MOA

(Memorandum of Agreement)

Guidelines

for the

Public Law 86-121
Sanitation Facilities Construction Program

Prepared by
Division of Sanitation Facilities Construction
Office of Environmental Health and Engineering

Working DRAFT

June 2003

Department of Health and Human Services
Public Health Service
Indian Health Service

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

JUN 16 2003

TO: Associate Directors, Office of Environmental Health and Engineering
Directors, Division of Sanitation Facilities Construction
All Areas

FROM: Acting Director
Office of Environmental Health and Engineering
Headquarters

SUBJECT: Memorandum of Agreement Guidelines–Revised Working Draft

Since the last update of this document in 1993, many changes occurred that affect the Indian Health Service (IHS) Sanitation Facilities Construction (SFC) Program. Most notable are the amendments to Public Law 93-638, the Indian Self-Determination and Education Assistance Act, which facilitated opportunities for tribes to administer their own primary health care and public health programs. Since 1993, the SFC Program developed many policy guidance documents interpreting the Memorandum of Agreement (MOA) content and implementation and clarifying how the SFC Program accomplishes projects under self-governance and self-determination. While the overall function of the MOA is unchanged, quality management initiatives necessitate additional procedural controls over the content and use of the instrument.

These Guidelines are intended for use by SFC Program staff, tribal leaders, and other MOA parties to insure that the MOA is implemented consistently in all IHS Areas. This update by the IHS Division of Sanitation Facilities Construction took more than two years to complete and incorporates previously approved guidance documents. Much effort was put into refining IHS policy on the appropriate use of the MOA.

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PREFACE

"--IHS' use of the memorandum of agreement as an obligating document is legal."
[Government Accounting Office. HRD-80-124. September 30,1980.]

This document is the guideline for using the Memorandum of Agreement under Public Law 86-121 (42 U.S.C. 2004a), which is a unique authority provided to the Indian Health Service (IHS), Sanitation Facilities Construction (SFC) Program. These guidelines are the SFC Program's response to the IHS Quality Management Initiative and are a Working Draft. These guidelines were issued initially in May 1990. This revision includes changes in the SFC Program implementation that resulted from the Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended. All IHS Areas apply these policies and procedures uniformly to insure that the SFC Program is executed consistently throughout the nation.

Please direct all questions and comments about this document to the IHS Headquarters SFC Program through the respective IHS Area Office SFC Program Director. Mention of trade names or commercial products does not constitute endorsement or recommendation for use.

Note: The inclusion of laws, regulations, OMB Circulars, and other documents are for reference purposes only. They are included in this version of the MOA Guidelines because many IHS staff in remote locations do not have those documents readily available.

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ABBREVIATIONS

108 contract	Title I services contract under the authority of Section 108, P.L. 93-638
A-87	see OMB A-87
A/E	Architect/Engineer
ACHP	Advisory Council on Historic Preservation
AFA	Annual Funding Agreement, P.L. 93-638, Title I
Area or Area Office	Refers to the 12 regional administrative units of the Indian Health Service
FA	Funding Agreement, P.L. 93-638, Title V
FAA	Funding Agreement addendum, P.L. 93-638, Title V
AI/AN	American Indian and Alaska Native
BIA	Bureau of Indian Affairs
CDBG	Community Development Block Grant program of the Department of Housing and Urban Development
CFR	Code of Federal Regulations
COR	Contracting Officer's Representative; often, the Project Engineer
CPA	Certified Public Accountant
Criteria document	Indian Health Service. "Criteria for the Sanitation Facilities Construction Program." Latest copy.
CWA	Clean Water Act
CWF	Consolidated Working Fund account
DHEW	Department of Health, Education, and Welfare (now called DHHS or HHS)
DHHS	Department of Health and Human Services
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DSFC	Division of Sanitation Facilities Construction, IHS
E.O.	Executive Order
EA	Environmental Assessment
EIS	Environmental Impact Statement
Environmental Review Manual	Indian Health Service. Environmental Review Manual. DEH, OEHE. March 1993.
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAR	Federal Acquisition Regulation system
FGCA	Federal Grants and Cooperative Agreements Act (P.L. 95-224)
FMB	Financial Management Branch
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FR	Federal Register
FY	Fiscal Year
GAO	U.S. General Accounting Office
Grey Book	Indian Health Service. "Guidance for Title I Self-Determination Contract Negotiations for the Sanitation Facilities Construction Program and/or Projects.." Latest copy.
HHS	Department of Health and Human Services
HIP	Home Improvement Program of the Bureau of Indian Affairs
HQ SFC Program	Headquarters Sanitation Facilities Construction Program, IHS
HQ	Headquarters
HUD	Department of Housing and Urban Development
IAG	Interagency Agreement
IHS	Indian Health Service
IMPAC	International Merchant Purchase Agreement Card; i.e., the Federal government credit card.
IPA	Intergovernmental Personnel Act - Temporary assignments of employees between federal agencies, State, local, Indian tribal governments, institutions of higher learning, and other eligible organizations.
ISDA	Indian Self-Determination Act, Title I, P.L. 93-638
ISDEA	Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended
MOA Guidelines	This document.
MOA	Memorandum of Agreement
NAGPRA	Native American Graves Protection and Repatriation Act

