to meet the approval of the Owner or funding agencies. This breakdown shall be submitted promptly after execution of the agreement and before any payment is made to the Contractor for the work performed under the Contract. After approval by the Owner the unit prices established in the breakdown shall be used in estimating the amount of partial payments to be made to the Contractor.

5. PAYMENTS TO CONTRACTOR.

(a) **Progress Payments.**

(1) The Contractor shall prepare his requisition for progress payment as of the last day of the month and submit it, with the required number of copies, to the Engineer for his review. The amount of the payment due the Contractor shall be determined by adding to the total value of work completed to date, the value of materials properly stored on the site and deducting (1) five percent (5%) of the total amount, as a retainage and (2) the amount of all previous payments. The total value of work completed to date shall be based on the estimated quantities of work completed and on the unit prices contained in the agreement (or cost breakdown approved pursuant to section 4.b relating to lump sum bids) and adjusted by approved change orders. The value of materials properly stored on the site shall be based upon the estimated quantities of such materials and the invoice prices. Copies of all invoices shall be available for inspection by the Engineer.

(2) The Contractor shall be responsible for the care and protection of all materials and work upon which payments have been made until final acceptance of such work and materials by the Owner. Such payments shall not constitute a waiver of the right of the Owner to require the fulfillment of all terms of the Contract and the delivery of all improvements embraced in this Contract complete and satisfactory to the Owner in all details.

(3) The five percent (5%) retainage of the progress payments otherwise due to the Contractor may not be reduced until the building of the project is substantially complete and a reduction in the retainage has been authorized by the TWDB.

(4) The following clause applies only to contracts where the total price at the time of execution is $400,000 or greater and the retainage is greater than 5% and the Owner is not legally exempted from the condition (i.e certain types of water districts).

The Owner shall deposit the retainage in an interest-bearing account, and the interest earned on such retainage funds shall be paid to the Contractor after completion of the contract and final acceptance.

(b) **Withholding Payments.**

The Owner may withhold from any payment otherwise due the Contractor so much as may be necessary to protect the Owner and if so elects may also withhold any amounts due from the Contractor to any subcontractors or material dealers, for work performed or material furnished by them. The foregoing provisions shall be construed solely for the benefit of the Owner and will not require the Owner to determine or adjust any claims or disputes between the Contractor and his subcontractors or Material dealers, or to withhold any moneys for their protection unless the Owner elects to do so. The failure or refusal of the Owner to withhold any moneys from the Contractor shall in no way impair the obligations of any surety or sureties under any bond or bonds furnished under this Contract.

(c) **Payments Subject to Submission of Certificates.**

Each payment to the Contractor by the Owner shall be made subject to submission by the Contractor of all written certifications required of him and his subcontractors by other general, supplemental and special conditions elsewhere in this contract.

(d) **Final Payment.**

(1) After final inspection and acceptance by the Owner of all work under the Contract, the Contractor shall prepare his requisition for final payment which shall be based upon the carefully measured or computed quantity of each item of work at the applicable unit prices stipulated in the Agreement or cost breakdown (if lump sum), as adjusted by approved change orders. The total amount of the final payment due the Contractor under this contract shall be the amount computed as described above less all previous payments. Final payment to the Contractor shall be made subject to his furnishing the Owner with a release in satisfactory form of all claims against the Owner arising under and by virtue of his contract, other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release as provided under general and special conditions elsewhere in this contract.

(2) The Owner, before paying the final estimate, may require the Contractor to furnish releases or receipts from all subcontractors having performed any work and all persons having supplied materials, equipment (installed on the Project) and services to the Contractor, if the Owner deems the same necessary in order to protect the Owner's interests. The Owner, however, may if it deems such action advisable make payment in part or in full to the Contractor without requiring the furnishing of such releases or receipts and any payments so made shall in no way impair the obligations of any surety or sureties furnished under this Contract.

(3) The retainage and its interest earnings, if any, shall not be paid to the Contractor until the TWDB has authorized a reduction in, or release of, retainage on the contract work.

(4) Withholding of any amount due the Owner, under general and/or special conditions regarding "Liquidated Damages," shall be deducted from the final payment due the Contractor.

6. REVIEW BY OWNER, TWDB, and EPA.

(a) The Owner, authorized representatives and agents of the Owner, TWDB, and EPA shall, at all times have access to and be permitted to observe and review all work, materials, equipment, payrolls, personnel records, employment conditions, material invoices, and other relevant data and records pertaining to this Contract, provided, however that all instructions and approval with respect to the work will be given to the Contractor only by the Owner through authorized representatives or agents.

(b) Any such inspection or review by the TWDB and EPA shall not subject the State of Texas to any action for damages.

7. FLOOD HAZARD INSURANCE.

This provision applies to any contract which will construct structures that are insurable under the National Flood Insurance Program of the Federal Emergency Management Agency. The Contractor shall apply for flood insurance on all insurable structures that will be built under this contract. A copy of the completed application must be provided to the owner before commencing construction of the project. The Contractor shall obtain the flood hazard insurance as soon as possible and submit a copy of the policy to the Owner.

8. OPERATION AND MAINTENANCE MANUALS AND TRAINING.

(a) The Contractor shall obtain installation, operation, and maintenance manuals from manufacturers and suppliers for equipment furnished under the contract. The Contractor shall submit three copies of each complete manual to the Engineer within 90 days after approval of shop drawings, product data, and samples, and not later than the date of shipment of each item of equipment to the project site or storage location.

(b) The Owner shall require the Engineer to promptly review each manual submitted, noting necessary corrections and revisions. If the Engineer rejects the manual, the Contractor shall correct and resubmit the manual until it is acceptable to Engineer as being in conformance with design concept of project and for compliance with information given in the Contract Documents. Owner may assess Contractor a charge for reviews of same items in excess of three (3) times. Such procedure

shall not be considered cause for delay. Acceptance of manuals by Engineer does not relieve Contractor of any requirements of terms of Contract.

(c) The Contractor shall provide the services of trained, qualified technicians to check final equipment installation, to assist as required in placing same in operation, and to instruct operating personnel in the proper manner of performing routine operation and maintenance of the equipment.

(d) Operations and maintenance manuals specified hereinafter are in addition to any operation, maintenance, or installation instructions required by the Contractor to install, test, and start-up the equipment.

(e) Each manual to be bound in a folder and labeled to identify the contents and project to which it applies. The manual shall contain the following applicable items:

(1) A listing of the manufacturer's identification, including order number, model, serial number, and location of parts and service centers.

(2) A list of recommended stock of parts, including part number and quantity.

(3) Complete replacement parts list.

(4) Performance data and rating tables.

(5) Specific instructions for installation, operation, adjustment, and maintenance.

(6) Exploded view drawings for major equipment items.

(7) Lubrication requirements.

(8) Complete equipment wiring diagrams and control schematics with terminal identification.

9. AS-BUILT DIMENSION & DRAWINGS.

(a) Contractor shall make appropriate daily measurements of facilities constructed and keep accurate records of location (horizontal and vertical) of all facilities.

(b) Upon completion of each facility, the Contractor shall furnish Owner with one set of direct prints, marked with red pencil, to show as-built dimensions and locations of all work constructed. As a minimum, the final drawings shall include the following:

(1) Horizontal and vertical locations of work.

(2) Changes in equipment and dimensions due to substitutions.

(3) "Nameplate" data on all installed equipment.

(4) Deletions, additions, and changes to scope of work.

(5) Any other changes made.

10. ARCHEOLOGICAL DISCOVERIES AND CULTURAL RESOURCES.

No activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, or eligible for designation as a State Archeological Landmark is authorized until the Owner has complied with the provisions of the National Historic Preservation Act and the Antiquities Code of Texas. The Owner has previously coordinated with the appropriate agencies and impacts to known cultural or archeological deposits have been avoided or mitigated. However, the Contractor may encounter unanticipated cultural or archeological deposits during construction.

If archeological sites or historic structures which may qualify for designation as a State Archeological Landmark according to the criteria in 13 TAC §§41.6 - 41.10, or that may be eligible for listing on the National Register of Historic Places in accordance with 36 CFR Part 800, are discovered after construction operations are begun, the Contractor shall immediately cease operations in that particular area and notify the Owner, the TWDB, and the Texas Antiquities Committee, P.O. Box 12276, Capitol Station, Austin, Texas 78711-2276. The Contractor shall take reasonable steps to protect and preserve the discoveries until they have been inspected by the Owner's representative and the TWDB. The Owner will promptly coordinate with the State Historic Preservation Officer and any other appropriate agencies to obtain any necessary approvals or permits to enable the work to continue. The Contractor shall not resume work in the area of the discovery until authorized to do so by the Owner.

11. ENDANGERED SPECIES.

No activity is authorized that is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), and/or the State of Texas Parks and Wildlife Code on Endangered Species, or to destroy or adversely modify the habitat of such species.

If a threatened or endangered species is encountered during construction, the Contractor shall immediately cease work in the area of the encounter and notify the Owner, who will immediately implement actions in accordance with the ESA and applicable State statutes. These actions shall include reporting the encounter to the TWDB, the U. S. Fish and Wildlife Service, and the Texas Parks and Wildlife Department, obtaining any necessary approvals or permits to enable the work to continue, or implement other mitigative

actions. The Contractor shall not resume construction in the area of the encounter until authorized to do so by the Owner.

12. HAZARDOUS MATERIALS.

Materials utilized in the project shall be free of any hazardous materials, except as may be specifically provided for in the specifications.

If the Contractor encounters existing material on sites owned or controlled by the Owner or in material sources that are suspected by visual observation or smell to contain hazardous materials, the Contractor shall immediately notify the Engineer and the Owner. The Owner will be responsible for the testing for and removal or disposition of hazardous materials on sites owned or controlled by the Owner. The Owner may suspend the work, wholly or in part during the testing, removal or disposition of hazardous materials on sites owned or controlled by the Owner.

13. PROJECT COST.

Federal grant funds and state matching funds will be utilized with local government funds for incurred project expenses. Federal funds in the amount of $50 million are provided by grant agreement between the United States Environmental Protection Agency and the Texas Water Development Board for the purposes of providing needed wastewater service to residents of eligible border county colonias. The grant agreement provides for federal assistance through the Colonias Wastewater Treatment Assistance Program in the amount of 50%, however, state matching funds do not have to be on a one-to-one basis for each project. State matching funds are provided through the Economically Distressed Areas Program. The dollar amount of the project that will be financed with federal monies will be determined when bids are received and accepted by the owner and will be noted on the project sign required by this contract.

14. PROJECT IDENTIFICATION SIGN.

A project IDENTIFICATION SIGN will be constructed and displayed in prominent location at the construction project site and/or facility where a substantial portion of the work is U.S. EPA funded. The sign must identify the project and U.S. EPA grant support in accordance with the "design and specifications" which are attached.

15. EMPLOYMENT OF LOCAL LABOR.

The contractor shall to the maximum feasible extent employ local labor for construction of the project. The Contractor and every subcontractor undertaking to do work on the project which is, or reasonably may be done as on-site work, shall employ, in carrying out such contract work, qualified persons who regularly reside within the political subdivision boundary of the Owner and the economically distressed area where the project is located, except:

a. To the extent that qualified persons regularly residing within the political subdivision boundary of the Owner and economically distressed area are not available.

b. For the reasonable needs of any such Contractor or subcontractor, to employ supervisory or specially experienced individuals necessary to assure an efficient execution of the contract.

c. For the obligation of any such Contractor or subcontractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that in no event shall the number of non-resident persons employed under this subparagraph exceed twenty percent of the total number of employees employed by such Contractor and his/her subcontractors on such project.

Every such Contractor and subcontractor shall furnish the Owner and the Local Texas Employment Commission Office with a list of all positions for which it may from time to time require laborers, mechanics, and other employees, the estimated numbers of employees required in each classification, and the estimated dates on which such employees will be required.

The Contractor shall give full consideration to all qualified job applicants referred by the local employment service, but is not required to employ any job applicants referred whom the Contractor does not consider qualified to perform the classification of work required.

The payrolls maintained by the Contractor shall contain the following information: The employee's full name, address, and social security number, and a notation indicating whether the employee does, or does not, normally reside within the political subdivision boundary of the Owner or the economically distressed area. Copies of the payroll records shall be provided to the Owner.

The Contractor shall include the provisions of this condition in every subcontract for work which is, or reasonably may be, done as on-site work.

16. MINORITY AND WOMEN-OWNED BUINESS ENTERPRISE GOALS

(a) This contract is subject to the EPA established Minority Business Enterprise (MBE) / Women's Business Enterprise (WBE) "fair share" goals:
MBE: CONSTRUCTION 10.3%; SUPPLIES 5%; SERVICES 11.5%; EQUIPMENT 5%.
WBE: CONSTRUCTION 5.9%; SUPPLIES 7.6%; SERVICES 14.5%; EQUIPMENT 7.6%.

TWDB document SRF-52 *Small, Minority and Women's Business Enterprise Guidance* describes the requirements of this program.

The prime contractor must **submit the PRIME CONTRACTOR AFFIRMATIVE STEPS CERTIFICATION and GOALS (WRD-217**) **with the bid**, to demonstrate the Prime Contractor's understanding and commitment to taking affirmative steps.

The contractor must provide the Recipient with the information required for *MWBE Certification and Participation Summary,* TWDB document SRF-373 or provide sufficient documentation (TWDB WRD-216) that a "good faith effort" was made in offering fair opportunity for participation by qualified SMWBE firms. This information must be submitted prior to the contract award so the information can be approved and presented to the TWDB for funding of this contract.

(b) The Contractor shall, if awarding sub-agreements, to the extent appropriate for the goals listed in the instructions to bidders make a good faith effort to use minority and women business when possible as sources of supplies, construction, equipment and services by taking the following steps:

(1) Including qualified small, minority, and women's businesses on solicitation lists;
(2) Assuring that small, minority, and women's businesses are solicited whenever they are potential sources;
(3) Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of small, minority, and women's businesses;
(4) Establishing delivery schedules, where the requirements of the work permit, which will encourage participation by small, minority, and women's businesses; and
(5) Using the services and assistance of the Small Business Administration and the Office of Minority Business Enterprise of the U.S. Department of Commerce, as appropriate.

(c) The Contractor shall submit to the Recipient information on utilization of minority and women business enterprises within 30 days of entering into an agreement with a minority or women business enterprise. **The information shall include reporting called for in SRF-052, Texas Water Development Board Guidance for Utilization of Small, Minority & Women-Owned Businesses in Procurement.**

(d) The Contractor shall maintain a documentation file on all efforts to obtain Minority and Women-Owned Business Participation.

Prime Contractor Affirmative Steps Certification and Goals

(WRD-217 6/1/02)

To be completed by Prime Contractor and submitted to TWDB by Applicant/Entity.

A. TWDB Project No.	B. Applicant/ Entity Name	C. PROGRAM TYPE (Check One)
		DRINKING WATER SRF (DWSRF) ☐ **CLEAN WATER SRF (CWSRF)** ☐ **COLONIA WASTEWATER (CWTAP)** ☐ **Other (Describe)** ☐

D. PRIME CONTRACTOR:	E. Contract Amount:
F. Street Address, City, State, Zip code:	

G. GOOD FAITH EFFORT

I understand that it is my responsibility to comply with all state and federal regulations and guidance in Utilization of Small, Minority & Women-Owned Businesses in Procurement. I certify that I will make a "good faith effort" to afford opportunities for SBE, MBE, WBE and SBRA participation by:

1. including qualified SBEs, MBEs, WBEs and SBRAs on solicitation lists;

2. soliciting potential SBEs, MBEs, WBEs and SBRAs;

3. making efforts to divide total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of SBEs, MBEs, WBEs and SBRAs;

4. making efforts to establish delivery schedules, where the requirements of the work permit, which will encourage participation by SBEs, MBEs, WBEs and SBRAs;

5. making efforts to use the services and assistance of the Small Business Administration and the Minority Business Development Agency, U.S. Department of Commerce, as appropriate; and

6. submitting documentation to the Applicant demonstrating "good faith" efforts.

H. Subcontract Participation – Estimates

1. Number of Subcontracts:

2. Procurement		3. MBE Awards		4. WBE Awards	
Category	**Total Amount**	**Amount**	**Percent**	**Amount**	**Percent**
1. Construction					
2. Supplies					
3. Equipment					
4. Services					

I. Signature Prime Contractor	J. Title	K. Date

L. Signature Applicant/Entity Authorized Representative	M. Title	N. Date

O. FOR TWDB USE ONLY

1. Completion Check by:	**Project Reviewer Signature:**	**Date:**
2. SMWBE Review by:	**SMWBE Coordinator Signature:**	**Date:**

SMWBE COORDINATOR COMMENTS:

TEXAS WATER DEVELOPMENT BOARD (WRD-216 (6/1/01))

AFFIRMATIVE STEPS SOLICITATION REPORT

ENTITY SUBMITS TO TWDB FOR EVERY PROCUREMENT.

A. TWDB PROJECT NO.	B. ENTITY NAME	C. PROGRAM TYPE (Check One)
		DRINKING WATER SRF (DWSRF) ☐ CLEAN WATER SRF (CWSRF) ☐ COLONIA WASTEWATER (CWTAP) ☐ Other (Describe) ☐

D. SOLICITATION BY (Check One):	ENTITY ☐	PRIME CONTRACTOR ☐

E. COMPLETE IF SOLICITATION BY PRIME

PROJECT DESCRIPTION	TWDB CONSTRUCTION CONTRACT NO.
PRIME CONTRACTOR NAME	

F. SOLICITATION LIST

1. List the full name, street address, city, state, and zipcode for each MINORITY, WOMAN, AND/OR SMALL BUSINESS solicited OR ATTACH A LIST THAT HAS THIS INFORMATION.

2. Enter one of the following contract/procurement categories: Construction; Supplies; Equipment; or Services.

3. Enter Type of Business: SBE; MBE; WBE; SBRA; or Other.

4. Solicitation Methods should include a combination of: 1. Newspaper Advertisement; 2. Direct Contact by fax, phone, letters, etc.; 3. Meetings & Conferences; 4. Minority Media; 5. Internet & Web Notices; 6. Trade Association Publications; and 7. Other Government Publications. **ATTACH COPIES OF EACH TYPE OF METHOD USED.**

1. Name & Address of Small, Minority or Women-Owned Business	2. Contract/ Procurement Category	2. Type Business	3. Solicitation Methods

G. SIGNATURE AUTHORIZED ENTITY REPRESENTATIVE	TITLE	DATE

TWDB USE ONLY – COMPLETION CHECK BY Project Reviewer

SIGNATURE	DATE

REVIEW AND APPROVAL BY SMWBE ADMINISTRATOR

SIGNATURE	DATE

SMWBE SELF CERTIFICATION
for
Utilization of Small, Minority & Women-Owned Businesses in Procurement (WRD-218)

Submitted by Applicant/Entity for Prime Contractor or Subcontractor as documentation of certification as SMWBE firm.

A. Applicant/Entity:					
B. TWDB Project No.:		C. Contract Amount:			
D. Contractor:					
E. Address:					
F. City:		G. State:		H. Zip:	I. Phone:
Minority Business Enterprise (MBE) ☐	Women Business Enterprise (WBE) ☐	Small Business Enterprise (SBE) ☐	Small Business in a Rural Area (SBRA) ☐		

J

I hereby certify that the above named firm is a

Small Business Enterprise (SBE), Small Business in a Rural Area (SBRA), Mi

nority Business Enterprise (MBE) or a Women Business Enterprise (WBE) in a

c c o r d a n c e w i t h T e x a s W a t e r D e v e l o p m e n t B o a r d (T W D B) g u i d a n c e d o c u m e n t

SRF-0522.

Signature of Authorized Representative	Print Name & Title	Date
Signature of Entity Authorized Representative	**Print Name & Title**	**Date**

State of		
County of		
SWORN TO AND SUBSCRIBED before me on the		
day of	2003	
(SEAL)		
	Notary Public Signature	
	Notary Public Printed or Typed Name	
	My Commission Expires:	

TEXAS WATER DEVELOPMENT BOARD (SRF-373, 6-1-01)

LOAN/GRANT PARTICIPATION SUMMARY

A. TWDB PROJECT NO.	B. ENTITY NAME	C. PROGRAM TYPE (Check One)	
		DRINKING WATER SRF (DWSRF) ☐	CLEAN WATER SRF (CWSRF) ☐
		COLONIA WASTEWATER (CWTAP) ☐	Other (Describe) ☐
D. PROCUREMENT BY (Check One):		APPLICANT/ENTITY ☐	PRIME CONTRACTOR ☐

E. COMPLETE IF PROCUREMENT BY PRIME:	
PRIME CONTRACTOR NAME	TWDB CONSTRUCTION CONTRACT NO.
Description (Proj. Name, Work Order #, Project #., etc.)	

F. ALL ACTUAL CONTRACTS/PROCUREMENTS MADE

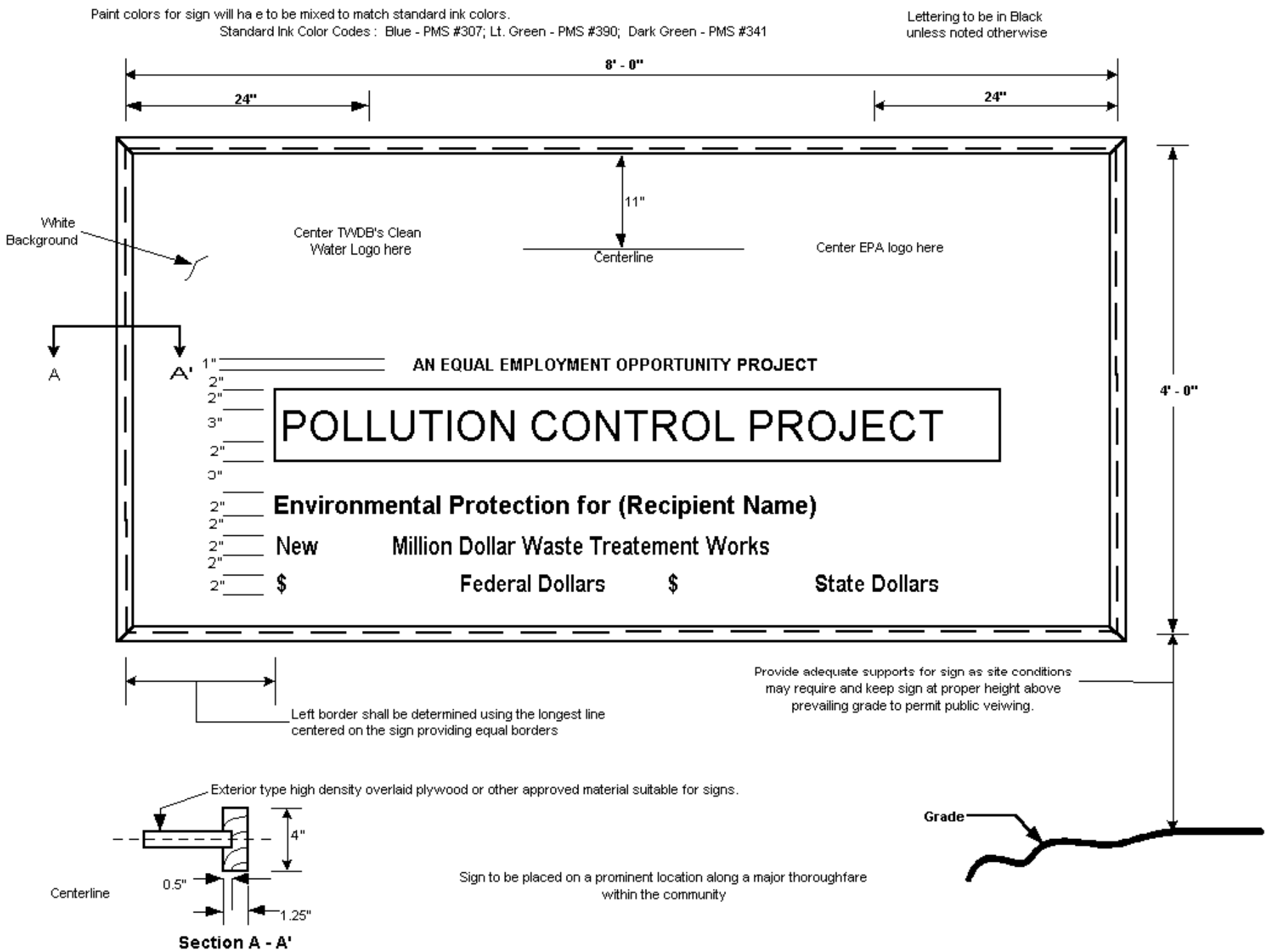
1. List the full name, street address, city, state, and zip code for each BUSINESS.
2. Enter one of the following contract/procurement categories: Construction; Supplies; Equipment; or Services.
3. Enter Type of Business: SBE; MBE; WBE; SBRA; or Other.
4. Enter the contract amount.
5. Enter date contract executed and/or goods procured.
6. Enter type of Certification (state, private certifier, or self) attached for SMWBE contractors.

1. Name & Address of Business	2. Category	3. Type Business	4. Contract Amount	5. Contract Execution Date	6. Type Certification Attached

I certify the above listed firms were procured to work on this project. I will inform the TWDB if any small, minority, or women-owned firms are terminated from the project.

G. SIGNATURE AUTHORIZED ENTITY REPRESENTATIVE	TITLE	DATE

TWDB USE ONLY – COMPLETION CHECK BY Project Reviewer	
SIGNATURE	**DATE**
REVIEW AND APPROVAL BY SMWBE ADMINISTRATOR	
SIGNATURE	**DATE**


Paint colors for sign will ha e to be mixed to match standard ink colors.
Standard Ink Color Codes : Blue - PMS #307; Lt. Green - PMS #390; Dark Green - PMS #341
Lettering to be in Black unless noted otherwise
8' - 0"
24"
24"
11"
White Background
Center TWDB's Clean Water Logo here
Centerline
Center EPA logo here
A
A'
1"
2"
2"
3"
2"
0"
2"
2"
2"
2"
2"
AN EQUAL EMPLOYMENT OPPORTUNITY PROJECT
POLLUTION CONTROL PROJECT
Environmental Protection for (Recipient Name)
New Million Dollar Waste Treatement Works
$ Federal Dollars $ State Dollars
4' - 0"
Left border shall be determined using the longest line centered on the sign providing equal borders
Provide adequate supports for sign as site conditions may require and keep sign at proper height above prevailing grade to permit public veiwing.
Exterior type high density overlaid plywood or other approved material suitable for signs.
4"
Centerline
0.5"
1.25"
Section A - A'
Grade
Sign to be placed on a prominent location along a major thoroughfare within the community

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Supplemental Conditions for Federally Assisted Water/Wastewater Infrastructures

under the

FY 1996 FEDERAL APPROPIRATIONS ACT (P.L. 104-134)
As Amended

Or

FY 1997 FEDERAL APPROPIRATIONS ACT (P.L. 104-204)
As Amended

Or

FY 1998 FEDERAL APPROPIRATIONS ACT (P.L. 105-65)
As Amended

REPRODUCTION OF THIS GUIDANCE
SHOULD ON COLORED PAPER,
PREFERABL Y PINK.