NAHASDA	Native American Housing Assistance and Self-Determination Act of 1996 (P. L. 104-330; 25 U.S.C. 4101 et. seq.)
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
O&M	Operation and Maintenance
OEHE	Office of Environmental Health and Engineering, IHS
OGC	Office of the General Counsel, HHS
OMB	Office of Management and Budget
OMB Circular A-87	Office of Management and Budget. "Cost Principles for State, Local and Indian Tribal Governments." Latest copy.
OPAC	Online Payment and Collection
OPDIVs	Operating Divisions
OPH	Office of Public Health, IHS
OSHA	Occupational Safety and Health Administration, U.S. Department of Labor
OTSG	Office of Tribal Self-Governance, IHS
P.L. 93-638	Indian Self-Determination and Education Assistance Act
P.L. 94-437	Indian Health Care Improvement Act
P.L. 100-713	Indian Health Care Amendments of 1988
P.L. 86-121	1959, authorization for the SFC Program in IHS
P.L. 103-399	Indian Lands Open Dump Cleanup Act
PDS	Project Data System
PFA	Project Funding Agreement
PHS	Public Health Service
POR	Program of Requirements
PSFA	Programs, Services, Functions, and Activities
RD	Rural Development Program, USDA
RFO	Request For Opinion. An opinion by the OGC which explains the specific points of law for Federal government program officials. The opinions are considered internal agency communications.
ROW	right-of-way
RUS	Rural Utilities Service of USDA RD (one of several agencies that were formerly Farmer's Home Administration)
SD/SG	Self-Determination/Self-Governance. Refers to tribes that assume responsibility for an IHS program under P.L. 93-638 Title I (SD) or Title V (SG).
SDWA	Safe Drinking Water Act
SFC	Sanitation Facilities Construction
SFCB	Sanitation Facilities Construction Branch, IHS
SFCP	Sanitation Facilities Construction Program, IHS
SHPO	State Historic Preservation Officer
Single Audit Act	Single Audit Act of 1984, Pub. L. 98-502, Oct. 19, 1984, 98 Stat. 2327 (31 U.S.C. Sec. 7501 et seq.)
Subpart J	Code of Federal Regulations, Title 25, Chapter V, Part 900, Contracts under the Indian Self-determination And Education Assistance Act (25 CFR 900); Subpart J--Construction, Sections 900.110 to 900.148.
TAC	Tribal Advisory Committee
TDHE	Tribally Designated Housing Entity (formerly Indian Housing Authority)
TERO	Tribal Employment Rights Office
THPO	Tribal Historic Preservation Officer
U.S.	United States government; Federal government
U.S.C.	United States Code, codification of the laws of the U.S.
USDA	U.S. Department of Agriculture
Yellow Book	Indian Health Service. Guideline for the Sanitation Facilities Construction Program under Self-Governance. Latest copy.

Memorandum of Agreement
Guidelines

Indian Health Service
Sanitation Facilities Construction Program

CHAPTER I. General Policies

Purpose of Guidelines

The purpose of this document is to set forth the policies and guidelines that the Indian Health Service (IHS) will use to enter into agreements with American Indian tribes, Alaska Native villages, and others for the provision of sanitation facilities and/or technical services as authorized by Public Law (P.L.) 86-121 (42 U.S.C. 2004a). The cooperative nature of a sanitation facilities project makes it essential that the parties involved have a clear understanding of the responsibilities they are undertaking in order to carry out the project. For each project, specific responsibilities are outlined in a Memorandum of Agreement (MOA). General responsibilities are outlined in this document in addition to specific requirements for utilization of the MOA. These guidelines complement the program document, Criteria for the Sanitation Facilities Construction Program.

- Chapter I provides an overview of the MOA, citing its authority, relationship to other procurement documents, methods of accomplishing work, method of project implementation, and general requirements for sanitation facilities construction projects.
- Chapter II discusses project development which includes policies for the methods of accomplishing work, profit and risk, and choice of work instrument.
- Chapter III outlines the general structure of the MOA document, required provisions, and procedures for implementing the MOA.
- Chapter IV details the administrative requirements for executing the MOA including accountability, roles of IHS personnel, standards, and procurement.
- Chapter V discusses the work method where IHS administers the project and executes the project by Federal contract or by force account.
- Chapter VI discusses the work method where a tribe administers the project including discussions of tribal force account and tribal procurement.
- Chapter VII discusses the work method where a third-party administers the project. Third-parties can include states, local governments, and non-profit organizations.

Scope of Guidelines

These guidelines are used by the Sanitation Facilities Construction (SFC) Program, Indian tribal leaders, and all other parties to an MOA including the IHS project engineer, IHS district staff, Area SFC Program staff, and personnel in tribal sanitation facilities construction programs. The guidelines will provide for a consistent and orderly approach in the utilization of the MOA for the provision of sanitation facilities and technical assistance to the American Indian and Alaska Native people and tribal governments nationwide. Any issues, circumstances, or questions that cannot be resolved using these guidelines should be referred to the SFC Program Director at the IHS Area Office, who will consult with IHS Headquarters as appropriate.

Sec. 1. Authority for the MOA: The MOA provides the IHS SFC Program with a unique instrument for providing assistance to tribes. The specific authority for the MOA is set forth in Section 7(a)(3) of P.L. 86-121 (42 U.S.C. 2004(a)(3)), which authorizes the Surgeon General:

> ". . . to make such arrangements and agreements with appropriate public authorities and nonprofit organizations or agencies and with the Indians to be served by such sanitation facilities (and any other person so served) regarding contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof, as in his judgment are equitable and will best assure the future maintenance of facilities in an effective and operating condition."

Section 7(a)(3) gave broad discretionary powers to the Surgeon General to carry out the mandates of P.L. 86-121. Most sanitation facilities projects are executed using an MOA, because it provides more flexibility than the traditional contracting process in arranging for contributions from non-Federal sources and in accomplishing the required sanitation improvement. The authority vested in the Surgeon General by P.L. 86-121 was transferred to the Secretary, Health, Education and Welfare (HEW), by Reorganization Plan No. 3 of 1966. The Secretary of HEW was redesignated Secretary of Health and Human Services by Section 509(b) of P.L. 96-88 in 1979. The authority was delegated to the Director, IHS, by the Reorganization Order of January 4, 1988 (52 FR 47053), which elevated the IHS to a Public Health Service (PHS) Agency. The authority was further delegated to Area Directors on March 3, 1995. (see Appendix E)

The relative simplicity of P.L. 86-121 resulted in the program moving forward without formal regulations, and none were ever developed. At the beginning of the SFC Program, guidance was provided in the document "Method of Conduct, Indian Sanitation Facilities Construction Activity," dated October 1959 and updated in August 1962. Further guidance was made available in the document "Criteria For Sanitation Facilities Construction," dated February 6, 1984, which was replaced by the Criteria for the Sanitation Facilities Construction Program (Criteria document) in June 1999.

(a) The IHS Sanitation Facilities Construction Program: Under the authority of P.L. 86-121 and the Indian Health Care Improvement Act (P.L. 94-437, as amended), the IHS implemented a program to provide essential sanitation facilities to eligible American Indian tribes and Alaska Native villages. The essential sanitation facilities that the IHS provides include domestic water supply, wastewater disposal, solid waste disposal facilities, and operation and maintenance equipment and training. The IHS also provides related services including engineering studies, testing, and housing site evaluations. The SFC Program was authorized in 1959 and is considered a fundamental element of the preventive health effort of the IHS direct health care delivery system. Congress reaffirmed the primary responsibility and authority of the IHS to provide the necessary sanitation facilities and services authorized by P.L. 86-121 in Section 302(b) of P.L. 94-437.

From 1959 through 2000, the IHS sanitation facilities construction program committed over $1.5 billion for sanitation facilities projects and related services benefitting American Indians and Alaska Natives. Most of those projects were funded using MOAs signed by the tribe and other project participants. The Criteria document outlines the methodology for allocating IHS appropriated funds for sanitation facilities in support of housing projects and for sanitation facilities for regular projects.

Sec. 2. Implementation: The MOA is a legal instrument entered into by the IHS and the Tribe to create, fund, and sometimes construct, sanitation facilities projects authorized by Public Law 86-121. Other entities may be parties to the MOA, usually because they contribute funds to the IHS project; however, the MOA is the controlling legal instrument for the project because it is the only document that includes the agreed upon commitments of the IHS, the Tribe, and the other parties.

The MOA is an agreement between the IHS and one or more other parties which establishes a cooperative relationship among those interested parties in accomplishing work authorized under P.L. 86-121. The work can be funded using the MOA as the instrument to obligate sanitation facilities funds [see GAO report HRD-80-124 (B-197343), September 30,1980 in Appendix C], or through other instruments, such as contracts, which are executed subsequent to the MOA.

In addition to identifying project funding arrangements, the purposes of the MOA include:

- Identifying the parties participating in a project and describing their responsibilities when performing the work described in the Project Summary which is an integral part of the MOA.
- Specifying the rules and procedures which govern the conduct of the parties in performing the work to complete the project.
- Designating the ownership of the completed sanitation facilities and designating the responsible party for operation and maintenance of the completed sanitation facilities.

When drafting the MOA, IHS Area SFC Programs must insure that the conditions written in the MOA are appropriate under IHS's authorizing statutes and that any functions, services, and activities assigned to the IHS are authorized under those statutes.

Almost every sanitation facilities project funded under authority of P.L. 86-121 has an MOA executed between the IHS and the group receiving the facilities or services, regardless of the source of the funds. Whether the funds used for the project are appropriated, transferred, or contributed to the IHS, if P.L. 86-121 is the authority for funding the sanitation facilities project, an MOA must be executed. One exception could be projects undertaken by tribes with self-determination agreements.

During the drafting of the MOA, the parties must agree on the method of accomplishing the work, because the method of accomplishing the work determines the provisions and conditions that are written into the MOA. The various methods are described in these guidelines with respect to the use of an MOA. Some methods, like force account construction, are covered in more detail, while methods such as government contracting, which have established regulations, are not covered.

(a) The Relationship of MOAs to Cooperative Agreements (See further discussion in Section 6.): P.L. 86-121 MOAs are most similar to cooperative agreements as defined by the Federal Grants and Cooperative Agreements Act (FGCA), P.L. 95-224, as amended (31 U.S.C. Sec. 6301 et seq.). P.L. 86-121 MOAs, like cooperative agreements, are not subject to the Federal Acquisition Regulation (FAR) system or departmental procurement regulations. A cooperative agreement is a legal instrument reflecting a relationship between the Federal Government and a recipient of Federal assistance (in the form of money, services, etc.) to accomplish a public purpose authorized by statute in which "substantial Federal involvement is anticipated" between a Federal agency and the assistance recipient (e.g., a tribe) during the performance of the contemplated activity. A cooperative agreement is not a contract; a contract is used when the principal purpose is to obtain property or services for the direct benefit or use

of the Federal government. The MOA is a legal fund transfer mechanism authorized by P.L. 86-121.

MOAs authorized under P.L. 86-121, do not fall neatly into the cooperative agreement classification and related regulations. Where appropriate, the concepts of regulations governing cooperative agreements were incorporated into this document to insure compatibility with those regulations, while preserving the uniqueness (e.g., flexibility) of the P.L. 86-121 MOA.

The MOA is used in the SFC Program because of considerable interaction and substantial involvement of the SFC Program staff with the recipient American Indian tribe and Alaska Native village during the performance of the project. That interaction between the IHS SFC Program and the tribe occurs when IHS provides or participates in some or all of the following: planning for or designing facilities; contracting for or supervising construction of facilities; assisting in the selection of contractors; coordinating or participating in the collection/analysis of data; providing training; reviewing and approving intermediate steps in the work; plan review and inspection; and providing technical management assistance.

In addition to sanitation facilities construction, the MOA may also be used to provide technical assistance and/or professional services from Federal employees or others, if they are related to the provision of sanitation facilities.