29 CFR PART 3 - CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

§ 3.3 Weekly statement with respect to payment of wages.

(a) As used in this section, the term employee shall not apply to persons in classifications higher than that of laborer or mechanic and those who are the immediate supervisors of such employees.

(b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by this part **3** and part 5 of this chapter during the preceding weekly payroll period. This statement shall be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and shall be on form WH 348, ``Statement of Compliance'', or on an identical form on the back of WH 347, ``Payroll (For Contractors Optional Use)'' or on any form with identical wording. Sample copies of WH 347 and WH 348 may be obtained from the Government contracting or sponsoring agency, and copies of these forms may be purchased at the Government Printing Office.

(c) The requirements of this section shall not apply to any contract of $2,000 or less.

(d) Upon a written finding by the head of a Federal agency, the Secretary of Labor may provide reasonable limitations, variations, tolerances, and exemptions from the requirements of this section subject to such conditions as the Secretary of Labor may specify. [29 FR 97, Jan. 4, 1964, as amended at 33 FR 10186, July 17, 1968; 47 FR 23679, May 28, 1982]

§ 3.4 Submission of weekly statements and the preservation and inspection of weekly payroll records.

(a) Each weekly statement required under 3.3 shall be delivered by the contractor or subcontractor, within seven days after the regular payment date of the payroll period, to a representative of a Federal or State agency in charge at the site of the building or work, or, if there is no representative of a Federal or State agency at the site of the building or work, the statement shall be mailed by the contractor or subcontractor, within such time, to a Federal or State agency contracting for or financing the building or work. After such examination and check as may be made, such statement, or a copy thereof, shall be kept available, or shall be transmitted together with a report of any violation, in accordance with applicable procedures prescribed by the United States Department of Labor.

(b) Each contractor or subcontractor shall preserve his weekly payroll records for a period of three years from date of completion of the contract. The payroll records shall set out accurately and completely the name and address of each laborer and mechanic, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. Such payroll records shall be made available at all times for inspection by the contracting officer or his authorized representative, and by authorized representatives of the Department of Labor. (Reporting and recordkeeping requirements in paragraph (b) have been approved by the Office of Management and Budget under control number 1215-0017) [29 FR 97, Jan. 4, 1964, as amended at 47 FR 145, Jan. 5, 1982]

29 CFR PART 5 - LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

§ 5.5 Contract provisions and related matters.

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract in excess of $2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in . 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, Provided, That such modifications are first approved by the Department of Labor):

(1) *Minimum wages.* (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in . 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at [[Page 110]] the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(1) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii)(B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of
Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(v)(A) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination with 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(v)(B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification

(2) *Withholding.* The (write in name of Federal Agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally- assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay

any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The payrolls submitted shall set out accurately and completely all of the information required to be maintained under ˙5.5(a)(3)(i) of Regulations, 29 CFR part 5. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

(B) Each payroll submitted shall be accompanied by a Statement of Compliance, signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be maintained under ˙5.5(a)(3)(i) of Regulations, 29 CFR part 5 and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the ``Statement of Compliance'' required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the (write the name of the agency) or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) *Apprentices and trainees*--(i) *Apprentices.* Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of

probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved. (ii) *Trainees.* Except as provided in 29 CFR **5**.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) *Equal employment opportunity*. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

(5) *Compliance with Copeland Act requirements.* The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

(6) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) *Contract termination: debarment*. A breach of the contract clauses in 29 CFR **5.5** may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) *Compliance with Davis-Bacon and Related Act requirements.* All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) *Disputes concerning labor standards.* Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) *Certification of eligibility*. (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR **5**.12(a)(1). (ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR **5**.12(a)(1). (iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) *Contract Work Hours and Safety Standards Act.* The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of $100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by Sec. 5.5(a) or 4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) *Overtime requirements*. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.

(3) *Withholding for unpaid wages and liquidated damages.* The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in . 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen,

working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

§ 5.6 Enforcement.

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by . 5.5 have been inserted in the contracts subject to the labor standards provisions of the Acts contained in . 5.1. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require the recipient of the Federal assistance to insert in its contracts the provisions of . 5.5. No payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency unless the agency insures that the clauses required by . 5.5 and the appropriate wage determination of the Secretary of Labor are contained in such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of . 5.5 or unless there is on file with the agency a certification by the contractor that there is a substantial dispute with respect to the required provisions.

§ 5.8 Liquidated damages under the Contract Work Hours and Safety Standards Act.

(a) The Contract Work Hours and Safety Standards Act requires that laborers or mechanics shall be paid wages at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in any workweek. In the event of violation of this provision, the contractor and any subcontractor shall be liable for the unpaid wages and in addition for liquidated damages, computed with respect to each laborer or mechanic employed in violation of the Act in the amount of $10 for each calendar day in the workweek on which such individual was required or permitted to work in excess of forty hours without payment of required overtime wages. Any contractor of subcontractor aggrieved by the withholding of liquidated damages shall have the right to appeal to the head of the agency of the United States (or the territory of District of Columbia, as appropriate) for which the contract work was performed or for which financial assistance was provided.

(b) *Findings and recommendations of the Agency Head.* The Agency Head has the authority to review the administrative determination of liquidated damages and to issue a final order affirming the determination. It is not necessary to seek the concurrence of the Administrator but the Administrator shall be advised of the action taken. Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, and the amount of the liquidated damages computed for the contract is in excess of $500, the Agency Head may make recommendations to the Secretary that an appropriate adjustment in liquidated damages be made or that the contractor or subcontractor be relieved of liability for such liquidated damages. Such findings with respect to liquidated damages shall include findings with respect to any wage underpayments for which the liquidated damages are determined.

(c) The recommendations of the Agency Head for adjustment or relief from liquidated damages under paragraph (a) of this section shall be reviewed by the Administrator or an authorized representative who shall issue an order concurring in the recommendations, partially concurring in the recommendations, or rejecting the recommendations, and the reasons therefor. The order shall be the final decision of the Department of Labor, unless a petition for review is filed pursuant to part 7 of this title, and the Administrative Review Board in its discretion reviews such decision and order; or, with respect to contracts subject to the Service Contract Act, unless petition for review is filed pursuant to part 8 of this title, and the Administrative Review Board in its discretion reviews such decision and order.

(d) Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours and Safety Standards Act for a contract is $500 or less and the Agency Head finds that the sum of liquidated damages is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours and Safety Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, an appropriate adjustment may be made in such liquidated damages or the contractor or subcontractor may be relieved of liability for such liquidated damages without submitting recommendations to this effect or a report to the Department of Labor. This delegation of authority is made under section 105 of the Contract Work Hours and Safety Standards Act and has been found to be necessary and proper in the public interest to prevent undue hardship and to avoid serious impairment of the conduct of Government business. [48 FR 19541, Apr. 29, 1983,

as amended at 51 FR 12265, Apr. 9, 1986; 51 FR 13496, Apr. 21, 1986] [[Page 119]]

§ 5.9 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with the labor standards clauses contained in . 5.5 and the applicable statutes listed in '5.1, the Federal agency, upon its own action or upon written request of an authorized representative of the Department of Labor, shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient. funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

§ 5.10 Restitution, criminal action.

(a) In cases other than those forwarded to the Attorney General of the United States under paragraph (b), of this section, where violations of the labor standards clauses contained in . 5.5 and the applicable statutes listed in . 5.1 result in underpayment of wages to employees, the Federal agency or an authorized representative of the Department of Labor shall request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of bona fide fringe benefits within the meaning of section .

(b) In cases where the Agency Head or the Administrator finds substantial evidence that such violations are willful and in violation of a criminal statute, the matter shall be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Administrator shall be informed simultaneously of the action taken.

29 CFR PART 6-RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS ENFORCING LABOR STANDARDS IN FEDERAL AND FEDERALLY ASSISTED CONSTRUCTION CONTRACTS AND FEDERAL SERVICE CONTRACTS

Subpart A--General

§ 6.1 Applicability of rules.

This part provides the rules of practice for administrative proceedings under the Service Contract Act, the Davis-Bacon Act and related statutes listed in Sec. 5.1 of part 5 of this title which require payment of wages determined in accordance with the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Act. See parts 4 and 5 of this title.

§ 6.2 Definitions.

(a) *Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative. (b) Associate Solicitor means the Associate Solicitor for Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(c) *Chief Administrative Law Judge* means the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, NW., Suite 400, Washington DC 20001-8002.

(d) *Respondent* means the contractor, subcontractor, person alleged to be responsible under the contract or subcontract, and/or any firm, corporation, partnership, or association in which such person or firm is alleged to have a substantial interest (or interest, if the proceeding is under the Davis-Bacon Act) against whom the proceedings are brought. [49 FR 10627, Mar. 21, 1984, as amended at 56 FR 54708, Oct. 22, 1991]

§ 6.3 Service; copies of documents and pleadings.

(a) *Manner of service*. Service upon any party shall be made by the party filing the pleading or document by delivering a copy or mailing a copy to the last known address. When a party is [[Page 134]] represented by an attorney, the service should be upon the attorney.

(b) *Proof of service.* A certificate of the person serving the pleading or other document by personal delivery or by mailing, setting forth the manner of said service shall be proof of the service. Where service is made by mail, service shall be complete upon mailing. However, documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges and where documents are filed by mail 5 days shall be added to the prescribed period.

(c) *Service upon Department, number of copies of pleading or other documents.* An original and three copies of all pleadings and other documents shall be filed with the Department of Labor: The original and one copy with the Administrative Law Judge before whom the case is pending, one copy with the attorney representing the Department during the hearing, and one copy with the Associate Solicitor.

§ 6.4 Subpoenas (Service Contract Act).

All applications under the Service Contract Act for subpoenas ad testificandum and subpoenas duces tecum shall be made in writing to the Administrative Law Judge. Application for subpoenas duces tecum shall specify as exactly as possible the documents to be produced.

§ 6.5 Production of documents and witnesses.

The parties, who shall be deemed to be the Department of Labor and the respondent(s), may serve on any other party a request to produce documents or witnesses in the control of the party served, setting forth with particularity the documents or witnesses requested. The party served shall have 15 days to respond or object thereto unless a shorter or longer time is ordered by the Administrative Law Judge. The parties shall produce documents and witnesses to which no privilege attaches which are in the control of the party, if so ordered by the Administrative Law Judge upon motion therefor by a party. If a privilege is claimed, it must be specifically claimed in writing prior to the hearing or orally at the hearing or deposition, including the reasons therefor. In no event shall a statement taken in confidence by the Department of Labor or other Federal agency be ordered to be produced prior to the date of testimony at trial of the person whose statement is at issue unless the consent of such person has been obtained.

§ 6.6 Administrative Law Judge.

(a) *Equal Access to Justice Act.* Proceedings under this part are not subject to the provisions of the Equal Access to Justice Act (Pub. L. 96-481). In any hearing conducted pursuant to the provisions of this part 6, Administrative Law Judges shall have no power or authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

(b) *Contumacious conduct*: failure or refusal of a witness to appear or answer. Contumacious conduct at any hearing before an Administrative Law Judge shall be ground for exclusion from the hearing., In cases arising under the Service Contract Act, the failure or refusal of a witness to appear at any hearing or at a deposition when so ordered by the Administrative Law Judge, or to answer any question which has been ruled to be proper, shall be ground for the action provided in section 5 of the Act of June 30, 1936 (41 U.S.C. 39) and, in the discretion of the Administrative Law Judge, for striking out all or part of the testimony which may have been given by such witness.

§ 6.7 Appearances.

(a) *Representation*. The parties may appear in person, by counsel, or otherwise.

(b) *Failure to appear*. In the event that a party appears at the hearing and no party appears for the opposing side, the presiding Administrative Law Judge is authorized, if such party fails to show good cause for such failure to appear, to dismiss the case or to find the facts as alleged in the complaint and to enter a default judgment

containing such findings, conclusions and order as are appropriate. Only where a petition for review of such default judgment cites alleged procedural irregularities in the proceeding below and not the merits of the case shall a non-appearing party be permitted to file such a petition for review. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Administrative Law Judge's decision.

§ 6.8 Transmission of record.

If a petition for review of the Administrative Law Judge's decision is filed with the Administrative Review Board, the Chief Administrative Law Judge shall promptly transmit the record of the proceeding. If a petition for review is not filed within the time prescribed in this part, the Chief Administrative Law Judge shall so advise the Administrator.

Subpart B--Enforcement Proceedings Under the Service Contract Act (and Under the Contract Work Hours and Safety Standards Act for Contracts Subject to the Service Contract Act)

§ 6.15 Complaints.

(a) Enforcement proceedings under the Service Contract Act and under the Contract Work Hours and Safety Standards Act for contracts subject to the Service Contract Act, may be instituted by the Associate Solicitor for Fair Labor Standards or a Regional Solicitor by issuing a complaint and causing the complaint to be served upon the respondent.

(b) The complaint shall contain a clear and concise factual statement of the grounds for relief and the relief requested.

(c) The Administrative Law Judge shall notify the parties of the time and place for a hearing.

§ 6.16 Answers.

(a) Within 30 days after the service of the complaint the respondent shall file an answer with the Chief Administrative Law Judge. The answer shall be signed by the respondent or his/her attorney.

(b) The answer shall (1) contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny each of the allegations of the complaint unless the respondent is without knowledge, in which case the answer shall so state; or (2) state that the respondent admits all of the allegations of the complaint. The answer may contain a waiver of hearing. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

(c) Failure to file an answer shall constitute grounds for waiver of hearing and entry of a default judgment unless respondent shows good cause for such failure to file. In preparing the decision of default judgment the Administrative Law Judge shall adopt as findings of fact the material facts alleged in the complaint and shall order the appropriate relief and/or sanctions.

§ 6.17 Amendments to pleadings.

At any time prior to the close of the hearing record, the complaint or answer may be amended with the permission of the Administrative Law Judge and on such terms as he/she may approve. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the data of the pleadings and which are relevant to any of the issues involved.

§ 6.18 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the discretion of the Administrative Law Judge, prior to the issuance of the decision of the Administrative Law Judge, the parties may enter into consent findings and an order disposing of the processings in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and Administrative Review Board regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 6.19 Decision of the Administrative Law Judge.

(a) Proposed findings of fact, conclusions, and order. Within 20 days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow each party may file with the Administrative Law Judge proposed findings of fact, conclusion of law, and order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) Decision of the Administrative Law Judge. (1) Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and order, or within 30 days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall make his/her decision. If any aggrieved party desires review of the decision, a petition for review thereof shall be filed as provided in Sec. 6.20 of this title, and such decision and order shall be inoperative unless and until the Administrative Review Board issues an order affirming the decision. The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made under . . 6.16, 6.17 and 6.18 of this title. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations and rulings contained in parts 4 and 5 and other pertinent parts of this title.

(2) If the respondent is found to have violated the Service Contract Act, the Administrative Law Judge shall include in his/her decision an order as to whether the respondent is to be relieved from the ineligible list as provided in section 5(a) of the Act, and, if relief is ordered, findings of the unusual circumstance, within the meaning of section 5(a) of the Act, which are the basis therefor. If respondent is found to have violated the provisions of the Contract Work Hours and Safety Standards Act, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the ineligible list as provided in . 5.12(a)(1) of part 4 of this title, including findings regarding the existence of aggravated or willful violations. If wages and/or fringe benefits are found due under the Service Contract Act and/or the Contract Work Safety Standards Act and are unpaid, no relief from the ineligible list shall be ordered except on condition that such wages and/or fringe benefits are paid.

(3) The Administrative Law Judge shall make no findings regarding liquidated damages under the Contract Work Hours and Safety Standards Act.

§ 6.20 Petition for review.

Within 40 days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board pursuant to 29 CFR part 8, with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

§6.21 Ineligible list.

(a) Upon the final decision of the Administrative Law Judge or Administrative Review Board, as appropriate, the Administrator shall within 90 days forward to the Comptroller General the name of any respondent found in violation of the Service Contract Act, including the name of any firm, corporation, partnership, or association in which the respondent has a substantial interest, unless such decision orders relief from the ineligible list because of unusual circumstances.

(b) Upon the final decision of the Administrative Law Judge or the Administrative Review Board, as appropriate, the Administrator promptly shall forward to the Comptroller General the name of any respondent found to be in aggravated or willful violation of the Contract Work Hours and Safety Standards Act, and the name of any firm, corporation, partnership, or association in which the respondent has a substantial interest.

Subpart C--Enforcement Proceedings Under the Davis-Bacon Act and Related Prevailing Wage Statutes, the Copeland Act, and the Contract Work Hours and Safety Standards Act (Except Under Contracts Subject to the Service Contract Act)

§ 6.30 Referral to Chief Administrative Law Judge.

(a) Upon timely receipt of a request for a hearing under . 5.11 (where the Administrator has determined that relevant facts are in dispute) or . 5.12 of part 5 of this title, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the notification letter to the respondent from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent.

(b) The notification letter from the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings. The notification letter and

response shall be in accordance with the provisions of ¸ 5.11 or ¸ 5.12(b)(1) of part 5 of this title, as appropriate.

§ 6.31 Amendments to pleadings.

At any time prior to the closing of the hearing record, the complaint (notification letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. For proceedings pursuant to ¸ 5.11 of part 5 of this title, such an amendment may include a statement that debarment action is warranted under ¸ 5.12(a)(1) of part 5 of this title or under section 3(a) of the Davis-Bacon Act. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 6.32 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the discretion of the Administrative Law Judge, prior to the issuance of the decision of the Administrative Law Judge, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.
(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) That any order concerning debarment under the Davis-Bacon Act (but not under any of the other statutes listed in ¸ 5.1 of part 5 of this title) shall constitute a recommendation to the Comptroller General;

(4) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board regarding those matters which are the subject of the agreement; and

(5) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(**c**) Within 30 days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 6.33 Decision of the Administrative Law Judge.

(a) Proposed findings of fact, conclusions, and order. Within 20 days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) Decision of the Administrative Law Judge. (1) Within a reasonable time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall make his/ her decision. If any aggrieved party desires review of the decision, a petition for review thereof shall be filed as provided in ¸ 6.34 of this title, and such decision and order shall be inoperative unless and until the Administrative Review Board either declines to review the decision or issues an order affirming the decision. The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. Such decision shall be in accordance with the regulations and rulings contained in part 5 and other pertinent parts of this title. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made in the respondent's answer (response) and ¸ 6.32 of this title. It shall be supported by reliable and probative evidence.

(2) If the respondent is found to have violated the labor standards provisions of any of the statutes listed in ¸ 5.1 of part 5 of this title other than the Davis-Bacon Act, and if debarment action was requested pursuant to the complaint (notification letter) or any amendment thereto, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the ineligible list as provided in ¸ 5.12(a)(1) of this title, including any findings of aggravated or willful violations. If the respondent is found to have violated the Davis-Bacon Act, and if debarment action was requested, the Administrative Law Judge shall issue as a part of the order a recommendation as to whether respondent should be subject to the ineligible list pursuant to section 3(a) of the Act, including any findings regarding respondent's disregard of obligations to employees and subcontractors.

If wages are found due and are unpaid, no relief from the ineligible list shall be ordered or recommended except on condition that such wages are paid.

(3) The Administrative Law Judge shall make no findings regarding liquidated damages under the Contract Work Hours and Safety Standards Act.

§ 6.34 Petition for review.

Within 40 days after the date of the decision of the Administrative Law judge (or such additional time as is granted by the Administrative Review Board). any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board, pursuant to part 7 of this title, with a copy thereof to the Chief Administrative Law judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the aggravated or willful violations and/or disregard of obligations to employees and subcontractors, or lack thereof, as appropriate.

§ 6.35 Ineligible lists.

Upon the final decision of the Administrative Law Judge or Administrative Review Board, as appropriate, regarding violations of any statute listed in ¸ 5.1 of part 5 of this title other than the Davis- Bacon Act, the Administrator promptly shall foward to the Comptroller General the name of any respondent found to have committed aggravated or willful violations of the labor standards provisions of such statute, and the name of any firm, corporation, partnership, or association in which such respondent has a substantial interest. Upon the final decision of the Administrative Law Judge or Administrative Review Board, as appropriate, regarding violations of the Davis-Bacon Act, the Administrator promptly shall forward to the Comptroller General any recommendation regarding debarment action against a respondent, and the name of any firm, corporation, partnership, or association in which such respondent has an interest.

Subpart D--Substantial Interest Proceedings

§ 6.40 Scope.

This subpart supplements the procedures contained in §4.12 of part 4 and ¸ 5.12(d) of part 5 of this title, and states the rules of practice applicable to hearings to determine whether persons of firms whose names appear on the ineligible list pursuant to section 5(a) of the Service Contract Act or ¸ 5.12(a)(1) of part 5 of this title have a substantial interest in any firm, corporation, partnership, or association other than those listed on the ineligible list; and/or to determine whether persons or firms whose names appear on the ineligible list pursuant to section 3(a) of the Davis-Bacon Act have an interest in any firm, corporation, partnership, or association other than those listed on the ineligible list.

§ 6.41 Referral to Chief Administrative Law Judge.

(a) Upon timely receipt of a request for a hearing under ¸ 4.12 of part 4 or ¸ 5.12 of part 5 of this title, where the Administrator has determined that relevant facts are in dispute, or on his/her own motion, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of any findings of the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the person or firm requesting the hearing, if any and upon the respondents.

(b) The findings of the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative preceedings.

§ 6.42 Amendments to pleadings.

At any time prior to the closing of the hearing record, the complaint (Administrator's findings) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened a since the data of the pleadings and which are relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 6.43 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the discretion of the Administrative Law Judge, prior to the issuance of the decision of the Administrative Law Judge, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall provide:

(1) That the order shall have the same force and effect as an order made after full hearing:

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board, as appropriate, regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall accept such agreement by issuing a decision based upon the agreed findings and order. If a such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 6.44 Decision of the Administrative Law Judge.

(a) Proposed findings of fact, conclusions, and order. Within 30 days of filing of the transcript of the testimony, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) Decision of the Administrative Law Judge. Within 60 days after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall make his/ her decision. If any aggrieved party desires review of the decision a petition for review thereof shall be filed as provided in ¸ 6.45 of this title, and such decision and order shall be inoperative unless and until the Administrative Review Board issues an order affirming the decision. The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. Such decision shall be in accordance with the regulations and rulings contained in parts 4 and 5 and other pertinent parts of this title. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made in the respondents' answer (response) and ¸ 6.43 of this title.

§ 6.45 Petition for review.

Within 30 days after the date of the decision of the Administrative Law Judge, any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board pursuant to 29 CFR part 8 if the proceeding was under the Service Contract Act, or to the Administrative Review Board pursuant to 29 CFR part 7 if the proceeding was under ¸ 5.12(a)(1) of part 5 of this title or under section 3(a) of the Davis-Bacon Act, with a copy thereof to the Chief Administrative Law Judge. The petition for review shall refer to the specific findings of fact, conclusions of law, or order at issue.

§ 6.46 Ineligible list.

Upon the final decision of the Administrative Law Judge, Administrative Review Board, as appropriate, the Administrator promptly shall forward to the Comptroller General the names of any firm, corporation, partnership, or association in which a person or firm debarred pursuant to section 5(a) of the Service Contract Act or ¸ 5.12(a) of part 5 of this title has a substantial interest; and/or the name of any firm, corporation, partnership, or association in which a person or firm debarred pursuant to section 3(a) of the Davis-Bacon Act has an interest.

Subpart E--Substantial Variance and Arm's Length Proceedings

§ 6.50 Scope.

This subpart supplements the procedures contained in ¸¸ 4.10 and 4.11 of part 4 of this title and states the rules of practice applicable to hearings under section 4(c) of the Act to determine whether the collectively bargained wages and/or fringe benefits otherwise required to be paid under that section and sections 2(a)(1) and (2) of the Act are substantially at variance with those which prevail for services of a character similar in the locality, and/or to determine whether the wages and/or fringe benefits provided in the collective bargaining agreement were reached as a result of arm's-length negotiations.

§ 6.51 Referral to Chief Administrative Law Judge.

(a) Referral pursuant to ¸ 4.10 or ¸ 4.11 of part 4 of this title will be by an Order of Reference from the Administrator to the Chief Administrative Law Judge, to which will be attached the material submitted by the applicant or any other material the Administrator considers relevant and, for proceedings pursuant to ¸ 4.11 of this title, a copy of any findings of the Administrator. A copy of the Order of Reference and all attachments will be sent by mail to the following parties: The agency whose contract is involved, the parties to the collective bargaining agreement, any contractor or subcontractor performing on the contract, any contractor or subcontractor known to be desirous of bidding thereon or performing services thereunder who is known or believed to be interested in the determination of the issue, any unions or other authorized representatives of service employees employed or who may be expected to be employed by such contractor or subcontractor on the contract work, and any other affected parties known to be interested in the determination of the issue. The Order of

Reference will have attached a certificate of service naming all interested parties who have been served.

(b) Accompanying the Order of Reference and attachments will be a notice advising that any interested party, including the applicant, who intends to participate in the proceeding shall submit a written response to the Chief Administrative Law Judge within 20 days of the date on which the certificate of service indicates the Order of Reference was mailed. The notice will state that such a response shall include:

(1) A statement of the interested party's case;

(2) A list of witnesses the interested party will present, a summary of the testimony each is expected to give, and copies of all exhibits proposed to be proffered;

(3) A list of persons who have knowledge of the facts for whom the interested party requests that subpoenas be issued and a brief statement of the purpose of their testimony; and

(4) A certificate of service in accordance with . 6.3 of this title on all interested parties, including the Administrator.