(b) MOA Participants: An MOA can be executed with, (1) any Federally recognized Indian tribe or Alaska Native Village, or Indian band, group, or community subject to IHS regulations on health care eligibility requirements, (2) appropriate public authorities; (3) nonprofit organizations, and (4) other agencies and units of the Federal government. Groups (2), (3), and (4) are considered "third-parties" and discussed further in Chapter VII. MOA's with public authorities and nonprofit organizations must be for the health benefit of eligible Indians and related to the provision of sanitation facilities and/or related technical services. Individual agreements with individual homeowners may be required in addition to the MOA.

The IHS must be consistent in the use of its legal obligating document, the MOA. IHS must be consistent in its relationships with other agencies, and it must be consistent in its use of the MOA from Area to Area. IHS's ability to continue to use a flexible MOA depends on that consistent implementation. The MOA is the obligating document between IHS and the Tribe, and the MOA may not enforce another agency's requirements. IHS is not authorized to enforce another agency's requirements; the other agency must do so in a separate agreement with the Tribe. P.L. 86 -121 provides authority to IHS to enter into MOAs with tribes and other participants. Other agencies have their own authorities for entering into agreements with tribes; therefore, the other agency's requirements must not be in the MOA.

The IHS is not a grant or loan recipient, and IHS needs to completely separate itself from the other agency's loan or grant provisions. The other agency's loan or grant requirements should be in its grant or loan with the Tribe.

Including another agency's requirements in an MOA gives the appearance that IHS will enforce those provisions. IHS will work with the Tribe to insure that the Tribe's contract and other documents meet the conditions of their grant or loan. The other funding agency is responsible for enforcing its grant or loan conditions whether or not it signs the MOA.

The MOA is an agreement between IHS and the Tribe; sometimes a contributing agency signs the MOA. The grant or loan requirements are between the Tribe and the

contributing agency. The instruments for contributing funds include the IHS MOA, other agency grants or loans to the Tribe, and Interagency Agreements (IAG). Each of those instruments has a different purpose and is executed under different authorities. Each of those instruments--MOA, grant, loan, IAG--must remain separate to meet the requirements of each agency's separate authorities.

(c) Non-Specific MOA: (See also Chapter III, Section 2(e)) Some tribes, communities, and other organizations participate in several P.L. 86-121 projects during a fiscal year or within a three or four fiscal year period. The participation of these entities and the agreement provisions covering their participation are often identical for all projects. Some examples of these recurring activities include: Power-line extensions, archeological services, tribal procurement procedures, and multi-project MOAs for tribes using Subpart J construction contracts. Use of non-specific MOAs to define the scope/activities/relationships of the respective parties may increase efficiency and reduce paperwork for numerous specific projects which may follow. A non-specific MOA cannot obligate any project or other IHS funds or resources.

(d) MOAs For Pre-Project Planning: Standard Federal government procurement with project funds of materials or services for planning or developing future construction projects does not always require prior execution of an MOA. Examples would include procurement of materials in large quantities used for several projects, or aerial photography services. However, MOAs are required if the following apply:

(1) Funds or resources are contributed from one governmental entity to another,
(2) There is tribal involvement, or
(3) The IHS and/or an IHS representative utilizes tribal lands/facilities/equipment; e.g., soil boring on tribal land.

(e) MOA Review and Approval: MOAs are approved and executed for IHS at the Area level by the Area Director. Copies of MOAs for projects exceeding $1 million (total of all IHS and contributed funds) must be sent to the Director, HQ SFC Program, for oversight purposes. It is recommended that the Area send unusual or complicated MOAs and MOAs for unusual projects to IHS Headquarters for review prior to approval by the Area Director. All original executed MOAs must be retained at the Area office level.

(f) Prohibited MOA Uses: MOAs, authorized by P.L. 86-121, may only be used to provide items (including services) related to sanitation facilities serving Indian people. The MOA may not be used to allow a tribe or other MOA party to procure goods or services that will benefit the government, even if the procured goods or services are used to assist Indian people through the SFC Program. Federal government contracts and purchase orders must be used if the goods or services are procured for the direct benefit or use of the Federal government, as specified in the FAR. For example, an IHS office may not use an MOA to have a tribe procure or rent office equipment (e.g., computers, copiers) for use by government employees even if that equipment is used for administration of SFC projects. An MOA with a tribe may not be used to purchase meeting space for a meeting of only government employees or any meeting not required to provide sanitation facilities or technical assistance as described in the MOA. Renting meeting space for operation and maintenance (O&M) training might be acceptable if related to specific projects funded under P.L. 86-121.

MOAs may not be used to hire tribal or other non-federal employees as secretaries, clerk typists, draftsmen, engineering aides, engineering technicians, and other personnel to work in government offices or otherwise provide personal services to the Federal government. Any individual who represents the IHS, such as an inspector, and/or retains control or responsibility of any work on behalf of the government, must

be a government employee or its agent; the individual cannot be a tribal employee paid under an MOA.

Sec. 3. Administrative Provisions:

(a) Contributions: Most MOAs contain clauses that list the contributions that each MOA party will make to the project. These contributions may be in the form of funds, paid labor, voluntary labor, equipment, land, interests in land (such as easements and rights-of-way), and materials.

While P.L. 86-121 does not require contributions from the tribe or other non-Federal party to the MOA, the legislative history clearly indicates the intention of the Congress that the federal government seek contributions from the beneficiary of the sanitation facilities project and other parties:

> In a hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce on May 1959, Dr. John D. Porterfield, then Deputy Surgeon General, testifying for the Department on bills to provide for the improvement of Indian sanitation facilities (which became P.L. 86-121) declared: "In the construction of Indian sanitation facilities it is anticipated that, for the most part, the Federal role will be one of planning, furnishing some of the materials needed, supervising the work, and educating the Indians in the utilization and maintenance of the facilities. Contributions of labor, materials, money or services would also be made by the Indians, and in some cases, by adjacent non-Indian communities and nonprofit organizations." With the enactment of P.L. 86-121 in 1959, Dr. Porterfield's statement about the roles of the Federal government, Indians, and others established the basic principle of the SFC Program.