§ 6.52 Appointment of Administrative Law Judge and notification of prehearing conference and hearing date.

Upon receipt from the Administrator of an Order of Reference, notice to the parties, attachments and certificate of service, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall promptly notify all interested parties of the time and place of a prehearing conference and of the hearing which shall be held immediately upon the completion of prehearing conference. The date of the prehearing conference and hearing shall be not more than 60 days from the date on which the certificate of service indicates the Order of Reference was mailed. Sec. 6.53 Prehearing conference.

(a) At the prehearing conference the Administrative Law Judge shall attempt to determine the exact areas of agreement and disagreement raised by the Administrator's Order of Reference and replies thereto, so that the evidence and arguments presented at the hearing will be relevant, complete, and as brief and concise as possible.

(b) Any interested party desiring to file proposed findings of fact and conclusions of law shall submit them to the Administrative Law Judge at the prehearing conference.

(c) If the parties agree that no hearing is necessary to supplement the written evidence and the views and arguments that have been presented, the Administrative Law Judge shall forthwith render his/her final decision. The Administrative Law Judge with the agreement of the parties may permit submission of additional written evidence or argument, such as data accompanied by affidavits attesting to its validity or depositions, within ten days of commencement of the prehearing conference.

§ 6.54 Hearing.

(a) Except as provided in . 6.53(c) of this title, the hearing shall commence immediately upon the close of the prehearing conference. All matters remaining in controversy, including the presentation of additional evidence, shall be considered at the hearing. There shall be a minimum of formality in the proceeding consistent with orderly procedure.

(b) To expedite the proceeding the Administrative Law Judge shall, after consultation with the parties, set reasonable guidelines and limitations for the presentations to be made at the hearing. The Administrative Law Judge may limit cross-examination and may question witnesses.

(c) Under no circumstances shall source data obtained by the Bureau of Labor Statistics, U.S. Department of Labor, or the names of establishments contacted by the Bureau be submitted into evidence or otherwise disclosed. Where the Bureau has conducted a survey, the published summary of the data may be submitted into evidence.

(d) Affidavits or depositions may be admitted at the discretion of the Administrative Law Judge. The Administrative Law Judge may also require that unduly repetitious testimony be submitted as affidavits. Such affidavits shall be submitted within three days of the conclusions of the hearing

. (e) Counsel for the Administrator shall participate in the proceeding to the degree he/she deems appropriate. (f) An expedited transcript shall be made of the hearing and of the prehearing conference.

§ 6.55 Closing of record.

The Administrative Law Judge shall close the record promptly and not later than 10 days after the date of commencement of the prehearing conference.

Post-hearing briefs may be permitted, but the filing of briefs shall not delay issuance of the decision of the Administrative Law Judge pursuant to . 6.56 of this title.

§ 6.56 Decision of the Administrative Law Judge.

Within 15 days of receipt of the transcript, the Administrative Law Judge shall render his/her decision containing findings of fact and conclusions of law. The decision of the Administrative Law Judge shall be based upon consideration of the whole record, and shall be in accordance with the regulations and rulings contained in part 4 and other pertinent parts of this title. If any party desires review of the decision, a petition for review thereof shall be filed as provided in . 6.57 of this title, and such decision and order shall be inoperative unless and until the Administrative Review Board issues an order affirming the decision. If a petition has not been filed within 10 days of issuance of the Administrative Law Judge's decision, the Administrator shall promptly issue any wage determination which may be required as a result of the decision.

§ 6.57 Petition for review.

Within 10 days after the date of the decision of the Administrative Law Judge, any interested party who participated in the proceedings before the Administrative Law Judge and desires review of the decision shall file a petition for review by the Administrative Review Board pursuant to 29 CFR part 8. The petition shall refer to the specific findings of fact, conclusions of law, or order excepted to and the specific pages of transcript relevant to the petition for review.

41 CFR 60 - OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

COMPLIANCE RESPONSIBILITY FOR EQUAL EMPLOYMENT OPPORTUNITY

PART 60-1 OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

§ 60-1.4 Equal opportunity clause.

(b) Federally assisted construction contracts. (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the contractor may request the United States to enter into such litigation to

protect the interests of the United States. The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract. The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance. The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(c) Subcontracts. Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) Incorporation by reference. The equal opportunity clause may be incorporated by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director may designate.

(e) Incorporation by operation of the order. By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

(f) Adaptation of language. Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

§ 60-1.7 Reports and other required information.

(a) Requirements for prime contractors and subcontractors.

(i) Each prime contractor and subcontractor shall file annually, on or before the 31st day of March, complete and accurate reports on Standard Form 100 (EEO-1) promulgated jointly by the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission and Plans for Progress or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (I) is not exempt from the provisions of these regulations in accordance with . 60-1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontractor; and (iv) has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes: Provided, That any subcontractor below the first tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of paragraphs (a)(1) (I), (ii), and (iv) of this section.

(2) Each person required by . 60-1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with . 60-1.7(a)(1), or at such other intervals as the Director may require. The Director may extend the time for filing any report.

(3) The Director or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the Director, an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and the regulations in this part.

(b) Requirements for bidders or prospective contractors-(1) Certification of compliance with Part 60-2: Affirmative Action Programs. Each agency shall require each bidder or prospective prime contractor and

proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract: (I) Whether it has developed and has on file at each establishment affirmative action programs pursuant to Part 60-2 of this chapter; (ii) whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; (iii) whether it has filed with the Joint Reporting Committee, the Director or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

(2) Additional information. A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as theapplicant or the Director requests.

(c) Use of reports. Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

§ 60-1.8 Segregated facilities.

(a) General. In order to comply with his obligations under the equal opportunity clause, a prime contractor or subcontractor must insure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, or national origin cannot result. He may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. His obligation extends further to insuring that his employees are not assigned to perform their services at any location, under his control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term facilities as used in this section means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees.

(b) Certification by prime contractors and subcontractors. Prior to the award or any nonexempt Government contract of subcontract or federally assisted construction contract or subcontract, each agency or applicant shall require the prospective prime contractor and each prime contractor and subcontractor shall require each subcontractor to submit a certification, in the form approved by the Director, that the prospective prime contractor or subcontractor does not and will not maintain any facilities he provides for his employees in a segregated manner, or permit his employees to perform their services at any location, under his control, where segregated facilities are maintained; and that he will obtain a similar certification in the form approved by the Director, prior to the award of any nonexempt subcontract.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-4.2 Solicitations.

(a) All Federal contracting officers and all applicants shall include the notice set forth in paragraph (d) of this section and the Standard Federal Equal Employment Opportunity Construction Contract Specifications set forth in . 60-4.3 of this part in all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts to be performed in geographical areas designated by the Director pursuant to . 60-4.6 of the part. Administering agencies shall require the inclusion of the notice set forth in paragraph (d) of this section and the specifications set forth in . 60-4.3 of this part as a condition of any grant, contract, subcontract, loan, insurance or guarantee involving federally assisted construction covered by this Part 60-4.

(b) All nonconstruction contractors covered by Executive Order 11246 and the implementing regulations shall include the notice in paragraph (d) of this section in all construction agreements which are necessary in whole or in part to the performance of the covered nonconstruction contract.

(c) Contracting officers, applicants and nonconstruction contractors shall given written notice to the Director within 10 working days of award of a contract subject to these provisions. The notification shall include the name, address and telephone number of the contractor; employer identification number; dollar amount of the contract, estimated starting and completion dates of the contract; the contract number; and geographical area in which the contract is to be performed.

(d) The following notice shall be included in, and shall be a part of, all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts in excess of $10,000 to be performed in geographical areas designated by the Director pursuant to . 60-4.6 of this part (see 41 CFR 60-4.2(a)):

NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246)

1. The Offeror's or Bidder's attention is called to the Equal Opportunity Clause and the Standard Federal Equal Employment Specifications set forth herein.

2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Time-Tables	Goals for minority participation for each trade	Goals for female participation in each trade
	Insert goals for each year.	Insert goals for each year.

These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the contractor also is subject to the goals for both its federally involved and nonfederally involved construction.

The Contractor's compliance with the Executive Order and the regulations in 41 CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within 10 working days of award of any construction subcontract in excess of $10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor; employer identification number of the subcontractor; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

4. As used in this Notice, and in the contract resulting from this solicitation, the covered area is (insert description of the geographical areas where the contract is to be performed giving the state, county and city, if any).

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978, as amended at 45 FR 65977, Oct. 3, 1980]

§ 60-4.3 Equal opportunity clauses.

(a) The equal opportunity clause published at 41 CFR 60-1.4(a) of this chapter is required to be included in, and is part of, all nonexempt Federal contracts and subcontracts, including construction contracts and subcontracts. The equal opportunity clause published at 41 CFR 60-1.4(b) is required to be included in, and is a part of, all nonexempt federally assisted construction contracts and subcontracts. In addition to the clauses described above, all Federal contracting officers, all applicants and all nonconstruction contractors, as applicable, shall include the specifications set forth in this section in all Federal and federally assisted construction contracts in excess of $10,000 to be performed in geographical areas designated by the director pursuant to . 60-4.6 of this part and in construction subcontracts in excess of $10,000 necessary in whole or in part to the performance of nonconstruction Federal contracts and subcontracts covered under the Executive order.

STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)

1. As used in these specifications:

a. Covered area means the geographical area described in the solicitation from which this contract resulted;

b. Director means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

c. Employer identification number means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

d. Minority includes:

(i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

(iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of $10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.

3. If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7 a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered Construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.

d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.
p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

9. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment

opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

11. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.

14. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

(b) The notice set forth in 41 CFR 60-4.2 and the specifications set forth in 41 CFR 60-4.3 replace the New Form for Federal Equal Employment Opportunity Bid Conditions for Federal and Federally Assisted Construction published at 41 FR 32482 and commonly known as the Model Federal EEO Bid Conditions, and the New Form shall not be used after the regulations in 41 CFR Part 60-4 become effective.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978, as amended at 45 FR 65978, Oct. 3, 1980]

40 CFR PART 7 - NONDISCRIMINATION IN PROGRAMS RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY

Subpart A--General

Subpart B--Discrimination Prohibited on the Basis of Race, Color, National Origin or Sex

Subpart C--Discrimination Prohibited on the Basis of Handicap

Subpart D--Requirements for Applicants and Recipients

Subpart E--Agency Compliance Procedures

Authority: 42 U.S.C. 2000d to 2000d-4; 29 U.S.C. 794; 33 U.S.C. 1251 nt.
Source: 49 FR 1659, Jan. 12, 1984, unless otherwise noted.

Subpart A--General

§ 7.10 Purpose of this part.

This part implements: Title VI of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act of 1973, as amended; and section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, (collectively, the Acts).

§7.15 Applicability.

This part applies to all applicants for, and recipients of, EPA assistance in the operation of programs or activities receiving such assistance beginning February 13, 1984. New construction (§7.70) for which design was initiated prior to February 13, 1984, shall comply with the accessibility requirements in the Department of Health, Education and Welfare (now the Department of Health and Human Services) nondiscrimination regulation, 45 CFR 84.23, issued June 3, 1977, or with equivalent standards that ensure the facility is readily accessible to and usable by handicapped persons. Such assistance includes but is not limited to that which is listed in the *Catalogue of Federal Domestic Assistance under* the 66.000 series. It supersedes the provisions of former 40 CFR parts 7 and 12.

§7.20 Responsible agency officers.

(a) The EPA Office of Civil Rights (OCR) is responsible for developing and administering EPA's compliance programs under the Acts.

(b) EPA's Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request.

§ 7.25 Definitions.

As used in this part:

Administrator means the Administrator of EPA. It includes any other agency official authorized to act on his or her behalf, unless explicity stated otherwise.

Alcohol abuse means any misuse of alcohol which demonstrably interferes with a person's health, interpersonal relations or working ability.

Applicant means any entity that files an application or unsolicited proposal or otherwise requests EPA assistance (see definition for EPA assistance).

Assistant Attorney General is the head of the Civil Rights Division, U.S. Department of Justice.

Award Official means the EPA official with the authority to approve and execute assistance agreements and to take other assistance related actions authorized by this part and by other EPA regulations or delegation of authority.

Drug abuse means:

(a) The use of any drug or substance listed by the Department of Justice in 21 CFR 1308.11, under authority of the Controlled Substances Act, 21 U.S.C. 801, as a controlled substance unavailable for prescription because:

(1) The drug or substance has a high potential for abuse,

(2) The drug or other substance has no currently accepted medical use in treatment in the United States, or (3) There is a lack of accepted safety for use of the drug or other substance under medical supervision. Note: Examples of drugs under paragraph (a)(1) of this section include certain opiates and opiate derivatives (e.g., heroin) and hallucinogenic substances (e.g., marijuana, mescaline, peyote) and depressants (e.g., methaqualone). Examples of (a)(2) include opium, coca leaves, methadone, amphetamines and barbiturates.

(b) The misuse of any drug or substance listed by the Department of Justice in 21 CFR 1308.12-1308.15 under authority of the Controlled Substances Act as a controlled substance available for prescription.

EPA means the United States Environmental Protection Agency.

EPA assistance means any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of personnel; or

(3) Real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if EPA's share of its fair market value is not returned to EPA.

Facility means all, or any part of, or any interests in structures, equipment, roads, walks, parking lots, or other real or personal property.

Handicapped person:

(a) ***Handicapped person*** means any person who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. For purposes of employment, the term handicapped person does not include any person who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current drug or alcohol abuse, would constitute a direct threat to property or the safety of others.

(b) As used in this paragraph, the phrase:

(1) ***Physical or mental impairment*** means (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; and (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) ***Major life activities*** means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) ***Has a record of such an impairment*** means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) ***Is regarded as having an impairment*** means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined above but is treated by a recipient as having such an impairment.

Office of Civil Rights or OCR means the Director of the Office of Civil Rights, EPA Headquarters or his/her designated representative.

Project Officer means the EPA official designated in the assistance agreement (as defined in EPA assistance) as EPA's program contact with the recipient; Project Officers are responsible for monitoring the project. ***Qualified handicapped person*** means:

(a) With respect to employment: A handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question.

(b) With respect to services: A handicapped person who meets the essential eligibility requirements for the receipt of such services.

Racial classifications:[1]

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[1] Additional subcategories based on national origin or primary language spoken may be used where appropriate on either a national or a regional basis. Subparagraphs (a) through (e) are in conformity with Directive 15 of the Office of Federal Statistical Policy and Standards, whose function is now in the Office of Information and Regulatory Affairs, Office of Management and Budget. Should that office, or any successor office, change or otherwise amend the categories listed in Directive 15, the categories in this paragraph shall be interpreted to conform with any such changes or amendments. ----------

(a) ***American Indian or Alaskan native***. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(b) ***Asian or Pacific Islander.*** A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.

(c) ***Black and not of Hispanic origin.*** A person having origins in any of the black racial groups of Africa.

(d) ***Hispanic.*** A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless or race.

(e) ***White, not of Hispanic origin.*** A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Recipient means, for the purposes of this regulation, any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

Section 13 refers to section 13 of the Federal Water Pollution Control Act Amendments of 1972.

United States includes the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico,

the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and all other territories and possessions of the United States; the term ***State*** includes any one of the foregoing.

Subpart B--Discrimination Prohibited on the Basis of Race, Color, National Origin or Sex

§ 7.30 General prohibition.

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act, as amended, including the Environmental Financing Act of 1972.

§ 7.35 Specific prohibitions.

(a) As to any program or activity receiving EPA assistance, a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin or, if applicable, sex:

(1) Deny a person any service, aid or other benefit of the program;

(2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program;

(3) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program;

(4) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program;

(5) Deny a person or any group of persons the opportunity to participate as members of any planning or advisory body which is an integral part of the program, such as a local sanitation board or sewer authority;

(6) Discriminate in employment on the basis of sex in any program subject to section 13, or on the basis of race, color, or national origin in any program whose purpose is to create employment; or, by means of employment discrimination, deny intended beneficiaries the benefits of the EPA assistance program, or subject the beneficiaries to prohibited discrimination.

(7) In administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination.

(b) A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

(c) A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

(d) The specific prohibitions of discrimination enumerated above do not limit the general prohibition of §7.30.

Subpart C--Discrimination Prohibited on the Basis of Handicap

§ 7.45 General prohibition.

No qualified handicapped person shall solely on the basis of handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance.

§ 7.50 Specific prohibitions against discrimination.

(a) A recipient, in providing any aid, benefit or service under any program or activity receiving EPA assistance shall not, on the basis of handicap, directly or through contractual, licensing, or other arrangement:

(1) Deny a qualified handicapped person any service, aid or other benefit of a federally assisted program;

(2) Provide different or separate aids, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless the action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others;

(3) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an entity that discriminates on the basis of handicap in providing aids, benefits, or services to beneficiaries of the recipient's program;

(4) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(5) Limit a qualified handicapped person in any other way in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service from the program.

(b) A recipient may not, in determining the site or location of a facility, make selections: (1) That have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from EPA assistance or (2) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity receiving EPA assistance with respect to handicapped persons.

(c) A recipient shall not use criteria or methods of administering any program or activity receiving EPA assistance which have the effect of subjecting individuals to discrimination because of their handicap, or have the effect of defeating or substantially impairing accomplishment of

the objectives of such program or activity with respect to handicapped persons.

(d) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

(e) The exclusion of non-handicapped persons or specified classes of handicapped persons from programs limited by Federal statute or Executive Order to handicapped persons or a different class of handicapped persons is not prohibited by this subpart.

§ 7.55 Separate or different programs.

Recipients shall not deny a qualified handicapped person an opportunity equal to that afforded others to participate in or benefit from the aid, benefit, or service in the program receiving EPA assistance. Recipients shall administer programs in the most integrated setting appropriate to the needs of qualified handicapped persons.

§ 7.60 Prohibitions and requirements relating to employment.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from Federal assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur, and shall not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; or

(9) Any other term, condition, or privilege of employment.

(d) A recipient shall not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(e) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(f) A recipient shall not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

(g) A recipient shall not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except as permitted by the Department of Justice in 28 CFR 42.513.

§7.65 Accessibility.

(a) ***General***. A recipient shall operate each program or activity receiving EPA assistance so that such program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not:

(1) Necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

(2) Require a recipient to take any action that the recipient can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. If an action would result in such an alternation or such financial and administrative burdens, the recipient shall be required to take any other action that would not result in such an alteration or financial and administrative burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity receiving EPA assistance.

(b) ***Methods of making existing programs accessible***. A recipient may comply with the accessibility requirements of this section by making structural changes, redesigning equipment, reassigning services to accessible buildings, assigning aides to beneficiaries, or any other means that make its program or activity accessible to handicapped persons. In choosing among alternatives, a recipient must give priority to methods that offer program benefits to handicapped persons in the most integrated setting appropriate.

(c) ***Deadlines.*** (1) Except where structural changes in facilities are necessary, recipients must adhere to the provisions of this section within 60 days after the effective date of this part.

(2) Recipients having an existing facility which does require alterations in order to make a program or activity accessible must prepare a transition plan in accordance with § 7.75 within six months from the effective date of this part.

The recipient must complete the changes as soon as possible, but not later than three years from date of award.

(d) ***Notice of accessibility***. The recipient must make sure that interested persons, including those with impaired vision or hearing, can find out about the existence and location of the assisted program services, activities, and facilities that are accessible to and usable by handicapped persons.

(e) ***Structural and financial feasibility.*** This section does not require structural alterations to existing facilities if making such alterations would not be structurally or financially feasible. An alteration is not structurally feasible when it has little likelihood of being accomplished without removing or altering a load-bearing structural member. Financial feasibility shall take into account the degree to which the alteration work is to be assisted by EPA assistance, the cost limitations of the program under which such assistance is provided, and the relative cost of accomplishing such alterations in manners consistent and inconsistent with accessibility.

§ 7.70 New construction.

(a) ***General.*** New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(b) ***Conformance with Uniform Federal Accessibility Standards.*** (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[49 FR 1659, Jan. 12, 1984, as amended at 55 FR 52138, 52142, Dec. 19, 1990]

§ 7.75 Transition plan.

If structural changes to facilities are necessary to make the program accessible to handicapped persons, a recipient must prepare a transition plan.

(a) ***Requirements.*** The transition plan must set forth the steps needed to complete the structural changes required and must be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. At a minimum, the transition plan must:

(1) Identify the physical obstacles in the recipient's facilities that limit handicapped persons' access to its program or activity,

(2) Describe in detail what the recipient will do to make the facilities accessible,

(3) Specify the schedule for the steps needed to achieve full program accessibility, and include a year-by-year timetable if the process will take more than one year,

(4) Indicate the person responsible for carrying out the plan.

(b) ***Availability.*** Recipients shall make available a copy of the transition plan to the OCR upon request and to the public for inspection at either the site of the project or at the recipient's main office.

Subpart D--Requirements for Applicants and Recipients

§ 7.80 Applicants.

(a) ***Assurances***--(1) ***General***. Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part. Applicants must also submit any other information that the OCR determines is necessary for preaward review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this part.

(2) ***Duration of assurance***--(i) ***Real property***. When EPA awards assistance in the form of real property, or assistance to acquire real property, or structures on the property, the assurance will obligate the recipient, or transferee, during the period the real property or structures are used for the purpose for which EPA assistance is extended, or for another purpose in which similar services or benefits are provided. The transfer instrument shall contain a covenant running with the land which assures nondiscrimination. Where applicable, the covenant shall also retain a right of reverter which will permit EPA to recover the property if the covenant is ever broken.

(ii) ***Personal property.*** When EPA provides assistance in the form of personal property, the assurance will obligate the recipient for so long as it continues to own or possess the property.

(iii) ***Other forms of assistance.*** In all other cases, the assurance will obligate the recipient for as long as EPA assistance is extended.

(b) ***Wastewater treatment project***. EPA Form 4700-4 shall also be submitted with applications for assistance under Title II of the Federal Water Pollution Control Act.

(c) ***Compliance information***. Each applicant for EPA assistance shall submit regarding the program or activity that would receive EPA assistance:

(1) Notice of any lawsuit pending against the applicant alleging discrimination on the basis of race, color, sex, handicap, or national origin;

(2) A brief description of any applications pending to other Federal agencies for assistance, and of Federal assistance being provided at the time of the application; and

(3) A statement describing any civil rights compliance reviews regarding the applicant conducted during the two-year period before the application, and information concerning the agency or organization performing the reviews.

(Approved by the Office of Management and Budget under control number 2000-0006)

§ 7.85 Recipients.

(a) ***Compliance information***. Each recipient shall collect, maintain, and on request of the OCR, provide the following information to show compliance with this part: (1) A brief description of any lawsuits pending against the recipient that allege discrimination which this part prohibits;

(2) Racial/ethnic, national origin, sex and handicap data, or EPA Form 4700-4 information submitted with its application;

(3) A log of discrimination complaints which identifies the complaint, the date it was filed, the date the recipient's investigation was completed, the disposition, and the date of disposition; and

(4) Reports of any compliance reviews conducted by any other agencies.

(b) ***Additional compliance information***. If necessary, the OCR may require recipients to submit data and information specific to certain programs to determine compliance where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance or to investigate a complaint alleging discrimination in a program or activity receiving EPA assistance. Requests shall be limited to data and information which is relevant to determining compliance and shall be accompanied by a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist.

(c) ***Self-evaluation.*** Each recipient must conduct a self-evaluation of its administrative policies and practices, to consider whether such policies and practices may involve handicap discrimination prohibited by this part. When conducting the self-evaluation, the recipient shall consult with interested and involved persons including handicapped persons or organizations representing handicapped persons. The evaluation shall be completed within 18 months after the effective date of this part.

(d) Preparing compliance information. In preparing compliance information, a recipient must:

(1) [Reserved]

(2) Use the racial classifications set forth in § 7.25 in determining categories of race, color or national origin.

(e) ***Maintaining compliance information.*** Recipients must keep records for paragraphs (a) and (b) of this section for three (3) years after completing the project. When any complaint or other action for alleged failure to comply with this part is brought before the three-year period ends, the recipient shall keep records until the complaint is resolved.

(f) Accessibility to compliance information. A recipient shall:

(1) Give the OCR access during normal business hours to its books, records, accounts and other sources of information, including its facilities, as may be pertinent to ascertain compliance with this part;

(2) Make compliance information available to the public upon request; and

(3) Assist in obtaining other required information that is in the possession of other agencies, institutions, or persons not under the recipient's control. If such party refuses to release that information, the recipient shall inform the OCR and explain its efforts to obtain the information.

(g) *Coordination of compliance effort.* If the recipient employs fifteen (15) or more employees, it shall designate at least one person to coordinate its efforts to comply with its obligations under this part.

(Approved by the Office of Management and Budget under control number 2000-0006)

§ 7.90 Grievance procedures.

(a) ***Requirements***. Each recipient shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part.

(b) ***Exception.*** Recipients with fewer than fifteen (15) full-time employees need not comply with this section unless the OCR finds a violation of this part or determines that creating a grievance procedure will not significantly impair the recipient's ability to provide benefits or services.

§ 7.95 Notice of nondiscrimination.

(a) ***Requirements.*** A recipient shall provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, or handicap in a program or activity receiving EPA assistance or, in programs covered by section 13, on the basis of sex. Methods of notice must accommodate those with impaired vision or hearing. At a minimum, this notice must be posted in a prominent place in the recipient's offices or facilities. Methods of notice may also include publishing in newspapers and magazines, and placing notices in recipient's internal publications or on recipient's printed letterhead. Where appropriate, such notice must be in a language or languages other than English. The notice must identify the responsible employee designated in accordance with § 7.85.

(b) ***Deadline.*** Recipients of assistance must provide initial notice by thirty (30) calendar days after award and continuing notice for the duration of EPA assistance.

§ 7.100 Intimidation and retaliation prohibited.

No applicant, recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group, either:

(a) For the purpose of interfering with any right or privilege guaranteed by the Acts or this part, or

(b) Because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part, or has opposed any practice made unlawful by this regulation.

Subpart E--Agency Compliance Procedures

§ 7.105 General policy.

EPA's Administrator, Director of the Office of Civil Rights, Project Officers and other responsible officials shall seek the cooperation of applicants and recipients in securing compliance with this part, and are available to provide help.

§ 7.110 Preaward compliance.

(a) ***Review of compliance information***. Within EPA's application processing period, the OCR will determine whether the applicant is in compliance with this part and inform the Award Official. This determination will be based on the submissions required by § 7.80 and any other information EPA receives during this time (including complaints) or has on file about the applicant. When the OCR cannot make a determination on the basis of this information, additional information will be requested from the applicant, local government officials, or interested persons or organizations, including handicapped persons or organizations representing such persons. The OCR may also conduct an on- site review only when it has reason to believe discrimination may be occurring in a program or activity which is the subject of the application.

(b) ***Voluntary compliance***. If the review indicates noncompliance, an applicant may agree in writing to take the steps the OCR recommends to come into compliance with this part. The OCR must approve the written agreement before any award is made.

(c) ***Refusal to comply.*** If the applicant refuses to enter into such an agreement, the OCR shall follow the procedure established by paragraph (b) of § 7.130.

§ 7.115 Postaward compliance.

(a) ***Periodic review***. The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.

(b) ***Notice of review***. After selecting a recipient for review or initiating a complaint investigation in accordance with § 7.120, the OCR will inform the recipient of:

(1) The nature of and schedule for review, or investigation; and

(2) Its opportunity, before the determination in paragraph (d) of this section is made, to make a written submission responding to, rebutting, or denying the allegations raised in the review or complaint.

(c) ***Postreview notice***. (1) Within 180 calendar days from the start of the compliance review or complaint investigation, the OCR will notify the recipient in writing by certified mail, return receipt requested, of:

(i) Preliminary findings;

(ii) Recommendations, if any, for achieving voluntary compliance; and

(iii) Recipient's right to engage in voluntary compliance negotiations where appropriate.

(2) The OCR will notify the Award Official and the Assistant Attorney General for Civil Rights of the preliminary findings of noncompliance.

(d) ***Formal determination of noncompliance.*** After receiving the notice of the preliminary finding of noncompliance in paragraph (c) of this section, the recipient may:

(1) Agree to the OCR's recommendations, or

(2) Submit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended by OCR

. If the recipient does not take one of these actions within fifty (50) calendar days after receiving this preliminary notice, the OCR shall, within fourteen (14) calendar days, send a formal written determination of noncompliance to the recipient and copies to the Award Official and Assistant Attorney General.

(e) ***Voluntary compliance time limits***. The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance in which to come into voluntary compliance. If the recipient fails to meet this deadline, the OCR must start proceedings under paragraph (b) of § 7.130.

(f) ***Form of voluntary compliance agreements.*** All agreements to come into voluntary compliance must:

(1) Be in writing;

(2) Set forth the specific steps the recipient has agreed to take, and

(3) Be signed by the Director, OCR or his/her designee and an official with authority to legally bind the recipient.

§ 7.120 Complaint investigations.

The OCR shall promptly investigate all complaints filed under this section unless the complainant and the party complained against agree to a delay pending settlement negotiations.

(a) ***Who may file a complaint.*** A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination. Complaints solely alleging employment discrimination against an individual on the basis of race, color, national origin, sex or religion shall be processed under the procedures for complaints of employment discrimination filed against recipients of Federal assistance (see 28 CFR part 42, subpart H and 29 CFR part 1691). Complainants are encouraged but not required to make use of any grievance procedure established under § 7.90 before filing a complaint. Filing a complaint through a grievance procedure does not extend the 180 day calendar requirement of paragraph (b)(2 of this section.

(b) ***Where, when and how to file complaint.*** The complainant may file a complaint at any EPA office. The complaint may be referred to the region in which the alleged discriminatory acts occurred.

(1) The complaint must be in writing and it must describe the alleged discriminatory acts which violate this part.

(2) The complaint must be filed within 180 calendar days of the alleged discriminatory acts, unless the OCR waives the time limit for good cause. The filing of a grievance with the recipient does not satisfy the requirement that complaints must be filed within 180 days of the alleged discriminatory acts.

(c) ***Notification.*** The OCR will notify the complainant and the recipient of the agency's receipt of the complaint within five (5) calendar days.

(d) ***Complaint processing procedures.*** After acknowledging receipt of a complaint, the OCR will immediately initiate complaint processing procedures.

(1) ***Preliminary investigation.*** (i) Within twenty (20) calendar days of acknowledgment of the complaint, the OCR will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.

(ii) If the complaint is accepted, the OCR will notify the complainant and the Award Official. The OCR will also notify the applicant or recipient complained against of the allegations and give the applicant or recipient opportunity to make a written submission responding to, rebutting, or denying the allegations raised in the complaint.

(iii) The party complained against may send the OCR a response to the notice of complaint within thirty (30) calendar days of receiving it.

(2) ***Informal resolution***. (i) OCR shall attempt to resolve complaints informally whenever possible. When a complaint cannot be resolved informally, OCR shall follow the procedures established by paragraphs (c) through (e) of § 7.115.

(ii) [Reserved]

(e) ***Confidentiality.*** EPA agrees to keep the complainant's identity confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Ordinarily in complaints of employment discrimination, the name of the complainant will be given to the recipient with the notice of complaint.

(f) [Reserved]

(g) ***Dismissal of complaint.*** If OCR's investigation reveals no violation of this part, the Director, OCR, will dismiss the complaint and notify the complainant and recipient.

§ 7.125 Coordination with other agencies.

If, in the conduct of a compliance review or an investigation, it becomes evident that another agency has jurisdiction over the subject matter, OCR will cooperate with that agency during the continuation of the review of investigation. EPA will:

(a) Coordinate its efforts with the other agency, and

(b) Ensure that one of the agencies is designated the lead agency for this purpose. When an agency other than EPA serves as the lead agency, any action taken, requirement imposed, or determination made by the lead agency, other than a final determination to terminate funds, shall have the same effect as though such action had been taken by EPA.

§ 7.130 Actions available to EPA to obtain compliance.

(a) ***General***. If compliance with this part cannot be assured by informal means, EPA may terminate or refuse to award or to continue assistance. EPA may also use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.

(b) ***Procedure to deny, annul, suspend or terminate EPA assistance***-- (1) ***OCR finding***. If OCR determines that an applicant or recipient is not in compliance with this part, and if compliance cannot be achieved voluntarily, OCR shall make a finding of noncompliance. The OCR will notify the applicant or recipient (by registered mail, return receipt requested) of the finding, the action proposed to be taken, and the opportunity for an evidentiary hearing.

(2) ***Hearing***. (i) Within 30 days of receipt of the above notice, the applicant or recipient shall file a written answer, under oath or affirmation, and may request a hearing.

(ii) The answer and request for a hearing shall be sent by registered mail, return receipt requested, to the Chief Administrative Law Judge (ALJ) (A-110), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Upon receipt of a request for a hearing, the ALJ will send the applicant or recipient a copy of the ALJ's procedures. If the recipient does not request a hearing, it shall be deemed to have waived its right to a hearing, and the OCR finding shall be deemed to be the ALJ's determination.

(3) ***Final decision and disposition***. (i) The applicant or recipient may, within 30 days of receipt of the ALJ's determination, file with the Administrator its exceptions to that determination. When such exceptions are filed, the Administrator may, within 45 days after the ALJ's determination, serve to the applicant or recipient, a notice that he/she will review the determination. In the absence of either exceptions or notice of review, the ALJ's determination shall constitute the Administrator's final decision.

(ii) If the Administrator reviews the ALJ's determination, all parties shall be given reasonable opportunity to file written statements. A copy of the Administrator's decision will be sent to the applicant or recipient.

(iii) If the Administrator's decision is to deny an application, or annul, suspend or terminate EPA assistance, that decision becomes effective thirty (30) days from the date on which the Administrator submits a full written report of the circumstances and grounds for such action to the Committees of the House and Senate having legislative jurisdiction over the program or activity involved. The decision of the Administrator shall not be subject to further administrative appeal under EPA's General Regulation for Assistance Programs (40 CFR part 30, subpart L).

(4) ***Scope of decision***. The denial, annulment, termination or suspension shall be limited to the particular applicant or recipient who was found to have discriminated, and shall be limited in its effect to the particular program or the part of it in which the discrimination was found.

§ 7.135 Procedure for regaining eligibility.

(a) ***Requirements***. An applicant or recipient whose assistance has been denied, annulled, terminated, or suspended under this part regains eligibility as soon as it:
(1) Provides reasonable assurance that it is complying and will comply with this part in the future, and

(2) Satisfies the terms and conditions for regaining eligibility that are specified in the denial, annulment, termination or suspension order.

(b) ***Procedure***. The applicant or recipient must submit a written request to restore eligibility to the OCR declaring that it has met the requirements set forth in paragraph (a) of this section. Upon determining that these requirements have been met, the OCR must notify the Award Official, and the applicant or recipient that eligibility has been restored.

(c) Rights on denial of restoration of eligibility. If the OCR denies a request to restore eligibility, the applicant or recipient may file a written request for a hearing before the EPA Chief Administrative Law Judge in accordance with paragraph (c) § 7.130, listing the reasons it believes the OCR was in error.

40 CFR PART 31-UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Authority: 33 U.S.C. 1251 et seq.; 42 U.S.C. 7401 et seq.; 42 U.S.C. 6901 et seq.; 42 U.S.C. 300f et seq.; 7 U.S.C. 136 et seq.; 15 U.S.C. 2601 et seq.; 42 U.S.C. 9601 et seq.; 20 U.S.C. 4011 et seq.; 33 U.S.C. 1401 et seq. Source: 53 FR 8075 and 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A-General

§ 31.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 31.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 31.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF-269 Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the U.S. Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted-not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of grant in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than equipment as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. ***Termination*** does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 31.4 Applicability.

(a) ***General.*** Subparts A-D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of . 31.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583-the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs f the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) ***Entitlement programs***. Entitlement programs enumerated above in . 31.4(a) (3) through (8) are subject to subpart E.

§ 31.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in . 31.6.

§ 31.6 Additions and exceptions

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the Federal Register.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(1) In the Environmental Protection Agency, the Director, Grants Administration Division, is authorized to grant the exceptions.

(d) The EPA Director is also authorized to approve exceptions, on a class or an individual case basis, to EPA program-specific assistance regulations other than those which implement statutory and executive order requirements.

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8075, Mar. 11, 1988]

Subpart B-Pre-Award Requirements

§ 31.10 Forms for applying for grants.

(a) ***Scope.*** (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) ***Authorized forms and instructions for governmental organizations.*** (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 31.11 State plans.

(a) ***Scope.*** The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, Intergovernmental Review of Federal Programs, States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive Order.

(b) ***Requirements.*** A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) ***Assurances.*** In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) ***Amendments.*** A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 31.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered high risk if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

§ 31.13 Principal environmental statutory provisions applicable to EPA assistance awards.

Grantees shall comply with all applicable Federal laws including:

(a) Section 306 of the Clean Air Act, (42 U.S.C. 7606).

(b) Section 508 of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1368).

(c) Section 1424(e) of the Safe Drinking Water Act, (42 U.S.C. 300h-3(e)).

[53 FR 8075, Mar. 11, 1988]

Subpart C-Post-Award Requirements

Financial Administration

§ 31.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to-

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) ***Financial reporting.*** Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) ***Accounting records.*** Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) ***Internal control.*** Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) ***Budget control.*** Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) ***Allowable cost.*** Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) ***Source documentation.*** Accounting records must be supported by such source documentation as canceled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) ***Cash management.*** Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 31.21 Payment.

(a) ***Scope***. This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) ***Basic standard.*** Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) ***Advances.*** Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) ***Reimbursement.*** Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) ***Working capital advances***. If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined

that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) ***Effect of program income, refunds, and audit recoveries on payment.*** (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) ***Withholding payments.*** (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless-

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with . 31.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) ***Cash depositories.*** (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) ***Interest earned on advances.*** Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§ 31.22 Allowable costs.

(a) ***Limitation on use of funds.*** Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) ***Applicable cost principles.*** For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a-	. Use the principles in-
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OBM Circular A-122.
Educational institutions.....	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 31.23 Period of availability of funds.

(a) ***General.*** Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) ***Liquidation of obligations.*** A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The

Federal agency may extend this deadline at the request of the grantee.

§ 31.24 Matching or cost sharing.

(a) ***Basic rule:*** Costs and contributions acceptable. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) ***Qualifications and exceptions-(1) Costs borne by other Federal grant agreements.*** Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) ***General revenue sharing.*** For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) ***Cost or contributions counted towards other Federal costs-sharing requirements.*** Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) ***Costs financed by program income.*** Costs financed by program income, as defined in ¸ 31.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in ¸ 31.25(g).)

(5) ***Services or property financed by income earned by contractors.*** Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) ***Records.*** Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) ***Special standards for third party in-kind contributions.*** (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) ***Valuation of donated services***-(1) ***Volunteer services.*** Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) ***Employees of other organizations.*** When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) ***Valuation of third party donated supplies and loaned equipment or space.*** (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) ***Valuation of third party donated equipment, buildings, and land.*** If a third party donates equipment, buildings, or land, and title passes to a grantee or

subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) ***Awards for capital expenditures.*** If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) ***Other awards.*** If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (I) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(I) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in . 31.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) ***Valuation of grantee or subgrantee donated real property for construction/acquisition.*** If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) ***Appraisal of real property.*** In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 31.25 Program income.

(a) ***General.*** Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) ***Definition of program income.*** Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) ***Cost of generating program income.*** If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) ***Governmental revenues.*** Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) ***Royalties.*** Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See . 31.34.)

(f) ***Property.*** Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of . . 31.31 and 31.32.

(g) ***Use of program income.*** Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) ***Deduction.*** Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) ***Addition.*** When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) ***Cost sharing or matching.*** When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) ***Income after the award period.*** There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 31.26 Non-Federal audit.

(a) ***Basic rule***. Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) ***Subgrantees.*** State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations have met the audit requirement. Commercial contractors (private for profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) ***Auditor selection.*** In arranging for audit services, . 31.36 shall be followed.

Changes, Property, and Subawards

§ 31.30 Changes.

(a) ***General.*** Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) ***Relation to cost principles.*** The applicable cost principles (see . 31.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) ***Budget changes.*** (1) ***Nonconstruction projects.*** Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) ***Construction projects.*** Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) ***Combined construction and nonconstruction projects.*** When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) ***Programmatic changes.*** Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of . 31.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) ***Additional prior approval requirements.*** The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) ***Requesting prior approval.*** (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see . 31.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 31.31 Real property.

(a) ***Title.*** Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) ***Use.*** Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) ***Disposition.*** When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1)***Retention of title.*** Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) ***Sale of property.*** Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) ***Transfer of title.*** Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 31.32 Equipment.

(a) ***Title.*** Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) ***States.*** A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) ***Use.*** (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in . 31.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a

trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) ***Management requirements.*** Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) ***Disposition.*** When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) ***Federal equipment.*** In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) ***Right to transfer title.*** The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards: (1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 31.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 31.33 Supplies.

(a) ***Title.*** Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) ***Disposition.*** If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 31.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 31.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, Debarment and Suspension."

§ 31.36 Procurement.

(a) ***States.*** When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or

other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) ***Procurement standards.*** (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only-

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) ***Competition.*** (1) All procurement transactions will be conducted in a manner providing full and open

competition consistent with the standards of . 31.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a brand name" product instead of allowing an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

NOTE: THE EPA-ASSISTED WATER AND WASTEWATER INFRASTRUCTURES PROJECTS AUTHORIZED UNDER THE P. L. 105-65 AND AS AMENDED ARE NOT SUBJECT TO THE FOLLOWING SECTION (5) Buy American REQUIREMENTS.

(5) Construction grants awarded under Title II of the Clean Water Act are subject to the following Buy American" requirements in paragraphs (c)(5)(I)-(iii) of this section. Section 215 of the Clean Water Act requires that contractors give preference to the use of domestic material in the construction of EPA-funded treatment works.

(i) Contractors must use domestic construction materials in preference to nondomestic material if it is priced no more than 6 percent higher than the bid or offered price of the nondomestic material, including all costs of delivery to the construction site and any applicable duty, whether or not assessed. The grantee will normally base the computations on prices and costs in effect on the date of opening bids or proposals.

(ii) The award official may waive the Buy American provision based on factors the award official considers relevant, including:

(A) Such use is not in the public interest;

(B) The cost is unreasonable;

(C) The Agency's available resources are not sufficient to implement the provision, subject to the Deputy Administrator's concurrence;

(D) The articles, materials or supplies of the class or kind to be used or the articles, materials or supplies from which they are manufactured are not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities or satisfactory quality for the particular project; or

(E) Application of this provision is contrary to multilateral government procurement agreements, subject to the Deputy Administrator's concurrence.

(iii) All bidding documents, subagreements, and, if appropriate, requests for proposals must contain the following Buy American" provision: In accordance with section 215 of the Clean Water Act (33 U.S.C. 1251 et seq.) and implementing EPA regulations, the contractor agrees that preference will be given to domestic construction materials by the contractor, subcontractors, materialmen and suppliers in the performance of this subagreement.

(d) ***Methods of procurement to be followed*** (1) ***Procurement by small purchase procedures.*** Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase

procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in 31.36(d)(2)(I) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents,
factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-+reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor
surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (I) through (v) of this section.

(f) *Contract cost and price*. (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see . 31.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) ***Awarding agency review***. (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a brand name product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) ***Bonding requirements***. For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A *bid guarantee from each bidder equivalent to five percent of the bid price.* The bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will,

upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) ***Contract provisions***. A grantee's and subgrantee's contracts must contain provisions in paragraph (I) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

NOTE: THE EPA-ASSISTED WATER AND WASTEWATER INFRASTRUCTURES PROJECTS AUTHORIZED UNDER THE P. L. 105-65 AND AS AMENDED ARE NOT SUBJECT TO THE FOLLOWING SECTION (5) THE DAVIS-BACON ACT REQUIREMENTS.

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of $2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

(j) ***Payment to consultants***. (1) EPA will limit its participation in the salary rate (excluding overhead) paid to individual consultants retained by grantees or by a grantee's contractors or subcontractors to the maximum daily rate for a GS-18. (Grantees may, however, pay consultants more than this amount). This limitation applies to consultation services of designated individuals with specialized skills who are paid at a daily or hourly rate. This rate does not include transportation and subsistence costs for travel performed; grantees will pay these in accordance with their normal travel reimbursement practices. (Pub. L. 99-591).

(2) Subagreements with firms for services which are awarded using the procurement requirements in this part are not affected by this limitation.

(k) ***Use of the same architect or engineer during construction.*** (1) If the grantee is satisfied with the qualifications and performance of the architect or engineer who provided any or all of the facilities planning or design services for a waste-water treatment works project and wishes to retain that firm or individual during construction of the project, it may do so without further public notice and evaluation of qualifications, provided:

(i) The grantee received a facilities planning (Step 1) or design grant (Step 2), and selected the architect or

engineer in accordance with EPA's procurement regulations in effect when EPA awarded the grant; or

(ii) The award official approves noncompetitive procurement under . 31.36(d)(4) for reasons other than simply using the same individual or firm that provided facilities planning or design services for the project; or

(iii) The grantee attests that:

(A) The initial request for proposals clearly stated the possibility that the firm or individual selected could be awarded a subagreement for services during construction; and

(B) The firm or individual was selected for facilities planning or design services in accordance with procedures specified in this section.

(C) No employee, officer or agent of the grantee, any member of their immediate families, or their partners have financial or other interest in the firm selected for award; and

(D) None of the grantee's officers, employees or agents solicited or accepted gratuities, favors or anything of monetary value from contractors or other parties to subagreements.

(2) However, if the grantee uses the procedures in paragraph (k)(1) of this section to retain an architect or engineer, any Step 3 subagreements between the architect or engineer and the grantee must meet all of the other procurement provisions in . 31.36.

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8075, Mar. 11, 1988]

§ 31.37 Subgrants.

(a) ***States***. States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with . 31.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) ***All other grantees***. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) ***Exceptions.*** By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 31.10;

(2) Section 31.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in . 31.21; and

(4) Section 31.50.

Reports, Records, Retention, and Enforcement

§ 31.40 Monitoring and reporting program performance.

(a) ***Monitoring by grantees***. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) ***Nonconstruction performance reports***. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) ***Construction performance reports***. For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) ***Significant developments***. Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) ***Waivers, extensions***. (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 31.41 Financial Reporting.

(a) ***General.*** (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decision making purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) ***Financial Status Report***-(1) *Form*. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with . 31.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency*. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date*. When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) ***Federal Cash Transactions Report***-(1) *Form*. (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the Remarks section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) ***Request for advance or reimbursement***-(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in . 31.41(b)(3).

(e) ***Outlay report and request for reimbursement for construction programs.*** (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in . 31.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in . 31.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by . 31.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in . 31.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in . 31.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 31.41(b)(2).

§ 31.42 Retention and access requirements for records.

(a) ***Applicability***. (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see . 31.36(I)(10).

(b) ***Length of retention period***. (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate record keeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) ***Starting date of retention period***-(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage charge back rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) ***Substitution of microfilm.*** Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) ***Access to records-(1) Records of grantees and subgrantees.*** The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) ***Restrictions on public access.*** The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 31.43 Enforcement.

(a) ***Remedies for noncompliance***. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(i) EPA can also wholly or partly annul the current award for the grantee's or subgrantee's program,

(ii) [Reserved]

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) ***Hearings, appeals***. In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) ***Effects of suspension and termination***. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) ***Relationship to Debarment and Suspension***. The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to Debarment and Suspension" under E.O. 12549 (see . 31.35).

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8076, Mar. 11, 1988]

§ 31.44 Termination for convenience.

Except as provided in . 31.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be

terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either . 31.43 or paragraph (a) of this section.

§ 31.45 Quality assurance.

If the grantee's project involves environmentally related measurements or data generation, the grantee shall develop and implement quality assurance practices consisting of policies, procedures, specifications, standards, and documentation sufficient to produce data of quality adequate to meet project objectives and to minimize loss of data due to out-of-control conditions or malfunctions.

[53 FR 8076, Mar. 11, 1988]

Subpart D-After-The-Grant Requirements

§ 31.50 Closeout.

(a) ***General.*** The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) ***Reports.*** Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this time frame. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable.)*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:*

In accordance with . 31.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) ***Cost adjustment***. The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) ***Cash adjustments***. (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 31.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in . 31.42;

(d) Property management requirements in . . 31.31 and 31.32; and

(e) Audit requirements in . 31.26.

§ 31.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E-Entitlement [Reserved]

Subpart F-Disputes

§ 31.70 Disputes.

(a) Disagreements should be resolved at the lowest level possible.

(b) If an agreement cannot be reached, the EPA disputes decision official will provide a written final decision. The EPA disputes decision official is the individual designated by the award official to resolve disputes concerning assistance agreements.

(c) The disputes decision official's decision will constitute final agency action unless a request for review is filed by registered mail, return receipt requested, within 30 calendar days of the date of the decision.

(1) For final decisions issued by an EPA disputes decision official at Headquarters, the request for review shall be filed with the Assistant Administrator responsible for the assistance program.

(2) For final decisions issued by a Regional disputes decision official, the request for review shall be filed with the Regional Administrator. If the Regional Administrator issued the final decision, the request for

reconsideration shall be filed with the Regional Administrator.

(d) The request shall include:

(1) A copy of the EPA disputes decision official's final decision;

(2) A statement of the amount in dispute;

(3) A description of the issues involved; and

(4) A concise statement of the objections to the final decision.

(e) The disputant(s) may be represented by counsel and may submit documentary evidence and briefs for inclusion in a written record.

(f) Disputants are entitled to an informal conference with EPA officials.

(g) Disputants are entitled to a written decision from the appropriate Regional or Assistant Administrator.

(h) A decision by the Assistant Administrator to confirm the final decision of a Headquarters disputes decision official will constitute the final Agency action.

(i) A decision by the Regional Administrator to confirm the Regional disputes decision official's decision will constitute the final Agency action. However, a petition for discretionary review by the Assistant Administrator responsible for the assistance program may be filed within 30 calendar days of the Regional Administrator's decision. The petition shall be sent to the Assistant Administrator by registered mail, return receipt requested, and shall include:

(1) A copy of the Regional Administrator's decision; and

(2) A concise statement of the objections to the decision.

(j) If the Assistant Administrator decides not to review the Regional Administrator's decision, the Assistant Administrator will advise the disputant(s) in writing that the Regional Administrator's decision remains the final Agency action.

(k) If the Assistant Administrator decides to review the Regional Administrator's decision, the review will generally be limited to the written record on which the Regional Administrator's decision was based. The Assistant Administrator may allow the disputant(s) to submit briefs in support of the petition for review and may provide an opportunity for an informal conference in order to clarify technical or legal issues. After reviewing the Regional Administrator's decision, the Assistant Administrator will issue a written decision which will then become the final Agency action.

(l) Reviews may not be requested of:

(1) Decisions on requests for exceptions under . 31.6;

(2) Bid protest decisions under . 31.36(b)(12);

(3) National Environmental Policy Act decisions under part 6;

(4) Advanced wastewater treatment decisions of the Administrator; and

(5) Policy decisions of the EPA Audit Resolution Board.

[53 FR 8076, Mar. 11, 1988]

Appendix A to Part 31- Audits of States, Local Governments, and Non-Profit Organizations

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

Circular No. A-133

Revised June 24, 1997

To the Heads of Executive Departments and Establishments.

Subject: Audits of States, Local Governments, and Non-Profit Organizations

1. **Purpose**. This Circular is issued pursuant to the Single Audit Act of 1984, P.L. 98-502, and the Single Audit Act Amendments of 1996, P.L. 104-156. It sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of States, local governments, and non-profit organizations expending Federal awards.

2. **Authority**. Circular A-133 is issued under the authority of sections 503, 1111, and 7501 *et seq*. of title 31, United States Code, and Executive Orders 8248 and 11541.

3. **Rescission and Supersession**. This Circular rescinds Circular A-128, "Audits of State and Local Governments," issued April 12, 1985, and supersedes the prior Circular A-133, "Audits of Institutions of Higher Education and Other Non-Profit Institutions," issued April 22, 1996. For effective dates, see paragraph 10.

4. **Policy**. Except as provided herein, the standards set forth in this Circular shall be applied by all Federal agencies. If any statute specifically prescribes policies or specific requirements that differ from the standards provided herein, the provisions of the subsequent statute shall govern.