The IHS Area Director will determine the type and extent of the contribution that is appropriate under the circumstances and will ensure the best use of IHS resources and the future operation and maintenance of the facilities.

(b) Indian Preference: The IHS must comply with the mandates of the Buy Indian Act, as amended (25 U.S.C. 47). The Act states that to the greatest extent feasible, all MOA parties including the tribe, tribal organizations, their contractors, and their subcontractors and suppliers shall give preference to Indians, Indian organizations, and Indian-owned economic enterprises on all employment and contracting opportunities. For Federal contracts executed subsequent to the MOA, the FAR contains more specific Indian preference requirements. Indian preference requirements applicable to tribal force account and procurement are discussed further in Chapter VI.

When IHS funds are pooled with funds from a non-Federal, non-tribal government, Indian preference shall be applied to the greatest extent feasible, except as prohibited by applicable law or regulation. If the non-federal, non-tribal government retains control of the funds, its Indian preference policy applies. In the absence of legal authority by that government to give Indians preference, it is considered "infeasible" to require the non-federal non-tribal government entities to mandate Indian preference (see also Chapter VII).

(c) Minimum Construction Standards: Minimum standards for construction, materials, and equipment will be established by agreement between the IHS and the MOA parties. In the absence of specified minimum standards for the project, the standards required for other IHS SFC projects within the IHS Area shall be used. For all SFC projects, plans and specifications or, at a minimum, a scope of work are required to identify exact technical requirements.

(d) Project Performance Monitoring: The cooperative nature of the P.L. 86-121 MOA method of accomplishing work requires close communication and project monitoring

by IHS personnel. Specific means of monitoring for each project will depend on the degree of participation by each party and the methods of accomplishing the work in accordance with the terms of the MOA. Monitoring of a project by IHS shall continue until IHS transfers the project and its interest to the tribe or other MOA party.

Sec. 4. Indian Self-Determination:

(a) Self-Determination: Under Title I (self-determination) of the Indian Self-Determination and Education Assistance Act (P.L. 93-638), a tribe may request to participate in a sanitation facilities construction project using a contract authorized under that title. For a 638 Title I tribe, the P.L. 86-121 sanitation facilities project funds and project-related program funds are paid to the Tribe on a project-by-project basis using construction contracts in accordance with the regulations at 25 CFR 900 Subpart J, or with Self-Determination MOAs under P.L. 86-121. Those contracts under Title I are also known as Subpart J construction contracts or Title I construction contracts or 638 construction contracts. Most 638 construction contracts for SFC projects are executed subsequent to an MOA with the tribe. Title I construction contracts are discussed in more detail in the Guidance for Title I Self-Determination Contract Negotiations for the Sanitation Facilities Construction Program and/or Projects or "Grey Book."

The Title I construction contract is the obligating document for sanitation facilities project funds when signed by the IHS Area Director (the contract is usually signed by the Area Contracting Officer also and in some cases, just the Contracting Officer). The IHS will monitor the progress of the sanitation facilities project through quarterly reports that the tribe submits. Payments to the tribe will be made quarterly based on the progress of the project.

(b) Self-Governance: Where the tribe is carrying out the activities of the IHS Sanitation Facilities Construction Program under a self-governance (SG) compact or addendum (Title V, P.L. 93-638), there are three ways to make funds available to SG tribes who will implement new sanitation facilities construction projects (authority is in parentheses):

1. Title I construction contract . . . . . (Title I, P.L. 93-638)
2. Funding Agreement Addendum or Amendment . . . . . (P.L. 86-121)
3. Construction Project Agreement . . . . . (Title V, P.L. 93-638)

The instruments in item 2 are executed under the authority of P.L. 86-121 but are not considered to be MOAs. Normally, these guidelines do not apply to the construction of sanitation facilities under self-governance; however, an MOA may be required if other agencies contribute funds to the project. Additional guidance may be found in the Guideline for the Sanitation Facilities Construction Program under Self-Governance, also called the "Yellow Book," and in the Title V regulations (42 CFR Part 137, specifically, Subpart N Construction).

(c) Contributions from other parties. An MOA may be required for a project, if funds from other parties are contributed to the project and are administered by IHS. The MOA is the instrument for obligating those funds to the project and for designating the responsibilities of each party.

IHS may enter into a self-determination or self-governance agreement for funds appropriated to other agencies but administered by IHS, provided that those contributed funds meet two statutory criteria[1]:

(1) The funding program must be either administered for the benefit of Indians or be a program of which Indian are the primary or significant beneficiaries;
(2) The funds must also be administered by the Secretary, Department of Health and Human Services (HHS).

Funds that another agency has already awarded or allocated to tribes, but then passed to IHS to give to the tribe are not considered to be "administered by the Secretary." If IHS accepts this type of contribution, which is not administered by the Secretary, then the MOA is the only instrument that may be used to transfer funds to the Tribe.

Sec. 5. Waivers to MOA Guidelines: These guidelines are based on Federal laws and regulations. Any waiver from these guidelines shall not be made without the written consent of the Director, Office of Environmental Health and Engineering (OEHE), IHS HQ, who will consult with the appropriate knowledgeable individuals within the HHS.

Sec. 6. Brief Overview of Federal Procurement: This section does not describe every type of contract or agreement that may be executed by the Federal Government. Laws other than those described below may authorize agencies to execute legal documents which do not fall neatly into one of these categories or may exempt a class of agreements from the Federal Grant and Cooperative Agreement Act; e.g. the MOA. The specific law that authorizes an agency's activities will always take precedence over the more general principles discussed in this section.