Federal agencies shall apply the provisions of the sections of this Circular to non-Federal entities, whether they are recipients expending Federal awards received directly from Federal awarding agencies, or are subrecipients expending Federal awards received from a pass-through entity (a recipient or another subrecipient).

This Circular does not apply to non-U.S. based entities expending Federal awards received either directly as a recipient or indirectly as a subrecipient.

5. **Definitions**. The definitions of key terms used in this Circular are contained in §___.105 in the Attachment to this Circular.

6. **Required Action**. The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in the Attachment to this Circular. Federal agencies making awards to non-Federal entities, either directly or indirectly, shall adopt the language in the Circular in codified regulations as provided in Section 10 (below), unless different provisions are required by Federal statute or are approved by the Office of Management and Budget (OMB).

7. **OMB Responsibilities**. OMB will review Federal agency regulations and implementation of this Circular, and will provide interpretations of policy requirements and assistance to ensure uniform, effective and efficient implementation.

8. **Information Contact**. Further information concerning Circular A-133 may be obtained by contacting the Financial Standards and Reporting Branch, Office of Federal Financial Management, Office of Management and Budget, Washington, DC 20503, telephone (202) 395-3993.

9. **Review Date**. This Circular will have a policy review three years from the date of issuance.

10. **Effective Dates**. The standards set forth in §___.400 of the Attachment to this Circular, which apply directly to Federal agencies, shall be effective July 1, 1996, and shall apply to audits of fiscal years beginning after June 30, 1996, except as otherwise specified in §___.400(a).

The standards set forth in this Circular that Federal agencies shall apply to non-Federal entities shall be adopted by Federal agencies in codified regulations not later than 60 days after publication of this final revision in the **Federal Register**, so that they will apply to audits of fiscal years beginning after June 30, 1996, with the exception that §___.305(b) of the Attachment applies to audits of fiscal years beginning after June 30, 1998. The requirements of Circular A-128, although the Circular is rescinded, and the 1990 version of Circular A-133 remain in effect for audits of fiscal years beginning on or before June 30, 1996.

/S/
Franklin D. Raines
Director

Attachment

PART__ --AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-PROFIT ORGANIZATIONS

Subpart A--General

§___.100 Purpose.

This part sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards.

§___.105 Definitions.

Auditee means any non-Federal entity that expends Federal awards which must be audited under this part.
Auditor means an auditor, that is a public accountant or a Federal, State or local government audit organization, which meets the general standards specified in generally accepted government auditing standards (GAGAS). The term **auditor** does not include internal auditors of non-profit organizations.

Audit finding means deficiencies which the auditor is required by **§___.510(a)** to report in the schedule of findings and questioned costs.

CFDA number means the number assigned to a Federal program in the **Catalog of Federal Domestic Assistance** (CFDA).

Cluster of programs means a grouping of closely related programs that share common compliance

requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. "Other clusters" are as defined by the Office of Management and Budget (OMB) in the compliance supplement or as designated by a State for Federal awards the State provides to its subrecipients that meet the definition of a cluster of programs. When designating an "other cluster," a State shall identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with **§___.400(d)(1)** and **§___.400(d)(2)**, respectively. A cluster of programs shall be considered as one program for determining major programs, as described in **§___.520**, and, with the exception of R&D as described in **§___.200(c)**, whether a program-specific audit may be elected.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in **§___.400(a)**.

Compliance supplement refers to the **Circular A-133 Compliance Supplement**, included as Appendix B to Circular A-133, or such documents as OMB or its designee may issue to replace it. This document is available from the Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325.

Corrective action means action taken by the auditee that:

(1) Corrects identified deficiencies;

(2) Produces recommended improvements; or

(3) Demonstrates that audit findings are either invalid or do not warrant auditee action.

Federal agency has the same meaning as the term **agency** in Section 551(1) of title 5, United States Code.
Federal award means Federal financial assistance and Federal cost-reimbursement contracts that non-Federal entities receive directly from Federal awarding agencies or indirectly from pass-through entities. It does not include procurement contracts, under grants or contracts, used to buy goods or services from vendors. Any audits of such vendors shall be covered by the terms and conditions of the contract. Contracts to operate Federal Government owned, contractor operated facilities (GOCOs) are excluded from the requirements of this part.

Federal awarding agency means the Federal agency that provides an award directly to the recipient.

Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, loans, loan guarantees, property (including donated surplus property), cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, and other assistance, but does not include amounts received as reimbursement for services rendered to individuals as described in **§___.205(h)** and **§___.205(i)**.

Federal program means:

(1) All Federal awards to a non-Federal entity assigned a single number in the CFDA.

(2) When no CFDA number is assigned, all Federal awards from the same agency made for the same purpose should be combined and considered one program.

(3) Notwithstanding paragraphs **(1)** and **(2)** of this definition, a cluster of programs. The types of clusters of programs are:

(i) Research and development (R&D);

(ii) Student financial aid (SFA); and

(iii) "Other clusters," as described in the definition of cluster of programs in this section.

GAGAS means generally accepted government auditing standards issued by the Comptroller General of the United States, which are applicable to financial audits.

Generally accepted accounting principles has the meaning specified in generally accepted auditing standards issued by the American Institute of Certified Public Accountants (AICPA).

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporation (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Internal control means a process, effected by an entity's management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

(1) Effectiveness and efficiency of operations;

(2) Reliability of financial reporting; and

(3) Compliance with applicable laws and regulations.

Internal control pertaining to the compliance requirements for Federal programs (Internal control over Federal programs) means a process--effected by an entity's management and other personnel--designed to provide reasonable assurance regarding the achievement of the following objectives for Federal programs:

(1) Transactions are properly recorded and accounted for to:

(i) Permit the preparation of reliable financial statements and Federal reports;

(ii) Maintain accountability over assets; and

(iii) Demonstrate compliance with laws, regulations, and other compliance requirements;

(2) Transactions are executed in compliance with:

(i) Laws, regulations, and the provisions of contracts or grant agreements that could have a direct and material effect on a Federal program; and

(ii) Any other laws and regulations that are identified in the compliance supplement; and

(3) Funds, property, and other assets are safeguarded against loss from unauthorized use or disposition.

Loan means a Federal loan or loan guarantee received or administered by a non-Federal entity.

Local government means any unit of local government within a State, including a county, borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

Major program means a Federal program determined by the auditor to be a major program in accordance with **§___.520** or a program identified as a major program by a Federal agency or pass-through entity in accordance with **§___.215(c)**.

Management decision means the evaluation by the Federal awarding agency or pass-through entity of the audit findings and corrective action plan and the issuance of a written decision as to what corrective action is necessary.

Non-Federal entity means a State, local government, or non-profit organization.

Non-profit organization means:

(1) any corporation, trust, association, cooperative, or other organization that:

(i) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;

(ii) Is not organized primarily for profit; and

(iii) Uses its net proceeds to maintain, improve, or expand its operations; and

(2) The term **non-profit organization** includes non-profit institutions of higher education and hospitals.

OMB means the Executive Office of the President, Office of Management and Budget.

Oversight agency for audit means the Federal awarding agency that provides the predominant amount of direct funding to a recipient not assigned a cognizant agency for audit. When there is no direct funding, the Federal agency with the predominant indirect funding shall assume the oversight responsibilities. The duties of the oversight agency for audit are described in **§___.400(b)**.

Pass-through entity means a non-Federal entity that provides a Federal award to a subrecipient to carry out a Federal program.

Program-specific audit means an audit of one Federal program as provided for in **§___.200(c)** and **§___.235**.

Questioned cost means a cost that is questioned by the auditor because of an audit finding:

(1) Which resulted from a violation or possible violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the use of Federal funds, including funds used to match Federal funds;

(2) Where the costs, at the time of the audit, are not supported by adequate documentation; or

(3) Where the costs incurred appear unreasonable and do not reflect the actions a prudent person would take in the circumstances.

Recipient means a non-Federal entity that expends Federal awards received directly from a Federal awarding agency to carry out a Federal program.

Research and development (R&D) means all research activities, both basic and applied, and all development activities that are performed by a non-Federal entity. **Research** is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. **Development** is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Single audit means an audit which includes both the entity's financial statements and the Federal awards as described in **§___.500**.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, any multi-State, regional, or interstate entity which has governmental functions, and any Indian tribe as defined in this section.

Student Financial Aid (SFA) includes those programs of general student assistance, such as those authorized by Title IV of the Higher Education Act of 1965, as amended, (20 U.S.C. 1070 **et seq.**) which is administered by the U.S. Department of Education, and similar

programs provided by other Federal agencies. It does not include programs which provide fellowships or similar Federal awards to students on a competitive basis, or for specified studies or research.

Subrecipient means a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency. Guidance on distinguishing between a subrecipient and a vendor is provided in **§___.210**.

Types of compliance requirements refers to the types of compliance requirements listed in the compliance supplement. Examples include: activities allowed or unallowed; allowable costs/cost principles; cash management; eligibility; matching, level of effort, earmarking; and, reporting.

Vendor means a dealer, distributor, merchant, or other seller providing goods or services that are required for the conduct of a Federal program. These goods or services may be for an organization's own use or for the use of beneficiaries of the Federal program. Additional guidance on distinguishing between a subrecipient and a vendor is provided in **§___.210**.

Subpart B--Audits

§___.200 Audit requirements.

(a) **Audit required**. Non-Federal entities that expend $300,000 or more in a year in Federal awards shall have a single or program-specific audit conducted for that year in accordance with the provisions of this part. Guidance on determining Federal awards expended is provided in **§___.205**.

(b) **Single audit**. Non-Federal entities that expend $300,000 or more in a year in Federal awards shall have a single audit conducted in accordance with **§___.500** except when they elect to have a program-specific audit conducted in accordance with paragraph **(c)** of this section.

(c) **Program-specific audit election**. When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's laws, regulations, or grant agreements do not require a financial statement audit of the auditee, the auditee may elect to have a program-specific audit conducted in accordance with **§___.235**. A program-specific audit may not be elected for R&D unless all of the Federal awards expended were received from the same Federal agency, or the same Federal agency and the same pass-through entity, and that Federal agency, or pass-through entity in the case of a subrecipient, approves in advance a program-specific audit.

(d) **Exemption when Federal awards expended are less than $300,000**. Non-Federal entities that expend less than $300,000 a year in Federal awards are exempt fromFederal audit requirements for that year, except as noted in **§___.215(a)**, but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and General Accounting Office (GAO).

(e) **Federally Funded Research and Development Centers (FFRDC)**. Management of an auditee that owns or operates a FFRDC may elect to treat the FFRDC as a separate entity for purposes of this part.

§___.205 Basis for determining Federal awards expended.

(a) **Determining Federal awards expended**. The determination of when an award is expended should be based on when the activity related to the award occurs. Generally, the activity pertains to events that require the non-Federal entity to comply with laws, regulations, and the provisions of contracts or grant agreements, such as: expenditure/expense transactions associated with grants, cost-reimbursement contracts, cooperative agreements, and direct appropriations; the disbursement of funds passed through to subrecipients; the use of loan proceeds under loan and loan guarantee programs; the receipt of property; the receipt of surplus property; the receipt or use of program income; the distribution or consumption of food commodities; the disbursement of amounts entitling the non-Federal entity to an interest subsidy; and, the period when insurance is in force.

(b) **Loan and loan guarantees (loans)**. Since the Federal Government is at risk for loans until the debt is repaid, the following guidelines shall be used to calculate the value of Federal awards expended under loan programs, except as noted in paragraphs **(c)** and **(d)** of this section:

(1) Value of new loans made or received during the fiscal year; plus

(2) Balance of loans from previous years for which the Federal Government imposes continuing compliance requirements; plus

(3) Any interest subsidy, cash, or administrative cost allowance received.

(c) **Loan and loan guarantees (loans) at institutions of higher education**. When loans are made to students of an institution of higher education but the institution does not make the loans, then only the value of loans made during the year shall be considered Federal awards expended in that year. The balance of loans for previous years is not included as Federal awards expended because the lender accounts for the prior balances.

(d) **Prior loan and loan guarantees (loans)**. Loans, the proceeds of which were received and expended in prior-years, are not considered Federal awards expended under this part when the laws, regulations, and the provisions of contracts or grant agreements pertaining to such loans

impose no continuing compliance requirements other than to repay the loans.

(e) **Endowment funds**. The cumulative balance of Federal awards for endowment funds which are federally restricted are considered awards expended in each year in which the funds are still restricted.

(f) **Free rent**. Free rent received by itself is not considered a Federal award expended under this part. However, free rent received as part of an award to carry out a Federal program shall be included in determining Federal awards expended and subject to audit under this part.

(g) **Valuing non-cash assistance**. Federal non-cash assistance, such as free rent, food stamps, food commodities, donated property, or donated surplus property, shall be valued at fair market value at the time of receipt or the assessed value provided by the Federal agency.

(h) **Medicare**. Medicare payments to a non-Federal entity for providing patient care services to Medicare eligible individuals are not considered Federal awards expended under this part.

(i) **Medicaid**. Medicaid payments to a subrecipient for providing patient care services to Medicaid eligible individuals are not considered Federal awards expended under this part unless a State requires the funds to be treated as Federal awards expended because reimbursement is on a cost-reimbursement basis.

(j) **Certain loans provided by the National Credit Union Administration**. For purposes of this part, loans made from the National Credit Union Share Insurance Fund and the Central Liquidity Facility that are funded by contributions from insured institutions are not considered Federal awards expended.

§___.210 Subrecipient and vendor determinations.

(a) **General**. An auditee may be a recipient, a subrecipient, and a vendor. Federal awards expended as a recipient or a subrecipient would be subject to audit under this part. The payments received for goods or services provided as a vendor would not be considered Federal awards. The guidance in paragraphs **(b)** and **(c)** of this section should be considered in determining whether payments constitute a Federal award or a payment for goods and services.

(b) **Federal award**. Characteristics indicative of a Federal award received by a subrecipient are when the organization:

(1) Determines who is eligible to receive what Federal financial assistance;

(2) Has its performance measured against whether the objectives of the Federal program are met;

(3) Has responsibility for programmatic decision making;

(4) Has responsibility for adherence to applicable Federal program compliance requirements; and

(5) Uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity.

(c) **Payment for goods and services**. Characteristics indicative of a payment for goods and services received by a vendor are when the organization:

(1) Provides the goods and services within normal business operations;

(2) Provides similar goods or services to many different purchasers;

(3) Operates in a competitive environment;

(4) Provides goods or services that are ancillary to the operation of the Federal program; and

(5) Is not subject to compliance requirements of the Federal program.

(d) **Use of judgment in making determination**. There may be unusual circumstances or exceptions to the listed characteristics. In making the determination of whether a subrecipient or vendor relationship exists, the substance of the relationship is more important than the form of the agreement. It is not expected that all of the characteristics will be present and judgment should be used in determining whether an entity is a subrecipient or vendor.

(e) **For-profit subrecipient**. Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The contract with the for-profit subrecipient should describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the contract, and post-award audits.

(f) **Compliance responsibility for vendors**. In most cases, the auditee's compliance responsibility for vendors is only to ensure that the procurement, receipt, and payment for goods and services comply with laws, regulations, and the provisions of contracts or grant agreements. Program compliance requirements normally do not pass through to vendors. However, the auditee is responsible for ensuring compliance for vendor transactions which are structured such that the vendor is responsible for program compliance or the vendor's records must be reviewed to determine program compliance. Also, when these vendor transactions relate to a major program, the scope of the audit shall include determining whether these transactions are in compliance with laws, regulations, and the provisions of contracts or grant agreements.

§___.215 Relation to other audit requirements.

(a) **Audit under this part in lieu of other audits**. An audit made in accordance with this part shall be in lieu of any financial audit required under individual Federal awards. To the extent this audit meets a Federal agency's needs, it shall rely upon and use such audits. The provisions of this part neither limit the authority of Federal agencies, including their Inspectors General, or GAO to conduct or arrange for additional audits (e.g., financial audits, performance audits, evaluations, inspections, or reviews) nor authorize any auditee to constrain Federal agencies from carrying out additional audits. Any additional audits shall be planned and performed in such a way as to build upon work performed by other auditors.

(b) **Federal agency to pay for additional audits**. A Federal agency that conducts or contracts for additional audits shall, consistent with other applicable laws and regulations, arrange for funding the full cost of such additional audits.

(c) **Request for a program to be audited as a major program**. A Federal agency may request an auditee to have a particular Federal program audited as a major program in lieu of the Federal agency conducting or arranging for the additional audits. To allow for planning, such requests should be made at least 180 days prior to the end of the fiscal year to be audited. The auditee, after consultation with its auditor, should promptly respond to such request by informing the Federal agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in **§___.520** and, if not, the estimated incremental cost. The Federal agency shall then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal agency request, and the Federal agency agrees to pay the full incremental costs, then the auditee shall have the program audited as a major program. A pass-through entity may use the provisions of this paragraph for a subrecipient.

§___.220 Frequency of audits.

Except for the provisions for biennial audits provided in paragraphs **(a)** and **(b)** of this section, audits required by this part shall be performed annually. Any biennial audit shall cover both years within the biennial period.

(a) A State or local government that is required by constitution or statute, in effect on January 1, 1987, to undergo its audits less frequently than annually, is permitted to undergo its audits pursuant to this part biennially. This requirement must still be in effect for the biennial period under audit.

(b) Any non-profit organization that had biennial audits for all biennial periods ending between July 1, 1992, and January 1, 1995, is permitted to undergo its audits pursuant to this part biennially.

§___.225 Sanctions.

No audit costs may be charged to Federal awards when audits required by this part have not been made or have been made but not in accordance with this part. In cases of continued inability or unwillingness to have an audit conducted in accordance with this part, Federal agencies and pass-through entities shall take appropriate action using sanctions such as:

(a) Withholding a percentage of Federal awards until the audit is completed satisfactorily;

(b) Withholding or disallowing overhead costs;

(c) Suspending Federal awards until the audit is conducted; or

(d) Terminating the Federal award.

§___.230 Audit costs.

(a) **Allowable costs**. Unless prohibited by law, the cost of audits made in accordance with the provisions of this part are allowable charges to Federal awards. The charges may be considered a direct cost or an allocated indirect cost, as determined in accordance with the provisions of applicable OMB cost principles circulars, the Federal Acquisition Regulation (FAR) (48 CFR parts 30 and 31), or other applicable cost principles or regulations.

(b) **Unallowable costs**. A non-Federal entity shall not charge the following to a Federal award:

(1) The cost of any audit under the Single Audit Act Amendments of 1996 (31 U.S.C. 7501 **et seq**.) not conducted in accordance with this part.

(2) The cost of auditing a non-Federal entity which has Federal awards expended of less than $300,000 per year and is thereby exempted under **§___.200(d)** from having an audit conducted under this part. However, this does not prohibit a pass-through entity from charging Federal awards for the cost of limited scope audits to monitor its subrecipients in accordance with **§___.400(d)(3)**, provided the subrecipient does not have a single audit. For purposes of this part, limited scope audits only include agreed-upon procedures engagements conducted in accordance with either the AICPA's generally accepted auditing standards or attestation standards, that are paid for and arranged by a pass-through entity and address only one or more of the following types of compliance requirements: activities allowed or unallowed; allowable costs/cost principles; eligibility; matching, level of effort, earmarking; and, reporting.

§___.235 Program-specific audits.

(a) **Program-specific audit guide available**. In many cases, a program-specific audit guide will be available to provide specific guidance to the auditor with respect to

internal control, compliance requirements, suggested audit procedures, and audit reporting requirements. The auditor should contact the Office of Inspector General of the Federal agency to determine whether such a guide is available. When a current program-specific audit guide is available, the auditor shall follow GAGAS and the guide when performing a program-specific audit.

(b) **Program-specific audit guide not available**. (1) When a program-specific audit guide is not available, the auditee and auditor shall have basically the same responsibilities for the Federal program as they would have for an audit of a major program in a single audit.

(2) The auditee shall prepare the financial statement(s) for the Federal program that includes, at a minimum, a schedule of expenditures of Federal awards for the program and notes that describe the significant accounting policies used in preparing the schedule, a summary schedule of prior audit findings consistent with the requirements of **§___.315(b)**, and a corrective action plan consistent with the requirements of **§___.315(c)**.

(3) The auditor shall:

(i) Perform an audit of the financial statement(s) for the Federal program in accordance with GAGAS;

(ii) Obtain an understanding of internal control and perform tests of internal control over the Federal program consistent with the requirements of **§___.500(c)** for a major program;

(iii) Perform procedures to determine whether the auditee has complied with laws, regulations, and the provisions of contracts or grant agreements that could have a direct and material effect on the Federal program consistent with the requirements of **§___.500(d)** for a major program; and

(iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding in accordance with the requirements of **§___.500(e)**.

(4) The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) shall state that the audit was conducted in accordance with this part and include the following:

(i) An opinion (or disclaimer of opinion) as to whether the financial statement(s) of the Federal program is presented fairly in all material respects in conformity with the stated accounting policies;

(ii) A report on internal control related to the Federal program, which shall describe the scope of testing of internal control and the results of the tests;

(iii) A report on compliance which includes an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the provisions of contracts or grant agreements which could have a direct and material effect on the Federal program; and

(iv) A schedule of findings and questioned costs for the Federal program that includes a summary of the auditor's results relative to the Federal program in a format consistent with **§___.505(d)(1)** and findings and questioned costs consistent with the requirements of **§___.505(d)(3)**.

(c) **Report submission for program-specific audits**.

(1) The audit shall be completed and the reporting required by paragraph **(c)(2)** or **(c)(3)** of this section submitted within the earlier of 30 days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance by the Federal agency that provided the funding or a different period is specified in a program-specific audit guide. (However, for fiscal years beginning on or before June 30, 1998, the audit shall be completed and the required reporting shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or 13 months after the end of the audit period, unless a different period is specified in a program-specific audit guide.) Unless restricted by law or regulation, the auditee shall make report copies available for public inspection.

(2) When a program-specific audit guide is available, the auditee shall submit to the Federal clearinghouse designated by OMB the data collection form prepared in accordance with **§___.320(b)**, as applicable to a program-specific audit, and the reporting required by the program-specific audit guide to be retained as an archival copy. Also, the auditee shall submit to the Federal awarding agency or pass-through entity the reporting required by the program-specific audit guide.

(3) When a program-specific audit guide is not available, the reporting package for a program-specific audit shall consist of the financial statement(s) of the Federal program, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph **(b)(2)** of this section, and the auditor's report(s) described in paragraph **(b)(4)** of this section. The data collection form prepared in accordance with **§___.320(b)**, as applicable to a program-specific audit, and one copy of this reporting package shall be submitted to the Federal clearinghouse designated by OMB to be retained as an archival copy. Also, when the schedule of findings and questioned costs disclosed audit findings or the summary schedule of prior audit findings reported the status of any audit findings, the auditee shall submit one copy of the reporting package to the Federal clearinghouse on behalf of the Federal awarding agency, or directly to the pass-through entity in the case of a subrecipient. Instead of submitting the reporting package to the pass-through entity, when a subrecipient is not required to submit a

reporting package to the pass-through entity, the subrecipient shall provide written notification to the pass-through entity, consistent with the requirements of **§___.320(e)(2)**. A subrecipient may submit a copy of the reporting package to the pass-through entity to comply with this notification requirement.

(d) **Other sections of this part may apply**. Program-specific audits are subject to **§___.100** through **§___.215(b)**, **§___.220** through **§___.230**, **§___.300** through **§___.305**, **§___.315**, **§___.320(f)** through **§___.320(j)**, **§___.400** through **§___.405**, **§___.510** through **§___.515**, and other referenced provisions of this part unless contrary to the provisions of this section, a program-specific audit guide, or program laws and regulations.

Subpart C--Auditees

§___.300 Auditee responsibilities.

The auditee shall:

(a) Identify, in its accounts, all Federal awards received and expended and the Federal programs under which they were received. Federal program and award identification shall include, as applicable, the CFDA title and number, award number and year, name of the Federal agency, and name of the pass-through entity.

(b) Maintain internal control over Federal programs that provides reasonable assurance that the auditee is managing Federal awards in compliance with laws, regulations, and the provisions of contracts or grant agreements that could have a material effect on each of its Federal programs.

(c) Comply with laws, regulations, and the provisions of contracts or grant agreements related to each of its Federal programs.

(d) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards in accordance with **§___.310**.

(e) Ensure that the audits required by this part are properly performed and submitted when due. When extensions to the report submission due date required by **§___.320(a)** are granted by the cognizant or oversight agency for audit, promptly notify the Federal clearinghouse designated by OMB and each pass-through entity providing Federal awards of the extension.

(f) Follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan in accordance with **§___.315(b)** and **§___.315(c)**, respectively.

§___.305 Auditor selection.

(a) **Auditor procurement**. In procuring audit services, auditees shall follow the procurement standards prescribed by the Grants Management Common Rule (hereinafter referred to as the "A-102 Common Rule") published March 11, 1988 and amended April 19, 1995 [insert appropriate CFR citation], Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations," or the FAR (48 CFR part 42), as applicable (OMB Circulars are available from the Office of Administration, Publications Office, room 2200, New Executive Office Building, Washington, DC 20503). Whenever possible, auditees shall make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services as stated in the A-102 Common Rule, OMB Circular A-110, or the FAR (48 CFR part 42), as applicable. In requesting proposals for audit services, the objectives and scope of the audit should be made clear. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of external quality control reviews, and price.

(b) **Restriction on auditor preparing indirect cost proposals**. An auditor who prepares the indirect cost proposal or cost allocation plan may not also be selected to perform the audit required by this part when the indirect costs recovered by the auditee during the prior year exceeded $1 million. This restriction applies to the base year used in the preparation of the indirect cost proposal or cost allocation plan and any subsequent years in which the resulting indirect cost agreement or cost allocation plan is used to recover costs. To minimize any disruption in existing contracts for audit services, this paragraph applies to audits of fiscal years beginning after June 30, 1998.

(c) **Use of Federal auditors**. Federal auditors may perform all or part of the work required under this part if they comply fully with the requirements of this part.

§___.310 Financial statements.

(a) **Financial statements**. The auditee shall prepare financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements shall be for the same organizational unit and fiscal year that is chosen to meet the requirements of this part. However, organization-wide financial statements may also include departments, agencies, and other organizational units that have separate audits in accordance with **§___.500(a)** and prepare separate financial statements.

(b) **Schedule of expenditures of Federal awards**. The auditee shall also prepare a schedule of expenditures of Federal awards for the period covered by the auditee's financial statements. While not required, the auditee may choose to provide information requested by Federal

awarding agencies and pass-through entities to make the schedule easier to use. For example, when a Federal program has multiple award years, the auditee may list the amount of Federal awards expended for each award year separately. At a minimum, the schedule shall:

(1) List individual Federal programs by Federal agency. For Federal programs included in a cluster of programs, list individual Federal programs within a cluster of programs. For R&D, total Federal awards expended shall be shown either by individual award or by Federal agency and major subdivision within the Federal agency. For example, the National Institutes of Health is a major subdivision in the Department of Health and Human Services.

(2) For Federal awards received as a subrecipient, the name of the pass-through entity and identifying number assigned by the pass-through entity shall be included.

(3) Provide total Federal awards expended for each individual Federal program and the CFDA number or other identifying number when the CFDA information is not available.

(4) Include notes that describe the significant accounting policies used in preparing the schedule.

(5) To the extent practical, pass-through entities should identify in the schedule the total amount provided to subrecipients from each Federal program.

(6) Include, in either the schedule or a note to the schedule, the value of the Federal awards expended in the form of non-cash assistance, the amount of insurance in effect during the year, and loans or loan guarantees outstanding at year end. While not required, it is preferable to present this information in the schedule.

§___.315 Audit findings follow-up.

(a) **General**. The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee shall prepare a summary schedule of prior audit findings. The auditee shall also prepare a corrective action plan for current year audit findings. The summary schedule of prior audit findings and the corrective action plan shall include the reference numbers the auditor assigns to audit findings under **§___.510(c)**. Since the summary schedule may include audit findings from multiple years, it shall include the fiscal year in which the finding initially occurred.

(b) **Summary schedule of prior audit findings**. The summary schedule of prior audit findings shall report the status of all audit findings included in the prior audit's schedule of findings and questioned costs relative to Federal awards. The summary schedule shall also include audit findings reported in the prior audit's summary schedule of prior audit findings except audit findings listed as corrected in accordance with paragraph **(b)(1)** of this section, or no longer valid or not warranting further action in accordance with paragraph **(b)(4)** of this section.

(1) When audit findings were fully corrected, the summary schedule need only list the audit findings and state that corrective action was taken.

(2) When audit findings were not corrected or were only partially corrected, the summary schedule shall describe the planned corrective action as well as any partial corrective action taken.

(3) When corrective action taken is significantly different from corrective action previously reported in a corrective action plan or in the Federal agency's or pass-through entity's management decision, the summary schedule shall provide an explanation.

(4) When the auditee believes the audit findings are no longer valid or do not warrant further action, the reasons for this position shall be described in the summary schedule. A valid reason for considering an audit finding as not warranting further action is that all of the following have occurred:

(i) Two years have passed since the audit report in which the finding occurred was submitted to the Federal clearinghouse;

(ii) The Federal agency or pass-through entity is not currently following up with the auditee on the audit finding; and

(iii) A management decision was not issued.

(c) **Corrective action plan**. At the completion of the audit, the auditee shall prepare a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan shall provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan shall include an explanation and specific reasons.

§___.320 Report submission.

(a) **General**. The audit shall be completed and the data collection form described in paragraph **(b)** of this section and reporting package described in paragraph **(c)** of this section shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance by the cognizant or oversight agency for audit. (However, for fiscal years beginning on or before June 30, 1998, the audit shall be completed and the data collection form and reporting package shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or 13 months after the end of the audit period.) Unless restricted by law or regulation, the auditee shall make copies available for public inspection.

(b) **Data Collection**. (1) The auditee shall submit a data collection form which states whether the audit was completed in accordance with this part and provides information about the auditee, its Federal programs, and the results of the audit. The form shall be approved by OMB, available from the Federal clearinghouse designated by OMB, and include data elements similar to those presented in this paragraph. A senior level representative of the auditee (e.g., State controller, director of finance, chief executive officer, or chief financial officer) shall sign a statement to be included as part of the form certifying that: the auditee complied with the requirements of this part, the form was prepared in accordance with this part (and the instructions accompanying the form), and the information included in the form, in its entirety, are accurate and complete.

(2) The data collection form shall include the following data elements:

(i) The type of report the auditor issued on the financial statements of the auditee (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion).

(ii) Where applicable, a statement that reportable conditions in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses.

(iii) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee.

(iv) Where applicable, a statement that reportable conditions in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses.

(v) The type of report the auditor issued on compliance for major programs (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion).

(vi) A list of the Federal awarding agencies which will receive a copy of the reporting package pursuant to **§___.320(d)(2)** of OMB Circular A-133.

(vii) A yes or no statement as to whether the auditee qualified as a low-risk auditee under **§___.530** of OMB Circular A-133.

(viii) The dollar threshold used to distinguish between Type A and Type B programs as defined in **§___.520(b)** of OMB Circular A-133.

(ix) The **Catalog of Federal Domestic Assistance** (CFDA) number for each Federal program, as applicable.

(x) The name of each Federal program and identification of each major program. Individual programs within a cluster of programs should be listed in the same level of detail as they are listed in the schedule of expenditures of Federal awards.

(xi) The amount of expenditures in the schedule of expenditures of Federal awards associated with each Federal program.

(xii) For each Federal program, a yes or no statement as to whether there are audit findings in each of the following types of compliance requirements and the total amount of any questioned costs:

(A) Activities allowed or unallowed.

(B) Allowable costs/cost principles.

(C) Cash management.

(D) Davis-Bacon Act.

(E) Eligibility.

(F) Equipment and real property management.

(G) Matching, level of effort, earmarking.

(H) Period of availability of Federal funds.

(I) Procurement and suspension and debarment.

(J) Program income.

(K) Real property acquisition and relocation assistance.

(L) Reporting.

(M) Subrecipient monitoring.

(N) Special tests and provisions.

(xiii) Auditee Name, Employer Identification Number(s), Name and Title of Certifying Official, Telephone Number, Signature, and Date.

(xiv) Auditor Name, Name and Title of Contact Person, Auditor Address, Auditor Telephone Number, Signature, and Date.

(xv) Whether the auditee has either a cognizant or oversight agency for audit.

(xvi) The name of the cognizant or oversight agency for audit determined in accordance with **§___.400(a)** and **§___.400(b)**, respectively.

(3) Using the information included in the reporting package described in paragraph **(c)** of this section, the auditor shall complete the applicable sections of the form. The auditor shall sign a statement to be included as part of the data collection form that indicates, at a minimum, the source of the information included in the form, the auditor's responsibility for the information, that the form is not a substitute for the reporting package described in paragraph **(c)** of this section, and that the content of the form is limited to the data elements prescribed by OMB.

(c) **Reporting package**. The reporting package shall include the:

(1) Financial statements and schedule of expenditures of Federal awards discussed in **§___.310(a)** and **§___.310(b)**, respectively;

(2) Summary schedule of prior audit findings discussed in **§___.315(b)**;

(3) Auditor's report(s) discussed in **§___.505**; and

(4) Corrective action plan discussed in **§___.315(c)**.

(d) **Submission to clearinghouse**. All auditees shall submit to the Federal clearinghouse designated by OMB the data collection form described in paragraph **(b)** of this section and one copy of the reporting package described in paragraph **(c)** of this section for:

(1) The Federal clearinghouse to retain as an archival copy; and

(2) Each Federal awarding agency when the schedule of findings and questioned costs disclosed audit findings relating to Federal awards that the Federal awarding agency provided directly or the summary schedule of prior audit findings reported the status of any audit findings relating to Federal awards that the Federal awarding agency provided directly.

(e) **Additional submission by subrecipients**. (1) In addition to the requirements discussed in paragraph **(d)** of this section, auditees that are also subrecipients shall submit to each pass-through entity one copy of the reporting package described in paragraph **(c)** of this section for each pass-through entity when the schedule of findings and questioned costs disclosed audit findings relating to Federal awards that the pass-through entity provided or the summary schedule of prior audit findings reported the status of any audit findings relating to Federal awards that the pass-through entity provided.

(2) Instead of submitting the reporting package to a pass-through entity, when a subrecipient is not required to submit a reporting package to a pass-through entity pursuant to paragraph **(e)(1)** of this section, the subrecipient shall provide written notification to the pass-through entity that: an audit of the subrecipient was conducted in accordance with this part (including the period covered by the audit and the name, amount, and CFDA number of the Federal award(s) provided by the pass-through entity); the schedule of findings and questioned costs disclosed no audit findings relating to the Federal award(s) that the pass-through entity provided; and, the summary schedule of prior audit findings did not report on the status of any audit findings relating to the Federal award(s) that the pass-through entity provided. A subrecipient may submit a copy of the reporting package described in paragraph **(c)** of this section to a pass-through entity to comply with this notification requirement.

(f) **Requests for report copies**. In response to requests by a Federal agency or pass-through entity, auditees shall submit the appropriate copies of the reporting package described in paragraph **(c)** of this section and, if requested, a copy of any management letters issued by the auditor.

(g) **Report retention requirements**. Auditees shall keep one copy of the data collection form described in paragraph **(b)** of this section and one copy of the reporting package described in paragraph **(c)** of this section on file for three years from the date of submission to the Federal clearinghouse designated by OMB. Pass-through entities shall keep subrecipients' submissions on file for three years from date of receipt.

(h) **Clearinghouse responsibilities**. The Federal clearinghouse designated by OMB shall distribute the reporting packages received in accordance with paragraph **(d)(2)** of this section and **§___.235(c)(3)** to applicable Federal awarding agencies, maintain a data base of completed audits, provide appropriate information to Federal agencies, and follow up with known auditees which have not submitted the required data collection forms and reporting packages.

(i) **Clearinghouse address**. The address of the Federal clearinghouse currently designated by OMB is Federal Audit Clearinghouse, Bureau of the Census, 1201 E. 10th Street, Jeffersonville, IN 47132.

(j) **Electronic filing**. Nothing in this part shall preclude electronic submissions to the Federal clearinghouse in such manner as may be approved by OMB. With OMB approval, the Federal clearinghouse may pilot test methods of electronic submissions.

Subpart D--Federal Agencies and Pass-Through Entities

§___.400 Responsibilities.

(a) **Cognizant agency for audit responsibilities**. Recipients expending more than $25 million a year in Federal awards shall have a cognizant agency for audit. The designated cognizant agency for audit shall be the Federal awarding agency that provides the predominant amount of direct funding to a recipient unless OMB makes a specific cognizant agency for audit assignment. To provide for continuity of cognizance, the determination of the predominant amount of direct funding shall be based upon direct Federal awards expended in the recipient's fiscal years ending in 1995, 2000, 2005, and every fifth year thereafter. For example, audit cognizance for periods ending in 1997 through 2000 will be determined based on Federal awards expended in 1995. (However, for States and local governments that expend more than $25 million a year in Federal awards and have previously assigned cognizant agencies for audit, the requirements of this paragraph are not effective until fiscal years beginning after June 30, 2000.) Notwithstanding the manner in which audit cognizance is determined, a Federal awarding agency with cognizance for an auditee may reassign cognizance to another Federal awarding agency which provides

substantial direct funding and agrees to be the cognizant agency for audit. Within 30 days after any reassignment, both the old and the new cognizant agency for audit shall notify the auditee, and, if known, the auditor of the reassignment. The cognizant agency for audit shall:

(1) Provide technical audit advice and liaison to auditees and auditors.

(2) Consider auditee requests for extensions to the report submission due date required by **§___.320(a)**. The cognizant agency for audit may grant extensions for good cause.

(3) Obtain or conduct quality control reviews of selected audits made by non-Federal auditors, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any direct reporting by the auditee or its auditor of irregularities or illegal acts, as required by GAGAS or laws and regulations.

(5) Advise the auditor and, where appropriate, the auditee of any deficiencies found in the audits when the deficiencies require corrective action by the auditor. When advised of deficiencies, the auditee shall work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency for audit shall notify the auditor, the auditee, and applicable Federal awarding agencies and pass-through entities of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance by auditors shall be referred to appropriate State licensing agencies and professional bodies for disciplinary action.

(6) Coordinate, to the extent practical, audits or reviews made by or for Federal agencies that are in addition to the audits made pursuant to this part, so that the additional audits or reviews build upon audits performed in accordance with this part.

(7) Coordinate a management decision for audit findings that affect the Federal programs of more than one agency.

(8) Coordinate the audit work and reporting responsibilities among auditors to achieve the most cost-effective audit.

(9) For biennial audits permitted under **§___.220**, consider auditee requests to qualify as a low-risk auditee under **§___.530(a)**.

(b) **Oversight agency for audit responsibilities**. An auditee which does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with **§___.105**. The oversight agency for audit:

(1) Shall provide technical advice to auditees and auditors as requested.

(2) May assume all or some of the responsibilities normally performed by a cognizant agency for audit.

(c) **Federal awarding agency responsibilities**. The Federal awarding agency shall perform the following for the Federal awards it makes:

(1) Identify Federal awards made by informing each recipient of the CFDA title and number, award name and number, award year, and if the award is for R&D. When some of this information is not available, the Federal agency shall provide information necessary to clearly describe the Federal award.

(2) Advise recipients of requirements imposed on them by Federal laws, regulations, and the provisions of contracts or grant agreements.

(3) Ensure that audits are completed and reports are received in a timely manner and in accordance with the requirements of this part.

(4) Provide technical advice and counsel to auditees and auditors as requested.

(5) Issue a management decision on audit findings within six months after receipt of the audit report and ensure that the recipient takes appropriate and timely corrective action.

(6) Assign a person responsible for providing annual updates of the compliance supplement to OMB.

(d) **Pass-through entity responsibilities**. A pass-through entity shall perform the following for the Federal awards it makes:

(1) Identify Federal awards made by informing each subrecipient of CFDA title and number, award name and number, award year, if the award is R&D, and name of Federal agency. When some of this information is not available, the pass-through entity shall provide the best information available to describe the Federal award.

(2) Advise subrecipients of requirements imposed on them by Federal laws, regulations, and the provisions of contracts or grant agreements as well as any supplemental requirements imposed by the pass-through entity.

(3) Monitor the activities of subrecipients as necessary to ensure that Federal awards are used for authorized purposes in compliance with laws, regulations, and the provisions of contracts or grant agreements and that performance goals are achieved.

(4) Ensure that subrecipients expending $300,000 or more in Federal awards during the subrecipient's fiscal year have met the audit requirements of this part for that fiscal year.

(5) Issue a management decision on audit findings within six months after receipt of the subrecipient's audit report

and ensure that the subrecipient takes appropriate and timely corrective action.

(6) Consider whether subrecipient audits necessitate adjustment of the pass-through entity's own records.

(7) Require each subrecipient to permit the pass-through entity and auditors to have access to the records and financial statements as necessary for the pass-through entity to comply with this part.

§___.405 Management decision.

(a) **General**. The management decision shall clearly state whether or not the audit finding is sustained, the reasons for the decision, and the expected auditee action to repay disallowed costs, make financial adjustments, or take other action. If the auditee has not completed corrective action, a timetable for follow-up should be given. Prior to issuing the management decision, the Federal agency or pass-through entity may request

additional information or documentation from the auditee, including a request for auditor assurance related to the documentation, as a way of mitigating disallowed costs. The management decision should describe any appeal process available to the auditee.

(b) **Federal agency**. As provided in **§___.400(a)(7)**, the cognizant agency for audit shall be responsible for coordinating a management decision for audit findings that affect the programs of more than one Federal agency. As provided in **§___.400(c)(5)**, a Federal awarding agency is responsible for issuing a management decision for findings that relate to Federal awards it makes to recipients. Alternate arrangements may be made on a case-by-case basis by agreement among the Federal agencies concerned.

(c) **Pass-through entity**. As provided in **§___.400(d)(5)**, the pass-through entity shall be responsible for making the management decision for audit findings that relate to Federal awards it makes to subrecipients.

(d) **Time requirements**. The entity responsible for making the management decision shall do so within six months of receipt of the audit report. Corrective action should be initiated within six months after receipt of the audit report and proceed as rapidly as possible.

(e) **Reference numbers**. Management decisions shall include the reference numbers the auditor assigned to each audit finding in accordance with **§___.510(c)**.

Subpart E--Auditors

§___.500 Scope of audit.

(a) **General**. The audit shall be conducted in accordance with GAGAS. The audit shall cover the entire operations of the auditee; or, at the option of the auditee, such audit shall include a series of audits that cover departments, agencies, and other organizational units which expended or otherwise administered Federal awards during such fiscal year, provided that each such audit shall encompass the financial statements and schedule of expenditures of Federal awards for each such department, agency, and other organizational unit, which shall be considered to be a non-Federal entity. The financial statements and schedule of expenditures of Federal awards shall be for the same fiscal year.

(b) **Financial statements**. The auditor shall determine whether the financial statements of the auditee are presented fairly in all material respects in conformity with generally accepted accounting principles. The auditor shall also determine whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the auditee's financial statements taken as a whole.

(c) **Internal control**. (1) In addition to the requirements of GAGAS, the auditor shall perform procedures to obtain an understanding of internal control over Federal programs sufficient to plan the audit to support a low assessed level of control risk for major programs.

(2) Except as provided in paragraph **(c)(3)** of this section, the auditor shall:

(i) Plan the testing of internal control over major programs to support a low assessed level of control risk for the assertions relevant to the compliance requirements for each major program; and

(ii) Perform testing of internal control as planned in paragraph **(c)(2)(i)** of this section.

(3) When internal control over some or all of the compliance requirements for a major program are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph **(c)(2)** of this section are not required for those compliance requirements. However, the auditor shall report a reportable condition (including whether any such condition is a material weakness) in accordance with **§___.510**, assess the related control risk at the maximum, and consider whether additional compliance tests are required because of ineffective internal control.

(d) **Compliance**. (1) In addition to the requirements of GAGAS, the auditor shall determine whether the auditee has complied with laws, regulations, and the provisions of contracts or grant agreements that may have a direct and material effect on each of its major programs.

(2) The principal compliance requirements applicable to most Federal programs and the compliance requirements of the largest Federal programs are included in the compliance supplement.

(3) For the compliance requirements related to Federal programs contained in the compliance supplement, an audit of these compliance requirements will meet the requirements of this part. Where there have been changes to the compliance requirements and the changes are not

reflected in the compliance supplement, the auditor shall determine the current compliance requirements and modify the audit procedures accordingly. For those Federal programs not covered in the compliance supplement, the auditor should use the types of compliance requirements contained in the compliance supplement as guidance for identifying the types of compliance requirements to test, and determine the requirements governing the Federal program by reviewing the provisions of contracts and grant agreements and the laws and regulations referred to in such contracts and grant agreements.

(4) The compliance testing shall include tests of transactions and such other auditing procedures necessary to provide the auditor sufficient evidence to support an opinion on compliance.

(e) **Audit follow-up**. The auditor shall follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with **§___.315(b)**, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor shall perform audit follow-up procedures regardless of whether a prior audit finding relates to a major program in the current year.

(f) **Data Collection Form**. As required in **§___.320(b)(3)**, the auditor shall complete and sign specified sections of the data collection form.

§___.505 Audit reporting.

The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) shall state that the audit was conducted in accordance with this part and include the following:

(a) An opinion (or disclaimer of opinion) as to whether the financial statements are presented fairly in all material respects in conformity with generally accepted accounting principles and an opinion (or disclaimer of opinion) as to whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the financial statements taken as a whole.

(b) A report on internal control related to the financial statements and major programs. This report shall describe the scope of testing of internal control and the results of the tests, and, where applicable, refer to the separate schedule of findings and questioned costs described in paragraph **(d)** of this section.

(c) A report on compliance with laws, regulations, and the provisions of contracts or grant agreements, noncompliance with which could have a material effect on the financial statements. This report shall also include an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the provisions of contracts or grant agreements which could have a direct and material effect on each major program, and, where applicable, refer to the separate schedule of findings and questioned costs described in paragraph **(d)** of this section.

(d) A schedule of findings and questioned costs which shall include the following three components:

(1) A summary of the auditor's results which shall include:

(i) The type of report the auditor issued on the financial statements of the auditee (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(ii) Where applicable, a statement that reportable conditions in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses;

(iii) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee;

(iv) Where applicable, a statement that reportable conditions in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses;

(v) The type of report the auditor issued on compliance for major programs (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(vi) A statement as to whether the audit disclosed any audit findings which the auditor is required to report under **§___.510(a)**;

(vii) An identification of major programs;

(viii)The dollar threshold used to distinguish between Type A and Type B programs, as described in **§___.520(b)**; and

(ix) A statement as to whether the auditee qualified as a low-risk auditee under **§___.530**.

(2) Findings relating to the financial statements which are required to be reported in accordance with GAGAS.

(3) Findings and questioned costs for Federal awards which shall include audit findings as defined in **§___.510(a)**.

(i) Audit findings (e.g., internal control findings, compliance findings, questioned costs, or fraud) which relate to the same issue should be presented as a single audit finding. Where practical, audit findings should be organized by Federal agency or pass-through entity.

(ii) Audit findings which relate to both the financial statements and Federal awards, as reported under paragraphs **(d)(2)** and **(d)(3)** of this section, respectively, should be reported in both sections of the schedule. However, the reporting in one section of the schedule

may be in summary form with a reference to a detailed reporting in the other section of the schedule.

§___.510 Audit findings.

(a) **Audit findings reported**. The auditor shall report the following as audit findings in a schedule of findings and questioned costs:

(1) Reportable conditions in internal control over major programs. The auditor's determination of whether a deficiency in internal control is a reportable condition for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program or an audit objective identified in the compliance supplement. The auditor shall identify reportable conditions which are individually or cumulatively material weaknesses.

(2) Material noncompliance with the provisions of laws, regulations, contracts, or grant agreements related to a major program. The auditor's determination of whether a noncompliance with the provisions of laws, regulations, contracts, or grant agreements is material for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program or an audit objective identified in the compliance supplement.

(3) Known questioned costs which are greater than $10,000 for a type of compliance requirement for a major program. Known questioned costs are those specifically identified by the auditor. In evaluating the effect of questioned costs on the opinion on compliance, the auditor considers the best estimate of total costs questioned (likely questioned costs), not just the questioned costs specifically identified (known questioned costs). The auditor shall also report known questioned costs when likely questioned costs are greater than $10,000 for a type of compliance requirement for a major program. In reporting questioned costs, the auditor shall include information to provide proper perspective for judging the prevalence and consequences of the questioned costs.

(4) Known questioned costs which are greater than $10,000 for a Federal program which is not audited as a major program. Except for audit follow-up, the auditor is not required under this part to perform audit procedures for such a Federal program; therefore, the auditor will normally not find questioned costs for a program which is not audited as a major program. However, if the auditor does become aware of questioned costs for a Federal program which is not audited as a major program (e.g., as part of audit follow-up or other audit procedures) and the known questioned costs are greater than $10,000, then the auditor shall report this as an audit finding.

(5) The circumstances concerning why the auditor's report on compliance for major programs is other than an unqualified opinion, unless such circumstances are otherwise reported as audit findings in the schedule of findings and questioned costs for Federal awards.

(6) Known fraud affecting a Federal award, unless such fraud is otherwise reported as an audit finding in the schedule of findings and questioned costs for Federal awards. This paragraph does not require the auditor to make an additional reporting when the auditor confirms that the fraud was reported outside of the auditor's reports under the direct reporting requirements of GAGAS.

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with **§___.315(b)** materially misrepresents the status of any prior audit finding.

(b) **Audit finding detail**. Audit findings shall be presented in sufficient detail for the auditee to prepare a corrective action plan and take corrective action and for Federal agencies and pass-through entities to arrive at a management decision. The following specific information shall be included, as applicable, in audit findings:

(1) Federal program and specific Federal award identification including the CFDA title and number, Federal award number and year, name of Federal agency, and name of the applicable pass-through entity. When information, such as the CFDA title and number or Federal award number, is not available, the auditor shall provide the best information available to describe the Federal award.

(2) The criteria or specific requirement upon which the audit finding is based, including statutory, regulatory, or other citation.

(3) The condition found, including facts that support the deficiency identified in the audit finding.

(4) Identification of questioned costs and how they were computed.

(5) Information to provide proper perspective for judging the prevalence and consequences of the audit findings, such as whether the audit findings represent an isolated instance or a systemic problem. Where appropriate, instances identified shall be related to the universe and the number of cases examined and be quantified in terms of dollar value.

(6) The possible asserted effect to provide sufficient information to the auditee and Federal agency, or pass-through entity in the case of a subrecipient, to permit them to determine the cause and effect to facilitate prompt and proper corrective action.

(7) Recommendations to prevent future occurrences of the deficiency identified in the audit finding.

(8) Views of responsible officials of the auditee when there is disagreement with the audit findings, to the extent practical.

(c) **Reference numbers**. Each audit finding in the schedule of findings and questioned costs shall include a reference number to allow for easy referencing of the audit findings during follow-up.

§___.515 Audit working papers.

(a) **Retention of working papers**. The auditor shall retain working papers and reports for a minimum of three years after the date of issuance of the auditor's report(s) to the auditee, unless the auditor is notified in writing by the cognizant agency for audit, oversight agency for audit, or pass-through entity to extend the retention period. When the auditor is aware that the Federal awarding agency, pass-through entity, or auditee is contesting an audit finding, the auditor shall contact the parties contesting the audit finding for guidance prior to destruction of the working papers and reports.

(b) **Access to working papers**. Audit working papers shall be made available upon request to the cognizant or oversight agency for audit or its designee, a Federal agency providing direct or indirect funding, or GAO at the completion of the audit, as part of a quality review, to resolve audit findings, or to carry out oversight responsibilities consistent with the purposes of this part. Access to working papers includes the right of Federal agencies to obtain copies of working papers, as is reasonable and necessary.

§___.520 Major program determination.

(a) **General**. The auditor shall use a risk-based approach to determine which Federal programs are major programs. This risk-based approach shall include consideration of: Current and prior audit experience, oversight by Federal agencies and pass-through entities, and the inherent risk of the Federal program. The process in paragraphs **(b)** through **(i)** of this section shall be followed.