(a) The Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. Section 6301, et seq.) defines the types of legal instruments that a Federal agency normally uses to transact its business and provides general guidance on their use. The three types of instruments defined are procurement contracts, grants, and cooperative agreements. The instrument used depends on the principal purpose of the transaction; i.e., whether the Government is primarily interested in acquiring goods and services or in providing assistance to a recipient authorized by law to receive such aid.

(1) Federal procurement contracts are used when the principal purpose is to acquire property or services for the direct benefit or use of the Government. These contracts are subject to the HHS acquisition regulations at 48 CFR Chapter 3. " 'Contract' means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited

[1]25 U.S.C. 450f(a)(1)(D), which states: "The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . . . . administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior;"

25 U.S.C. Sec. 458aaa-4(b)(2)(G),which states: The Secretary may enter into a Self-Governance agreement with a qualified tribe for ". . . all programs, services, functions, activities (or portions thereof), . . . with respect to which Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service . . . under the authority of . . . any other Act of Congress authorizing such a program, service, function, or activity (or portions thereof) carried out for the benefit of Indians under which appropriations are made available to any agency other than an agency within the Department of Health and Human Services, in any case in which the Secretary administers that program, service, function, or activity (or portion thereof)."

to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq."[2] An example of Federal procurement is the purchase of personal computers for use by IHS employees for office administration or project administration with a government IMPAC card.

(2) Grants are used between the Federal Government and a non-federal entity when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support, authorized by law. No substantial continuing involvement of the government is expected in carrying out the activity covered by the grant. Grant authority must be specified by law; e.g., EPA Indian set-aside grants under the Clean Water Act and Safe Drinking Water Act.

(3) Cooperative agreements are used between the Federal Government and a non-federal entity when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support, authorized by law, and substantial involvement is expected between the Government and the recipient in carrying out the agreement.

(b) The Indian Self-Determination and Education Assistance Act, P.L. 93-638 as amended and P.L. 86-121 created other instruments for IHS to use besides those listed above:

(1) P.L. 93-638 Title I construction contracts. Section 105(a) of P.L. 93-638, as amended, states that Federal contracting laws do not apply to 638 Title I construction contracts, and it restricted the applicability of the FAR subject to negotiation with the tribe or tribal entity.
(2) P.L. 93-638, Title V. Tribes may also perform construction projects under Title V of P.L. 93-638, as amended, which replaced Title III; however, Title V construction projects are administered under the Title V regulations and are beyond the scope of this document.
(3) P.L. 86-121 MOA, the subject of this document. The P.L. 86-121 MOA resembles a cooperative agreement in its principal purpose; however, it also includes characteristics of the other two instruments listed in (a).

(c) The issue of ownership of the facilities constructed with federal funds has evolved due to the 1994 amendments to P.L. 93-638. Additional information is found in the Criteria document.

(1) For most Federal Government agencies, goods and services obtained with a Federal procurement contract belong to the Government, and if authorized, the agency may and must formally transfer ownership to a non-governmental entity such as a tribe. Formal transfer of ownership is needed, if:
(A) the sanitation facilities, provided in accordance with an MOA, are constructed under an IHS Federal procurement contract, or
(B) some of the materials, supplies, or equipment were purchased by IHS.
(2) Under a grant, the non-governmental recipient owns the good or service obtained with the grant, since the Government is usually not involved in the project after the grant is awarded.

[2]FAR 2.101

(3) Under a P.L. 93-638 Title I construction contract, the proposed facilities belong to the Tribe unless the contract states otherwise.

Keep the discussion in this section in mind as you review the next chapters on the different delivery methods available to the IHS SFC Program.

CHAPTER II. Project Development

Sec. 1. Methods for Accomplishing the Work: The purpose of a SFC project is to provide to the American Indian and Alaska Native people assistance in the form of projects to provide either services or facilities or both. The MOA establishes the project relationship between the Federal government, a tribe, and other parties; the methods of accomplishing the project work include contracts and force account. The Federal government may do the work with Federal procurement contracts for materials and services and by force account using Federal employees for labor. The Tribe or a third-party could do the work with their own force account labor and procurement practices. The SFC Program uses all those methods. (See Fig. 2-1)

The MOA for every IHS SFC project describes the cooperative relationship among all parties and describes how the work will be accomplished. The choices or methods for accomplishing the work are as follows:

1. Direct Provision by the IHS
   - Federal procurement
     - Open market Federal contract (includes Buy-Indian contract)
     - P.L. 93-638 construction contract (Title I)
   - Government Force Account

2. Direct Provision by a Tribe
   - Tribal Force Account
   - Tribal Procurement

3. Direct Provision by a Third-party
   - Third-party Force Account
   - Third-party Procurement

(a) Direct Provision By the IHS: This method of accomplishing work includes Federal contracts with tribes or others and force account where the work is done by Federal workers. The products of contracts (goods and services) are transferred to the American Indian or Alaska Native community or other responsible non-Federal entity.

(1) Federal Procurement: Federal contracts are used when the Federal Government plans to acquire property, services, resources, or studies for its own use or direct benefit, and those contracts are regulated by the FAR. The sanitation facilities procured by IHS with a contract belong to the Federal government and may be transferred to an American Indian or Alaska Native community or other responsible non-Federal entity upon project completion. The IHS SFC Program uses two types of contracts for sanitation projects; open market contracts which include Buy-Indian contracts and 638 construction contracts. Contracts with tribes for construction of all or part of the facilities described in the MOA are often awarded after the MOA is signed–the signed MOA obligated the project funds for sanitation facilities to be provided by IHS, then IHS contracted with the Tribe (as the contractor) to construct the project.