(b) **Step 1**. (1) The auditor shall identify the larger Federal programs, which shall be labeled Type A programs. Type A programs are defined as Federal programs with Federal awards expended during the audit period exceeding the larger of:

(i) $300,000 or three percent (.03) of total Federal awards expended in the case of an auditee for which total Federal awards expended equal or exceed $300,000 but are less than or equal to $100 million.

(ii) $3 million or three-tenths of one percent (.003) of total Federal awards expended in the case of an auditee for which total Federal awards expended exceed $100 million but are less than or equal to $10 billion.

(iii) $30 million or 15 hundredths of one percent (.0015) of total Federal awards expended in the case of an auditee for which total Federal awards expended exceed $10 billion.

(2) Federal programs not labeled Type A under paragraph **(b)(1)** of this section shall be labeled Type B programs.

(3) The inclusion of large loan and loan guarantees (loans) should not result in the exclusion of other programs as Type A programs. When a Federal program providing loans significantly affects the number or size of Type A programs, the auditor shall consider this Federal program as a Type A program and exclude its values in determining other Type A programs.

(4) For biennial audits permitted under **§___.220**, the determination of Type A and Type B programs shall be based upon the Federal awards expended during the two-year period.

(c) **Step 2**. (1) The auditor shall identify Type A programs which are low-risk. For a Type A program to be considered low-risk, it shall have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, it shall have had no audit findings under **§___.510(a)**. However, the auditor may use judgment and consider that audit findings from questioned costs under **§___.510(a)(3)** and **§___.510(a)(4)**, fraud under **§___.510(a)(6)**, and audit follow-up for the summary schedule of prior audit findings under **§___.510(a)(7)** do not preclude the Type A program from being low-risk. The auditor shall consider: the criteria in **§___.525(c)**, **§___.525(d)(1)**, **§___.525(d)(2)**, and **§___.525(d)(3)**; the results of audit follow-up; whether any changes in personnel or systems affecting a Type A program have significantly increased risk; and apply professional judgment in determining whether a Type A program is low-risk.

(2) Notwithstanding paragraph **(c)(1)** of this section, OMB may approve a Federal awarding agency's request that a Type A program at certain recipients may not be considered low-risk. For example, it may be necessary for a large Type A program to be audited as major each year at particular recipients to allow the Federal agency to comply with the Government Management Reform Act of 1994 (31 U.S.C. 3515). The Federal agency shall notify the recipient and, if known, the auditor at least 180 days prior to the end of the fiscal year to be audited of OMB's approval.

(d) **Step 3**. (1) The auditor shall identify Type B programs which are high-risk using professional judgment and the criteria in **§___.525**. However, should the auditor select Option 2 under Step 4 (paragraph **(e)(2)(i)(B)** of this section), the auditor is not required to identify more high-risk Type B programs than the number of low-risk Type A programs. Except for known reportable conditions in internal control or compliance problems as discussed in **§___.525(b)(1)**, **§___.525(b)(2)**, and **§___.525(c)(1)**, a single criteria in

§___.525 would seldom cause a Type B program to be considered high-risk.

(2) The auditor is not expected to perform risk assessments on relatively small Federal programs. Therefore, the auditor is only required to perform risk assessments on Type B programs that exceed the larger of:

(i) $100,000 or three-tenths of one percent (.003) of total Federal awards expended when the auditee has less than or equal to $100 million in total Federal awards expended.

(ii) $300,000 or three-hundredths of one percent (.0003) of total Federal awards expended when the auditee has more than $100 million in total Federal awards expended.

(e) **Step 4**. At a minimum, the auditor shall audit all of the following as major programs:

(1) All Type A programs, except the auditor may exclude any Type A programs identified as low-risk under Step 2 (paragraph **(c)(1)** of this section).

(2) (i) High-risk Type B programs as identified under either of the following two options:

(A) **Option 1**. At least one half of the Type B programs identified as high-risk under Step 3 (paragraph **(d)** of this section), except this paragraph **(e)(2)(i)(A)** does not require the auditor to audit more high-risk Type B programs than the number of low-risk Type A programs identified as low-risk under Step 2.

(B) **Option 2**. One high-risk Type B program for each Type A program identified as low-risk under Step 2.

(ii) When identifying which high-risk Type B programs to audit as major under either Option 1 or 2 in paragraph **(e)(2)(i)(A)** or **(B)**, the auditor is encouraged to use an approach which provides an opportunity for different high-risk Type B programs to be audited as major over a period of time.

(3) Such additional programs as may be necessary to comply with the percentage of coverage rule discussed in paragraph **(f)** of this section. This paragraph **(e)(3)** may require the auditor to audit more programs as major than the number of Type A programs.

(f) **Percentage of coverage rule**. The auditor shall audit as major programs Federal programs with Federal awards expended that, in the aggregate, encompass at least 50 percent of total Federal awards expended. If the auditee meets the criteria in **§___.530** for a low-risk auditee, the auditor need only audit as major programs Federal programs with Federal awards expended that, in the aggregate, encompass at least 25 percent of total Federal awards expended.

(g) **Documentation of risk**. The auditor shall document in the working papers the risk analysis process used in determining major programs.

(h) **Auditor's judgment**. When the major program determination was performed and documented in accordance with this part, the auditor's judgment in applying the risk-based approach to determine major programs shall be presumed correct. Challenges by Federal agencies and pass-through entities shall only be for clearly improper use of the guidance in this part. However, Federal agencies and pass-through entities may provide auditors guidance about the risk of a particular Federal program and the auditor shall consider this guidance in determining major programs in audits not yet completed.

(i) **Deviation from use of risk criteria**. For first-year audits, the auditor may elect to determine major programs as all Type A programs plus any Type B programs as necessary to meet the percentage of coverage rule discussed in paragraph **(f)** of this section. Under this option, the auditor would not be required to perform the procedures discussed in paragraphs **(c)**, **(d)**, and **(e)** of this section.

(1) A first-year audit is the first year the entity is audited under this part or the first year of a change of auditors.

(2) To ensure that a frequent change of auditors would not preclude audit of high-risk Type B programs, this election for first-year audits may not be used by an auditee more than once in every three years.

§___.525 Criteria for Federal program risk.

(a) **General**. The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring which could be material to the Federal program. The auditor shall use auditor judgment and consider criteria, such as described in paragraphs **(b)**, **(c)**, and **(d)** of this section, to identify risk in Federal programs. Also, as part of the risk analysis, the auditor may wish to discuss a particular Federal program with auditee management and the Federal agency or pass-through entity.

(b) **Current and prior audit experience**. (1) Weaknesses in internal control over Federal programs would indicate higher risk. Consideration should be given to the control environment over Federal programs and such factors as the expectation of management's adherence to applicable laws and regulations and the provisions of contracts and grant agreements and the competence and experience of personnel who administer the Federal programs.

(i) A Federal program administered under multiple internal control structures may have higher risk. When assessing risk in a large single audit, the auditor shall consider whether weaknesses are isolated in a single

operating unit (e.g., one college campus) or pervasive throughout the entity.

(ii) When significant parts of a Federal program are passed through to subrecipients, a weak system for monitoring subrecipients would indicate higher risk.

(iii) The extent to which computer processing is used to administer Federal programs, as well as the complexity of that processing, should be considered by the auditor in assessing risk. New and recently modified computer systems may also indicate risk.

(2) Prior audit findings would indicate higher risk, particularly when the situations identified in the audit findings could have a significant impact on a Federal program or have not been corrected.

(3) Federal programs not recently audited as major programs may be of higher risk than Federal programs recently audited as major programs without audit findings.

(c) **Oversight exercised by Federal agencies and pass-through entities**. (1) Oversight exercised by Federal agencies or pass-through entities could indicate risk. For example, recent monitoring or other reviews performed by an oversight entity which disclosed no significant problems would indicate lower risk. However, monitoring which disclosed significant problems would indicate higher risk.

(2) Federal agencies, with the concurrence of OMB, may identify Federal programs which are higher risk. OMB plans to provide this identification in the compliance supplement.

(d) **Inherent risk of the Federal program**. (1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have a high-risk for time and effort reporting, but otherwise be at low-risk.

(2) The phase of a Federal program in its life cycle at the Federal agency may indicate risk. For example, a new Federal program with new or interim regulations may have higher risk than an established program with time-tested regulations. Also, significant changes in Federal programs, laws, regulations, or the provisions of contracts or grant agreements may increase risk.

(3) The phase of a Federal program in its life cycle at the auditee may indicate risk. For example, during the first and last years that an auditee participates in a Federal program, the risk may be higher due to start-up or closeout of program activities and staff.

(4) Type B programs with larger Federal awards expended would be of higher risk than programs with substantially smaller Federal awards expended.

§___.530 Criteria for a low-risk auditee.

An auditee which meets all of the following conditions for each of the preceding two years (or, in the case of biennial audits, preceding two audit periods) shall qualify as a low-risk auditee and be eligible for reduced audit coverage in accordance with **§___.520**:

(a) Single audits were performed on an annual basis in accordance with the provisions of this part. A non-Federal entity that has biennial audits does not qualify as a low-risk auditee, unless agreed to in advance by the cognizant or oversight agency for audit.

(b) The auditor's opinions on the financial statements and the schedule of expenditures of Federal awards were unqualified. However, the cognizant or oversight agency for audit may judge that an opinion qualification does not affect the management of Federal awards and provide a waiver.

(c) There were no deficiencies in internal control which were identified as material weaknesses under the requirements of GAGAS. However, the cognizant or oversight agency for audit may judge that any identified material weaknesses do not affect the management of Federal awards and provide a waiver.

(d) None of the Federal programs had audit findings from any of the following in either of the preceding two years (or, in the case of biennial audits, preceding two audit periods) in which they were classified as Type A programs:

(1) Internal control deficiencies which were identified as material weaknesses;

(2) Noncompliance with the provisions of laws, regulations, contracts, or grant agreements which have a material effect on the Type A program; or(3) Known or likely questioned costs that exceed five percent of the total Federal awards expended for a Type A program during the year.

MODEL CONTRACT CLAUSE

1. SUPERSESSION

The recipient and the contractor agree that this and other appropriate clauses in 40 CFR 31.36(I) apply to that work eligible for EPA assistance to be performed under this contract and that these clauses supersede any conflicting provisions of this contract.

2. PRIVITY OF CONTRACT

This contract is expected to be funded in part with funds from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or mployees is, or will be, a party to this contract or any lower tier contract. This contract is subject to the applicable EPA procurement regulations in effect on the date of the assistance award for this project.

3. CHANGES

(a) The following clause applies only to contracts for construction.

(1) The recipient may at any time, without notice to any surety, by written order, make any change in the work within the general scope of the contract, including but not limited to changes:

(i) In the specifications (including drawings and designs);

(ii) In the time, method or manner of performance of the work;

(iii) In the recipient-furnished facilities, equipment, materials, services or site, or

(iv) Directing acceleration in the performance of the work.

(2) A change order shall also be any other written order (including direction, instruction, interpretation or determination) from the recipient which causes any change, provided the contractor gives the recipient written notice stating the date, circumstances and source of the order and that the contractor regards the order as a change order.

(3) Except as provided in this clause, no order, statement or conduct of the recipient shall be treated as a change under this clause or entitle the contractor to an equitable adjustment.

(4) If any change under this clause causes an increase or decrease in the contractor's cost or the time required to perform any part of the work under this contract, whether or not changed by any order, the recipient shall make an equitable adjustment and modify the contract in writing. Except for claims based on defective specifications, no claim for any change under paragraph (a)(2) above shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as required in paragraph (a)(2). In the case of defective specifications for which the recipient is responsible, the equitable adjustment shall include any increased cost the contractor reasonably incurred in attempting to comply with those defective specifications.

(5) If the contractor intends to assert a claim for an equitable adjustment under this clause, the contractor must, within 30 days after receipt of a written change order under paragraph (a)(1) or the furnishing of a written notice under paragraph (a)(2), submit a written statement to the recipient setting forth the general nature and monetary extent of such claim. The recipient may extend the 30-day period. The contractor may include the statement of claim in the notice under paragraph (2) of this changes clause.

(6) No claim by the contractor for an equitable adjustment shall be allowed if made after final payment under this contract.

(b) The following clause applies only to contracts for services.

(1) The recipient may at any time, by written order and without notice to the sureties, make changes within the general scope of this contract in the services or work to be performed. If such changes cause an increase or decrease in the contractor's cost or time required to perform any services under this contract, whether or not changed by any order, the recipient shall make an equitable adjustment and modify this contract in writing. The contractor must assert any claim for adjustment under this clause in writing within 30 days from the date it receives the recipient's notification of change, unless the recipient grants additional time before the date of final payment.

(2) No claim by the contractor for an equitable adjustment shall be allowed if made after final payment under this contract.

(3) No services for which the contractor will charge an additional compensation shall be furnished without the written authorization of the recipient.

(c) the following clause applies only to contracts for supplies.

(1) The recipient may at any time, by written order and without notice to the sureties, make changes within the general scope of this contract in any one or more of the following:

(i) Drawings, designs or specifications where the supplies to be furnished are specifically manufactured for the recipient;

(ii) Method of shipment or packing; and

(iii) Place of delivery.

(2) If any changes cause an increase or decrease in the cost or time required to perform any part of the work under this contract, whether or not changed by such order, the recipient shall make an equitable adjustment in the contract price or delivery schedule, or both, and modify the contract in writing. The contractor must assert any claim for adjustment under this clause within 30 days from the date the contractor receives the recipient's notification of change. If the recipient decides that the facts justify such action, the recipient may receive and act upon any such claim asserted at any time before final payment under this contract. where the cost of property made obsolete or excess as a result of a change is included in the contractor's claim for adjustment, the recipient has the right to prescribe the manner of disposition of such property. Nothing in this

clause shall excuse the contractor from proceeding with the contract as changed.

(3) No claim by the contractor for an equitable adjustment shall be allowed if made after final payment under this contract.

4. DIFFERING SITE CONDITIONS

The following clause applies only to construction contracts.

(a) The contractor shall promptly, and before such conditions are disturbed, notify the recipient in writing of:

(1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or

(2) Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.

(b) The recipient shall promptly investigate the conditions. If it finds that conditions materially differ and will cause an increase or decrease in the contractor's cost or the time required to perform any part of the work under this contract, whether or not changed as a result of such conditions, the recipient shall make an equitable adjustment and modify the contract in writing.

(c) No claim of the contractor under this clause shall be allowed unless the contractor has given the notice required in paragraph (a) of this clause. However, the recipient may extend the time prescribed in paragraph (a).

(d) No claim by the contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

5. SUSPENSION OF WORK

The following clause applies only to construction contracts.

(a) The recipient may order the contractor in writing to suspend, delay or interrupt all or any part of the work for such period of time as the recipient may determine to be appropriate for the convenience of the recipient.

(b) If the performance of all or any part of the work is suspended, delayed or interrupted for an unreasonable period of time by an act of the recipient in administration of this contract, or by the recipient's failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), the recipient shall make an adjustment for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and modify the subagreement in writing. However, no adjustment shall be made under this clause for any suspension, delay or interruption to the extent (1) that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the contractor notified the recipient in writing of the act, or failure to act, involved (this requirement does not apply to a claim resulting from a suspension order), and (2) unless the amount claimed is asserted in writing as soon as practicable after the termination of such suspension, delay or interruption, but not later than the date of final payment under the contract.

6. TERMINATION

The following clause applies only to contracts over $10,000.

(a) This contract may be terminated in whole or in part in writing by either party in the event of substantial failure by the other party to fulfill its obligations under this contract through no fault of the terminating party, provided that no termination may be effected unless the other party is given (1) not less than ten (10) calendar days' written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party prior to termination.

(b) This contract may be terminated in whole or in part in writing by the recipient for its convenience, provided that the contractor is given (1) not less than ten (10) calendar days' written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party prior to termination.

(c) If termination for default is effected by the recipient, an equitable adjustment in the price provided for in this contract shall be made, but (1) no amount shall be allowed for anticipated profit on unperformed services or other work, and (2) any payment due to the contractor at the time of termination may be adjusted to cover any additional costs to the recipient because of the contractor's default. If termination for default is effected by the contractor, or if termination for convenience is effected by the recipient, the equitable adjustment shall include a reasonable profit for services or other work performed. The equitable adjustment for any termination shall provide for payment to the contractor for services rendered and expenses incurred prior to the termination, in addition to termination settlement costs reasonably incurred by the contractor relating to commitments which had become firm prior to the termination.

(d) Upon receipt of a termination action under paragraphs (a) or (b) above, the contractor shall (1) promptly discontinue all affected work (unless the notice directs otherwise), and (2) deliver or otherwise make available to the recipient all data, drawings, specifications, reports, estimates, summaries and such other information and materials as may have been

accumulated by the contractor in performing this contract, whether completed or in process.
(e) Upon termination under paragraphs (a) or (b) above, the recipient may take over the work and may award another party a contract to complete the work under this contract.
(f) If, after termination for failure of the contractor to fulfill contractual obligations, it is determined that the contractor had not failed to fulfill contractual obligations, the termination shall be deemed to have been for the convenience of the recipient. In such event, adjustment of the subagreement price shall be made as provided in paragraph (c) of this clause.

7. REMEDIES

This clause applies only to contracts over $25,000.

Unless otherwise provided in this contract, all claims, counter-claims, disputes and other matters in question between the recipient and the contractor arising out of, or relating to, this contract or the breach of it will be decided, if the parties mutually agree, by arbitration, mediation, or other alternative dispute resolution mechanism; or in a court of competent jurisdiction within the State in which the recipient is located.

8. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

[NOTE - The following clause applies to (1) any contract negotiated between the recipient and its contractor in excess of $100,000; (2) negotiated contract amendments or change orders in excess of $100,000 affecting the price of a formally advertised, competitively awarded, fixed price contract, or (3) any lower tier contract or purchase order in excess of $100,000 under a contract other than a formally advertised, competitively awarded, fixed price contract. This clause does not apply to contracts awarded on the basis of effective price competition.]
(a) The contractor and subcontractor, where appropriate, assure that the cost and pricing data submitted for evaluation with respect to negotiation of prices for negotiated contracts, lower tier contracts and change orders is based on current, accurate and complete data supported by their books and records. If the recipient or EPA determines that any price (including profit) negotiated in connection with this contract, lower tier contract or amendment thereunder was increased by any significant sums because the data provided was incomplete, inaccurate or not current at the time of submission, then such price or cost or profit shall be reduced accordingly and the recipient shall modify the contract in writing to reflect such action.
(b) Failure to agree on a reduction shall be subject to the remedies clause of this contract.
[NOTE - Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with lower tier contracts, the contractor may wish to include a clause in each lower tier contract requiring the lower tier contractor to appropriately indemnify the contractor. It is expected that any lower tier contractor subject to such indemnification will generally require substantially similar indemnification for defective cost and pricing data submitted by lower tier contractors.]

9. AUDIT; ACCESS TO RECORDS

(a) The contractor shall maintain books, records, documents and other evidence directly pertinent to performance on EPA funded work under this contract in accordance with generally accepted accounting principles and practices consistently applied, and the applicable EPA regulations in effect on the date of execution of this
contract. The contractor shall also maintain the financial information and data used in the preparation or support of any cost submission required under applicable regulations for negotiated contracts or change orders and a copy of the cost summary submitted to the recipient. The United States Environmental Protection Agency, the Comptroller General of the United States, the United States Department of Labor, the recipient, and [the State] or any of their authorized representatives shall have access to all such books, records, documents and other evidence for the purpose of inspection, audit and copying during normal
business hours. The contractor will provide proper facilities for such access and inspection.
(b) If this is a fixed price contract awarded through sealed bidding or otherwise on the basis of effective price competition, the contractor agrees to make paragraphs
(a) through (g) of this clause applicable to all negotiated change orders and contract amendments affecting the contract price. In the case of all other types of prime contracts, the contractor agrees to make paragraphs (a) through (g) applicable to all contract awards in excess of $10,000, at any tier, and to make paragraphs (a) through (g) of this clause applicable to all change orders directly related to project performance.
(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and with established procedures and guidelines of the reviewing or audit agency(ies).
(d) The contractor agrees to disclose all information and reports resulting from access to records under paragraphs (a) and (b) of this clause to any of the agencies referred to in paragraph (a).
(e) Records under paragraphs (a) and (b) above shall be maintained by the contractor during performance on EPA assisted work under this contract and for the time periods specified in 40 CFR part 31. In addition, those records which relate to any controversy arising under an EPA assistance agreement, litigation, the settlement of claims arising out of such performance or to costs or items to

which an audit exception has been taken shall be maintained by the contractor for the time periods specified in 40 CFR part 31.

(f) Access to records is not limited to the required retention periods. The authorized representatives designated in paragraph (a) of this clause shall have access to records at any reasonable time for as long as the records are maintained.

(g) This right of access clause applies to financial records pertaining to all contracts (except for fixed price contracts awarded through sealed bidding or otherwise on the basis of effective price competition) and all contract change orders regardless of the type of contract, and all contract amendments regardless of the type of contract. In addition this right of access applies to all records pertaining to all contracts, contract change orders and contract amendments:

(1) To the extent the records pertain directly to contract performance;

(2) If there is any indication that fraud, gross abuse or corrupt practices may be involved; or

(3) If the subagreement is terminated for default or for convenience.

10. COVENANT AGAINST CONTINGENT FEES

The contractor assures that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this assurance, the recipient shall have the right to annul this agreement without liability or, at its discretion, to deduct from the contract price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

11. GRATUITIES

(a) If the recipient finds after a notice and hearing that the contractor or any of the contractor's agents or representatives offered or gave gratuities (in the form of entertainment, gifts or otherwise) to any official, employee or agent of the recipient, the State or EPA in an attempt to secure a contract or favorable treatment in awarding, amending or making any determinations related to the performance of this contract, the recipient may, by written notice to the contractor, terminate this contract. The recipient may also pursue other rights and remedies that the law or this contract provides.

(b) In the event this contract is terminated as provided in paragraph (a), the recipient may pursue the same remedies against the contractor as it could pursue in the event of a breach of the contract by the contractor, and as a penalty, in addition to any other damages to which it may be entitled by law, be entitled to exemplary damages in an amount (as determined by the recipient) which shall be not less than three nor more than ten times the costs the contractor incurs in providing any such gratuities to any such officer or employee.

12. RESPONSIBILITY OF THE CONTRACTOR

(a) The following clause applies only to subagreements for services.

(1) The contractor is responsible for the professional quality, technical accuracy, timely completion and coordination of all designs, drawings, specifications, reports and other services furnished by the contractor under this contract. If the contract involves environmental measurements or data generation, the contractor shall comply with EPA quality assurance requirements in 40 CFR 31.45. The contractor shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in his designs, drawings, specifications, reports and other services.

(2) The contractor shall perform the professional services necessary to accomplish the work specified in this contract in accordance with this contract and applicable EPA requirements in effect on the date of execution of the assistance agreement for this project.

(3) The owner's or EPA's approval of drawings, designs, specifications, reports and incidental work or materials furnished shall not in any way relieve the contractor of responsibility for the technical adequacy of his work. Neither the owner's nor EPA's review, approval, acceptance or payment for any of the services shall be construed as a waiver of any rights under this agreement or of any cause for action arising out of the performance of this contract.

(4) The contractor shall be, and shall remain, liable in accordance with applicable law for all damages to the owner or EPA caused by the contractor's negligent performance of any of the services furnished under this contract, except for errors, omissions or other deficiencies to the extent attributable to the owner, owner-furnished data or any third party. The contractor shall not be responsible for any time delays in the project caused by circumstances beyond the contractor's control.

(5) The contractor's obligations under this clause are in addition to the contractor's other express or implied assurances under this contract or State law and in no way diminish any other rights that the owner may have against the contractor for faulty materials, equipment or work.

(b) The following clause applies only to contracts for construction.

(1) The contractor agrees to perform all work under this contract in accordance with this agreement's designs, drawings and specifications.

(2) The contractor guarantees for a period of at least one (1) year from the date of substantial completion of the work that the completed work is free from all defects due to faulty materials, equipment or workmanship and that he shall promptly make whatever adjustments or corrections which may be necessary to cure any defects, including repairs of any damage to other parts of the system resulting from such defects. The owner shall promptly give notice to the contractor of observed defects. In the event that the contractor fails to make adjustments, repairs, corrections or other work made necessary by such defects, the owner may do so and charge the contractor the cost incurred. The performance bond shall remain in full force and effect through the guarantee period.

(3) The contractor's obligations under this clause are in addition to the contractor's other express or implied assurances under this contract or State law and in no way diminish any other rights that the owner may have against the contractor for faulty materials, equipment or work.

13. FINAL PAYMENT

Upon satisfactory completion of the work performed under this contract, as a condition before final payment under this contract or as a termination settlement under this contract the contractor shall execute and deliver to the owner a release of all claims against the owner arising under, or by virtue of, this contract, except claims which are specifically exempted by the contractor to be set forth therein. Unless otherwise provided in this contract, by State law or otherwise expressly agreed to by the parties to this contract, final payment under this contract or settlement upon termination of this contract shall not constitute a waiver of the owner's claims against the contractor or his sureties under this contract or applicable performance and payment bonds.

40 CFR PART 32-GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS); CLEAN AIR ACT AND CLEAN WATER ACT INELIGIBILITY OF FACILITIES IN PERFORMANCE OF FEDERAL CONTRACTS, GRANTS AND LOANS

Authority: E.O. 12549; 41 U.S.C. 701 et seq.; 7 U.S.C. 136 et seq.; 15 U.S.C. 2601 et seq.; 20 U.S.C. 4011 et seq.; 33 U.S.C. 1251 et seq.; 42 U.S.C. 300f, 4901, 6901, 7401, 9801 et seq.; E.O. 12689; E.O. 11738; Pub. L. 103-355 Sec. 2455. Source: 53 FR 19196, 19204, May 26, 1988, unless otherwise noted. Editorial Note: For nomenclature change see 53 FR 19196, May 26, 1988.

Cross Reference: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

Subpart A-General

§ 32.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

(1) Prescribing the programs and activities that are covered by the governmenteide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of ineligible in . 32.105), and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103-355, sec. 2455, 108 Stat. 3327) by-

(1) Providing for the inclusion in the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

(e) Facilities ineligible to provide goods, materials, or services under Federal contracts, loans or assistance, pursuant to Section 306 of the Clean Air Act (CAA) or Section 508 of the Clean Water Act (CWA) are excluded in accordance with the terms of those statutes. Reinstatement of a CAA or CWA ineligible facility may be requested in accordance with the procedures at . 32.321.