(A) Open market Federal Contract: In a fixed-price contract, the contractor assumes the risk for non-performance and can make a profit; however, the government may require bonds or other assurances of performance (see Chapter V, Section 1). A contract may be restricted to a class of contractor, such as Indian contractors (Buy-Indian) or small business enterprises.

(B) P.L. 93-638 construction contracts: (See Chapter V, Section 1) Under P.L. 93-638, the IHS is required, upon the request of any Indian tribe or tribal organization, to evaluate entering into a contract with that organization to carry out any or all IHS programs, services, functions, and activities; this evaluation is subject to applicable regulations (42 CFR Chapter I, Part 36, Indian Health). Most 638 construction contracts for SFC projects are executed subsequent to an MOA with the tribe. Most 638 construction contract provisions generally follow the FAR except as prescribed by Subpart J (25 CFR 900, Contracts under the Indian Self-determination and Education Assistance Act; Subpart J--Construction). For example, 638 construction contracts may be negotiated without advertising. In a fixed-price 638 construction contract, the tribe assumes some risk in that it must perform at the price negotiated until the work is complete, or the tribe requests retrocession[3]. If a contract retrocedes to the IHS and costs incurred exceed budgeted amounts, the scope of the project(s) may be reduced. The 638 construction contracts for construction of sanitation facilities are executed on a project by project basis and generally are fixed price.

(C) Government Force Account: In general, force account refers to work done without prior contractual agreement, and the cost of labor, materials, equipment, insurance, and miscellaneous support costs are charged to the project account. In the SFC Program, government force account work is performed by government employees under the direction of an IHS construction supervisor. Under an MOA, the IHS may elect to use Federal employees to construct all or part of the project. IHS schedules the work, assures quality control, and may provide procurement, equipment, and arrange transportation. The Tribe may provide skilled or unskilled workers to work with Federal employees on the job site; however, there are restrictions on IHS supervision of tribal employees. IHS activities at the job site are discussed in more detail in Chapter V, Section 2.

(b) Direct Provision by Tribes: Under this method of accomplishing work, funds are obligated by the MOA. Then, as agreed upon in the MOA and in accordance with a payment schedule and upon request, the obligated funds are contributed to the Tribe; and the Tribe constructs or procures the sanitation facilities. [Note: This differs significantly from the situation described in (a)(1) where a tribe contracts with the Federal government to provide the facilities, after the MOA is signed. In the method described in (a)(1), the tribe is providing the goods and services to the Government, and the Government in turn transfers the goods and services back to the Indian people. Refer to Chapter V, Section 1 on contracts between the Federal Government and tribes.]

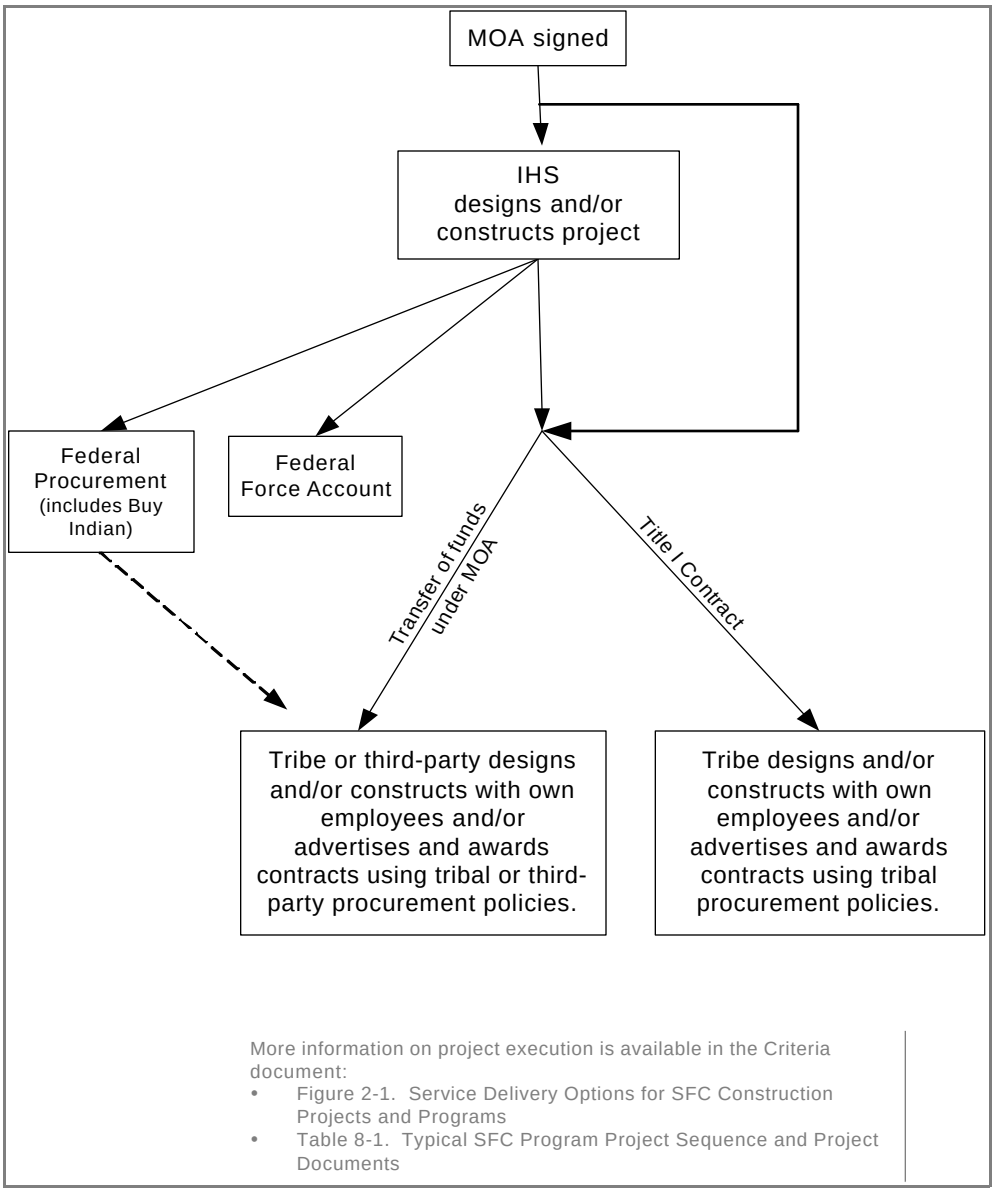
(1) Tribal Force Account: In a Tribal force account project, the tribe accomplishes the work with tribal employees directed by a tribal construction supervisor who has control of the project at the construction site. Typically, the tribe manages the project funds and provides the equipment, materials, and support. The IHS role includes providing technical assistance and inspection for quality control during construction (as well as applicable items described in Chapter I, Section 2(a)). Job-site technical guidance (but not supervision or control) may be provided by a government employee, if the tribe and IHS decide to utilize this approach to construction. In a tribal force account situation,