[Amended 60 FR 33037, Aug. 25, 1995; 61 FR 28755, June 6, 1996]

§ 32.105 Definitions.

The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

Agency head. Administrator of the Environmental Protection Agency.

CAA or CWA ineligibility. The status of a facility which, as provided in section 306 of the Clean Air Act (CAA) and section 508 of the Clean Water Act (CWA),

is ineligible to be used in the performance of a Federal contract, subcontract, loan, assistance award or covered transaction. Such ineligibility commences upon conviction of a facility owner, lessee, or supervisor for a violation of section 113 of the CAA or section 309(c) of the CWA, which violation occurred at the facility. The ineligibility of the facility continues until such time as the EPA Debarring Official certifies that the condition giving rise to the CAA or CWA criminal conviction has been corrected.

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is debarred. '

Debarring official. An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The Director, Office of Grants and Debarment, is the authorized Debarring Official.

EPA. Environmental Protection Agency.

Facility. Any building, plant, installation, structure, mine, vessel, floating craft, location or site of operations at which, or from which, a Federal contract, subcontract, loan, assistance award or covered transaction is to be performed. Where a location or site of operations contains or includes more than one building, plant, installation or structure, the entire location or site shall be deemed the facility unless otherwise limited by EPA.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9, subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(2) Bid and proposal estimators and preparers.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher

education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The Director, Office of Grants and Debarment, is the authorized Suspending Official.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is suspended. '

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19196, May 26, 1988; 59 FR 50691, Oct. 5, 1994; 60 FR 33037, Aug. 25, 1995; 61 FR 28755, June 6, 1996]

§ 32.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as covered transactions.

(1) ***Covered transaction.*** For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) ***Primary covered transaction.*** Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) ***Lower tier covered transaction.*** A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) ***Exceptions***. The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(A) For the purpose of this paragraph, no transactions under EPA assistance programs are deemed to be pursuant to agency-recognized emergencies or disasters.

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) ***Relationship to other sections***. This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, Effect of Action, . 32.200, Debarment or suspension, sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in . 32.110(a). Sections 32.325, Scope of debarment, ' and 32.420, Scope of suspension, govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) ***Relationship to Federal procurement activities.*** In accordance with E.O. 12689 and section 2455 of Public Law 103-355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated

under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

(d) Except as provided in . 32.215 of this part, Federal agencies shall not use a CAA or CWA ineligible facility in the performance of any Federal contract, subcontract, loan, assistance award or covered transaction.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988; 60 FR 33037, Aug. 25, 1995; 61 FR 28755, June 6, 1996]

§ 32.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) It is EPA policy to exercise its authority to reinstate CAA or CWA ineligible facilities in a manner which is consistent with the policies in paragraphs (a) and (b) of this section.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988; 61 FR 28755, June 6, 1996]

Subpart B-Effect of Action

§ 32.200 Debarment or suspension.

(a) ***Primary covered transactions.*** Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to . 32.215.

(b) ***Lower tier covered transactions.*** Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see . 32.110(a)(1)(ii)) for the period of their exclusion.

(c) ***Exceptions.*** Debarment or suspension does not affect a person's eligibility for-

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988; 60 FR 33037, Aug. 25, 1995]

§ 32.205 Ineligible persons.

Persons who are ineligible, as defined in . 32.105(I), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 32.210 Voluntary exclusion.

Persons who accept voluntary exclusions under . 32.315 are excluded in accordance with the terms of their settlements. EPA shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 32.215 Exception provision.

(a) EPA may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating

from the Presidential policy established by Executive Order 12549 and . 32.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with . 32.505(a).

(b) Any agency head, or authorized designee, may except any Federal contract, subcontract, loan, assistance award or covered transaction, individually or as a class, in whole or in part, from the prohibitions otherwise applicable by reason of a CAA or CWA ineligibility. The agency head granting the exception shall notify the EPA Debarring Official of the exception as soon, before or after granting the exception, as may be practicable. The justification for such an exception, or any renewal thereof, shall fully describe the purpose of the contract or covered transaction, and show why the paramount interest of the United States requires the exception.

(c) The EPA Debarring Official is the official authorized to grant exceptions under this section for EPA.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988; 59 FR 50691, Oct. 5, 1994; 60 FR 33037, Aug. 25, 1995; 61 FR 28755, June 6, 1996]

§ 32.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntary excluded, except as provided in . 32.215.

[Amende 60 FR 33037, Aug. 25, 1995]

§ 32.225 Failure to adhere to restrictions.

(a) Except as permitted under . 32.215 or . 32.220, a participant shall not knowingly do business under a covered transaction with a person who is-

(1) Debarred or suspended;

(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (See Appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

[Amended 60 FR 33037, Aug. 25, 1995]

Subpart C-Debarment

§ 32.300 General.

The debarring official may debar a person for any of the causes in . 32.305, using procedures established in . . 32.310 through 32.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 32.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 32.300 through 32.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in . . 32.215 or 32.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under . 32.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in . 32.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[53 FR 19196, 19204, May 26, 1988, as amended at 54 FR 4962, Jan. 31, 1989]

§ 32.310 Procedures.

EPA shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 32.311 through 32.314.

§ 32.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 32.305 for proposing debarment;

(d) Of the provisions of . 32.311 through . 32.314, and any other EPA procedures, if applicable, governing debarment decision making; and

(e) Of the potential effect of a debarment.

§ 32.313 Opportunity to contest proposed debarment.

(a) ***Submission in opposition.*** Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(1) If the respondent desires a hearing, it shall submit a written request to the debarring official within the 30-day period following receipt of the notice of proposed debarment.

(b) ***Additional proceedings as to disputed material facts.*** (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.314 Debarring official's decision.

(a) ***No additional proceedings necessary.*** In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) ***Additional proceedings necessary.*** (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) ***Standard of proof.*** In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) Burden of proof. The burden of proof is on the agency proposing debarment.

(d) ***Notice of debarring official's decision.*** (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in . 32.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§ 32.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, EPA may, at any time, settle a debarment or suspension action.

(1) The debarring and suspending official is the official authorized to settle debarment or suspension actions.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see subpart E). (c) The EPA Debarring Official may consider matters regarding present responsibility, as well as any other matter regarding the conditions giving rise to alleged CAA or CWA violations in anticipation of entry of a plea, judgment or conviction. If, at any time, it is in the interest of the United States to conclude such matters pursuant to a comprehensive settlement agreement, the EPA Debarring Official may conclude the debarment and ineligibility matters as part of any such settlement, so long as he or she certifies that the condition giving rise to the CAA or CWA violation has been corrected.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988; 61 FR 28755, June 6, 1996]

§ 32.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of subpart F of this part (see . 32.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of . . 32.311 through 32.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

[53 FR 19196, 19204, May 26, 1988, as amended at 54 FR 4962, Jan. 31, 1989]

§ 32.321 Reinstatement of facility eligibility.

(a) A written petition to reinstate the eligibility of a CAA or CWA ineligible facility may be submitted to the EPA Debarring Official. The petitioner bears the burden of providing sufficient information and documentation to establish, by a preponderance of the evidence, that the condition giving rise to the CAA or CWA conviction has been corrected. If the material facts set forth in the petition are disputed, and the Debarring Official denies the petition, the petitioner shall be afforded the opportunity to have additional proceedings as provided in . 32.314(b).

(b) A decision by the EPA Debarring Official denying a petition for reinstatement may be appealed under . 32.335.

[Added 61 FR 28755, June 6, 1996]

§ 32.325 Scope of debarment.

(a) ***Scope in general.*** (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see . . 32.311 through 32.314).

(b) ***Imputing conduct.*** For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

§ 32.335 Appeal.

(a) The debarment determination under . 32.314 shall be final. However, any party to the action may request the Assistant Administrator for Administration and Resources Management (Assistant Administrator), to review the findings of the Debarring Official by filing a request with the Assistant Administrator within 30 calendar days of the party's receipt of the debarment determination, or its reconsideration. The request must be in writing and set forth the specific reasons why relief should be granted.

(b) A review under this section shall be at the discretion of the Assistant Administrator. If a review is granted, the debarring official may stay the effective date of a debarment order pending resolution of the appeal. If a debarment is stayed, the stay shall be automatically lifted if the Assistant Administrator affirms the debarment.

(c) The review shall be based solely upon the record. The Assistant Administrator may set aside a determination only if it is found to be arbitrary, capricious, and abuse of discretion, or based upon a clear error of law.

(d) The Assistant Administrator's subsequent determination shall be in writing and mailed to all parties.

(e) A determination under . 32.314 or a review under this section shall not be subject to a dispute or a bid protest under parts 30, 31 or 33 of this subchapter.

[53 FR 19197, May 26, 1988; amended at 59 FR 50691, Oct. 5, 1994]

Subpart D-Suspension

§ 32.400 General.

(a) The suspending official may suspend a person for any of the causes in . 32.405 using procedures established in . . 32.410 through 32.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in . 32.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 32.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of . . 32.400 through 32.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in . 32.305(a); or

(2) That a cause for debarment under . 32.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 32.410 Procedures.

(a) ***Investigation and referral.*** Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) ***Decision making process.*** EPA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in . 32.411 through . 32.413.

§ 32.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 32.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of § 32.411 through § 32.413 and any other EPA procedures, if applicable, governing suspension decision making; and

(g) Of the effect of the suspension.

§ 32.412 Opportunity to contest suspension.

(a) ***Submission in opposition.*** Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(1) If the respondent desires a hearing, it shall submit a written request to the suspending official within the 30-day period following receipt of the notice of suspension.

(b) ***Additional proceedings as to disputed material facts.*** (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 32.320 for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) ***No additional proceedings necessary.*** In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) ***Additional proceedings necessary.*** (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) ***Notice of suspending official's decision.*** Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 32.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to

give that Department an opportunity to request an extension.

§ 32.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see . 32.325), except that the procedures of . . 32.410 through 32.413 shall be used in imposing a suspension.

§ 32.430 Appeal.

(a) The suspension determination under . 32.413 shall be final. However, any party to the action may request the Assistant Administrator for Administration and Resources Management (Assistant Administrator), to review the findings of the suspending official by filing a request with the Assistant Administrator within 30 calendar days of the party's receipt of the suspension determination, or its reconsideration. The request must be in writing and set forth the specific reasons why relief should be granted.

(b) A review under this section shall be at the discretion of the Assistant Administrator. If a review is granted, the suspending official may stay the effective date of a suspension order pending resolution of appeal. If a suspension is stayed, the stay shall be automatically lifted if the Assistant Administrator affirms the suspension.

(c) The review shall be based solely upon the record. The Assistant Administrator may set aside a determination only if it is found to be arbitrary, capricious, an abuse of discretion, or based upon a clear error of law.

(d) The Assistant Administrator's subsequent determination shall be in writing and mailed to all parties.

(e) A determination under . 32.413 or a review under this section shall not be subject to a dispute or a bid protest under parts 30, 31, or 33 of this subchapter.

[53 FR 19197, May 26, 1988]

Subpart E-Responsibilities of GSA, Agency and Participants

§ 32.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 32.505 EPA responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which EPA has granted exceptions under . 32.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in . 32.500(b) and of the exceptions granted under . 32.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§ 32.510 Participants' responsibilities.

(a) ***Certification by participants in primary covered transactions.*** Each participant shall submit the certification in Appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) ***Certification by participants in lower tier covered transactions.*** (1) Each participant shall require participants in lower tier covered transactions to include

the certification in Appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) ***Changed circumstances regarding certification.*** A participant shall provide immediate written notice to EPA if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F-Drug-Free Workplace Requirements (Grants)

Source: 55 FR 21688, 21701, May 25, 1990, unless otherwise noted.

§ 32.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that-

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 32.605 Definitions.

(a) Except as amended in this section, the definitions of . 32.105 apply to this subpart.

(b) For purposes of this subpart-

(1) ***Controlled substance*** means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) ***Conviction*** means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) ***Criminal drug statute*** means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) ***Drug-free workplace*** means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) ***Employee*** means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) ***Federal agency or agency*** means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) ***Grant*** means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) ***Grantee*** means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) ***Individual*** means a natural person;

(10) ***State*** means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 32.610 Coverage.

(a) This subpart applies to any grantee of the agency.
(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.
(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 32.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that-
(a) The grantee has made a false certification under . 32.630;
(b) With respect to a grantee other than an individual-
(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to appendix C) or
(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.
(c) With respect to a grantee who is an individual-
(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to appendix C); or
(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 32.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in . 32.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:
(1) Suspension of payments under the grant;
(2) Suspension or termination of the grant; and
(3) Suspension or debarment of the grantee under the provisions of this part.
(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (see . 32.320(a)(2) of this part).

§ 32.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 32.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.
(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.
(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.
(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.
(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.
(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that

a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circum-stances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 32.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(Approved by the Office of Management and Budget under control number 0991-0002)

APPENDIX A TO PART 32- CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS-PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in

this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction, provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[Amended 60 FR 33037, Aug. 25, 1995]

APPENDIX B TO PART 32-CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION-LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction , without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility an Voluntary Exclusion-Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988; 60 FR 33037, Aug. 25, 1995]

APPENDIX C TO PART 32- CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (I) All direct charge employees; (ii) All indirect charge employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about-

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will-

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted-

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

Check if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690, 21701, May 25, 1990]

(XP-214)
(Rev.06-01-00)

CERTIFICATION BY CONTRACTOR OF LABOR STANDARDS COMPLIANCE

In accordance with Title 29, Subtitle A, Part 5, Section 5.6(a)(1), each monthly engineering estimate must be accompanied by the following certification executed by each prime contractor employing mechanics and laborers at the site on work in which the Federal Government is to participate:

Estimate No._____ for period _____ to _____

Name of Project Location

Contract No. Date Contract Awarded

U. S. Environmental Protection Agency Project No.

I hereby certify that all of the contract requirements as specified under the applicable labor standards as set forth in the Copeland Anti-Kickback Act and the Contract Work Hours and Safety Standards Act, have been complied with by _____ as principal contractor and

by each_____ subcontractor
(Name of Contractor)

employing mechanics or laborers at the site of the work, or there is a substantial dispute

with the respect to the required provisions.

_____
Typed Name & Title of Contractor's Authorized Representative

_____
Signature of Contractor's Authorized Representative Date

NOTES:

1. This certification may be placed on the estimate or on a separate sheet attached to the estimate.

2. The U. S. Environmental Protection Agency shall, prior to approving a voucher, satisfy itself that copies of these certificates are on file with the owner.

*XP-214 is a suggested format. The grantee may substitute other equivalent format.

SRF-404
(5/13/91)

_____
SRF Number

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS

The prospective participant certifies to the best of its knowledge and belief that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three year period preceding this proposal been convicted of or had a civil judgement rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a government entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

I understand that a false statement on this certification may be grounds for rejection of this proposal or termination of the award. In addition, under 18 USC Sec. 1001, a false statement may result in a fine of up to $10,000 or imprisonment for up to 5 years, or both.

_____
Typed Name & Title of Authorized Representative

_____
Signature of Authorized Representative Date

_____

I am unable to certify to the above statements. My explanation is attached.

BIDDER'S EEO/NSF CERTIFICATIONS

Project Name _____

Project Number _____

Contract For _____

The following certifications must be completed by the bidder for each contract.

A. EQUAL EMPLOYMENT OPPROTUNITY:

( ) I have developed and have on file at my each establishment affirmative action programs pursuant to 41 CFR Part 60-2.

( ) I have participated in previous contract(s) or subcontract(s) subject to the equal opportunity clause under **Executive Orders 11246 and 11375**. I have filed all reports due under the requirements contained in 41 CFR 60-1.7.

( ) I have not participated in previous contracts(s) subject to the equal opportunity clause under **Executive Orders 11246 and 11375**.

( ) I will obtain a similar certification from any proposed subcontractor(s), when appropriate.

B. NONSEGREGATED FACILITIES

( ) I certify that I do not and will not maintain any facilities provided for my employees in a segregated manner, or permit my employees to perform their services at any location under my control where segregated facilities are maintained; and that I will obtain a similar certification prior to the award of any federally assisted subcontract exceeding $10,000 which is not exempt from the equal opportunity clause as required by 41 CFR 60-1.8.

I understand that a false statement on this certification may be grounds for rejection of this bid proposal or termination of the contract award.

_____

Typed Name & Title of Bidder's Authorized Representative

_____

Signature of Bidder's Authorized Representative

_____

Date

_____

Name & Address of Bidder

BREAKDOWN OF BID

EXAMPLE

(The bid breakdown is not limited to the items listed below.)

Item No.	Description	Quantity	Unit	Unit Price	Amount
1.	Bond		L.S.		
2.	Move In Costs		L.S.		
3.	Fencing		L.S.		
4.	Road Material and Grading In Place		S.Y.		
5.	Sidewalks		S.Y.		
6.	Excavation		C.Y.		
7.	Backfill		C.Y.		
8.	Waterstop		L.F.		
9.	Concrete (by class)		C.Y.		
10.	Reinforcing Steel		LBS.		
11.	Miscellaneous and Structural Steel		L.S.		
12.	Grout		C.Y.		
13.	Sludge Bed-Sand		C.Y.		
14.	Concrete Finish		S.F.		
15.	Redwood		Bd.Ft.		
16.	Blower Building Comp. Except Concrete		L.S.		
17.	Lift Station Comp. Except Concrete		L.S.		
18.	Yard Piping, Valves, Fittings, etc.		L.S.		
18a.	All other Piping, Valves, Fittings, etc.		L.S.		
19.	Manholes (group by depth)		Each		
20.	Final Clarifier Equipment		L.S.		

Item No.	Description	Quantity	Unit	Unit Price	Amount
21.	Storm Clarifier Equipment	_____	L.S.	_____	_____
22.	Aeration Equipment	_____	L.S.	_____	_____
23.	Blowers and Accessories	_____	L.S.	_____	_____
24.	All Weirs, Baffles, Gates, and Troughs	_____	L.S.	_____	_____
25.	Flow Meter, Chlorinator, Scales, and Hoist	_____	L.S.	_____	_____
26.	Sludge Bed Skimmers	_____	L.S.	_____	_____
27.	Scum and Sump Pumps	_____	L.S.	_____	_____
28.	Variable Speed Pumps and Controllers	_____	L.S.	_____	_____
29.	Motor Control Centers	_____	L.S.	_____	_____
30.	Comminutor	_____	L.S.	_____	_____
31.	Metal Storage Building	_____	L.S.	_____	_____
31a.	Administration Building	_____	L.S.	_____	_____
32.	Laboratory Equipment Complete	_____	L.S.	_____	_____
32a.	Laboratory Building	_____	L.S.	_____	_____
33.	Electrical	_____	L.S.	_____	_____
34.	Painting and Cleanup	_____	L.S.	_____	_____
35.	Landscaping	_____	L.S.	_____	_____
36.	Incinerator	_____	L.S.	_____	_____
37.	Vacuum Filter	_____	L.S.	_____	_____
38.	Digester	_____	L.S.	_____	_____
39.	Disinfection Equipment	_____	L.S.	_____	_____
40.	Site Work	_____	L.S.	_____	_____
41.	Trenching Safety	_____	L.F.	_____	_____
	TOTAL BASE BID				$ _____

WRD-265
October, 2001

Water Conservation Program Annual Report

For Questions or Information call:
Adolph L. Stickelbault
512-936-2391
Municipal Water Conservation Unit
adolph.stickelbault@twdb.state.tx.us

Texas Water Development Board (TWDB) Rules require that entities that receive financial assistance of more than $500,000 implement a water conservation program for the life of the loan, and report annually for at least 3 years on the progress of implementation. A water conservation plan should contain long-term elements such as ongoing public education activities, universal metering, water accounting and estimated water savings from reuse/recycling activities, leak detection and repair and other conservation activities.

The following questions are designed to provide the TWDB this information in a concise and consistent format for all loan recipients. Please fill in the blanks that pertain to your program as completely and objectively as possible**. As you complete the report form, please review your utility's water conservation plan to see if you are making progress toward meeting your stated goal(s).**

Return completed form to:

Executive Administrator
Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231
ATTN: CONSERVATION

LONG-TERM WATER CONSERVATION PROGRAM

1. <u>Education and Information Program</u>

(TWDB Rules require a continuing program that at minimum provides conservation information directly to each customer, one other type of annual educational water conservation activity and to provide water conservation literature to new customers when they apply for service)

What is the total number of water conservation brochures that your utility mailed to its customers during the last 12 months? _____

How many handouts were distributed to customers by field employees, at the utility office, and other programs and events? _____

Number of water conservation articles published in local newspaper(s) _____

Which months were conservation messages printed on utility/water bills?
_____

In addition, the following education activities were conducted during the reporting period (presentations, school programs, exhibits, television, radio, etc.).
_____
_____
_____
_____

2. <u>Water Conservation Retrofit and Plumbing Rebate Programs</u>

Have you conducted a plumbing retrofit or rebate program during the last 12 months? ___**Yes** ___**No**

If yes, approximately_____households received kits/rebates. Please describe your program and list specific items provided or types of fixtures rebated
_____
_____
_____
_____

3. <u>Conservation – Oriented Rate Structure</u>

Have your rates or rate structure changed since your last report? ___**Yes** ___**No**
If yes, please describe the changes and attach a copy of the new rate structure.
_____
_____
_____
_____

If you purchase water from a wholesale supplier, is this a "take or pay" contract? ___**Yes** ___**No**

If yes, what is your minimum volume to take? _____gallons/day.

4. Universal Metering and Meter Repair

(TWDB Rules require that your utility undertake measures to determine and control unaccounted for water, universal metering of both customer and public uses, periodic meter testing and repair, and distribution system leak detection and repair)

In the first blank fill in total number of meters in your utility for each type or size of meter.

During the past 12 months, what was the number of **(system-wide):**

Production (master) meters _____ (total), tested _____, repaired _____, replaced _____.

Meters larger than 1 ½" _____ (total), tested _____, repaired _____, replaced _____.

Meters 1 ½" or smaller _____(total), tested _____, repaired _____, replaced _____.

5. Water Audits and Leak Detection

a. The total amount of water purchased or produced during the last 12 months was _____

b. The total amount of account (metered) water sold during the last 12 months _____

c. The total amount of identified and estimated (known & explained) losses _____

d. The total amount of lost water (unexplained missing water) _____

e. What is your water loss percentage (line d. ÷ line a. x 100) _____%

How often do you calculate water loss or audit the water in your system? _____ (Times per year)

Number of leaks repaired on the system and at service connections _____.

Please list the main cause of water loss for water in your system: *(examples - leaks, un-metered utility or city uses, problems with master meter, customer meters, record and data problems, etc.*):

_____
_____
_____
_____

The TWDB offers free technical assistance regarding leak detection and unaccounted for water. To find out more about this free service, please place checkmark on left.

6. Water-Conserving Landscaping

Please list any water-conserving landscaping programs, educational activities, or ordinances enacted during the last 12 months.

_____
_____
_____

Other Comments

List any other water conservation activities your utility is conducting.

_____
_____
_____
_____

DROUGHT CONTINGENCY/EMERGENCY WATER DEMAND MANAGEMENT

8. During the past 12 months, did your utility find it necessary to activate its the Drought Contingency/Emergency Demand Management Plan? (Please check one) **___Yes ___No**

If you answered **yes**, was the need due to: (Please check all applicable)

(1)___ water shortage, (2) ___ high demand, (3) ___ inability to treat or pump water at required rates,

(4) ___ equipment failure, or (5) ___ other causes?

If you answered **yes**, what were the starting and ending dates:

Start Date (mm/dd/yr) _____

Ending Date (mm/dd/yr) _____

9. Recycling and Reuse of Water or Wastewater Effluent

What types of water recycling or reuse activities are practiced by your utility? Examples: effluent irrigation, recycling filter backwash, or using effluent for chlorination at wastewater plant, etc.

_____
_____
_____

10. The recycling and/or reuse (In Question 9) amounted to approximately _____ gallons per month for _____ months. (Number of months)

11. Approximately how much water did the utility save during the reporting period due to the overall conservation program? [Review your water conservation plan regarding your gpcd and/or other goal(s)]

_____ Million gallons.

EFFECTIVENESS OF THE PROGRAM

(Review the stated goal(s) of your water conservation plan to gauge effectiveness)

12. In your opinion, how you would rank the effectiveness of your utility's conservation program?

Effective____ Somewhat effective____ Less than effective_____ Not effective_____

13. Does the staff of your utility review the conservation program on a regular basis? ___Yes ___No
How often? _____ **Year your plan was approved** _____

14. What types of problems did your utility encounter in implementing the water conservation program during the last 12 months?

15. What might your utility do to improve the effectiveness of your program?

_____
_____
_____

What might the TWDB do to improve the effectiveness of your program?

_____
_____
_____

17. If known, how much expense has your utility incurred in implementing this program during the reporting period (*literature, materials, staff time, etc.*)? $_____(dollars/year)

18. If known, how much did your program save? $ _____(dollars/year based on water savings and treatment or purchase of waster costs and any deferred capital costs due to conservation).

To ensure we address future correspondence to the proper person, please type or print the following:

_____

Name Title Phone Date

Email address: _____

For a list of free technical assistance services available from the TWDB, please write or call at 512-463-7955, or check out our website: **http://twdb.state.tx.us/assistance/conservation**

Return completed form to:

Executive Administrator
Texas Water Development Board
P.O. Box 13231
Austin, TX 78711-13231

ATTN: CONSERVATION

CWT-121B
01/03/01(CWT-121b)

NOTIFICATION OF INITIATION OF OPERATION AND PROJECT PERFORMANCE PERIOD

This is to advise that the Wastewater Treatment Works for:

_____,
Recipient Name

_____
Project Name and Description

Initiated operation on _____ , 20_____

This begins the Project Performance Period which will end on year from this date.

_____ / _____
Signature Authorized Representative Date

_____
Title of Signer

---

* Please complete this form within 7 days of the initiation of operation and mail to:

Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

CERTIFICATION OF PROJECT PERFORMANCE

This is to certify that the Wastewater Treatment Works for:

_____
Recipient Name

_____
Project Name and Description

_____

has been in operation for one year and performance meets the design specifications and effluent limitations.

_____ Date_____
Signature Authorized Representative

_____
Title of Signer

* Please complete this form within 7 days of the project performance and mail to:

Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231