[3]Retrocession means a Self-Governance Tribe returns to the Secretary the programs, services, functions, and activities that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

ownership of the facilities, materials, and supplies purchased by the tribe with MOA funds vests with the tribe upon acquisition of materials and installation of the facilities. Refer to Chapter 6, Section 1.

(2) Tribal Procurement: Where sanitation facilities are procured by the tribe (i.e., the tribe contracts with another entity to construct the sanitation facilities), ownership vests in the tribe upon final acceptance of completed construction from its contractors. The tribe may transfer individual facilities to homeowners. Refer to Chapter 6, Section 2.

Fig. 2-1. Project Execution after MOA is signed



(c) Direct Provision by a Third-party: For various reasons, a third-party may decide to participate in the sanitation facilities project. Third-parties can be States, counties, municipalities, housing authorities, rural water districts, non-IHS Indian health clinics, or other non-profit organizations as defined in Chapter I, Section 2(b). If a third-party procures the sanitation facilities, ownership vests in the third-party upon final acceptance of the completed construction from its contractor. In accordance with the MOA, the third-party may own and operate the facilities or transfer the facilities to the tribe or to individual Indian recipients.

(1) Third-party Force Account: If the third-party has the capability to construct the sanitation facilities with its own employees, the MOA parties may choose to allow the third-party to perform all or a portion of the project with IHS funds. The IHS role could include providing technical assistance and inspection to assure quality control during construction. In a third-party force account situation, ownership of the facilities vests with the third-party upon acquisition of materials and installation of the facilities. In the MOA, the third-party may agree to transfer the facilities to the tribe or individual Indian recipients. Refer to Chapter VII.

(2) Third-party Procurement: A third-party to an MOA may use IHS funds to procure the goods and services authorized under P.L. 86-121 to benefit the Indian people. Refer to Chapter VII.

Sec. 2. General Concepts of Profit and Risk:

(a) Profit: Profit is not allowed under an MOA. When IHS contributes funds to an MOA party, that party may not earn a profit from those funds even if that party is a tribe. Any MOA funds remaining after the project is complete must be returned to the contributors or IHS unless those remaining funds are applied towards a mutually amended scope of work as described in an amended MOA approved by all affected parties. This is not to be confused with profit which is allowable under a contract subsequent to the MOA between the IHS and an MOA party.

(b) Risk: MOA parties might share in four types of risk. The extent of the risk depends on the type and extent of participation by each party, and some types of risk may not always be apparent or applicable. The types of risk are described below:

(1) Reduced Project Scope or Incomplete Project: An MOA establishes a cooperative relationship for accomplishing the project. The risk assumed by the MOA parties who contributed to the project described in the Project Summary is limited under the cooperative MOA relationship. All MOA parties share the risk that the project will not be completed as intended, and the full benefits of the proposed project may not be realized. For example, if the project costs more than available or obligated funds, the assistance recipients may have to accept a reduced scope of work or a cancellation of the project.

(2) Loss of Contribution: This type of risk borne by the MOA parties is limited to complete loss of that party's fund contribution toward the project, as outlined in the MOA. If the assistance recipient also made an in-kind contribution toward a project that later was cancelled, the assistance recipient would not get reimbursed for its in-kind work.

(3) Liability for Damages : The liability assumed by each MOA party depends on the functions they performed under the MOA. Each MOA party is responsible

for damages due to its own negligence (torts[4]). For example, when a tribe wants to construct a project using its own employees (tribal force account), the tribe assumes a significant liability (risk) for damages to public facilities and injuries to bystanders and workers. To cover those risks, the tribe should carry applicable liability insurance and workmen's compensation coverage (and may be required to carry coverage in the MOA).

(A) Federal Tort Claims Act (FTCA)[5]: The FTCA provides immunity from personal liability for federal employees **acting within the scope of their federal employment**. The FTCA makes suit against the United States the exclusive remedy available for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[6]

(B) The FTCA covers acts performed by a tribe or its employees in carrying out a self-determination construction contract, Pub. L 101-512 §314 (1990), or self-governance construction project agreement. [25 U.S.C. §458aaa-15(a)]. The FTCA coverage does not imply that IHS has a duty to oversee safety on the construction site. Instead, it provides that the Department of Justice will defend the tribe against claims arising from the performance of construction, including claims arising from the tribe's performance or nonperformance of the tribe's duty to oversee safety at the construction site, so long as those claims fall within the criteria of the FTCA. The FTCA coverage does not include general contractors. [28 U.S.C. §2671]. [RFO 11-8-01]

(C) The FY 1995 appropriation act[7] for IHS gave the agency authority to enter personal services contracts; however, FTCA coverage is limited to individuals providing health care services within the scope of their employment under these types of contracts.[8] Personal service contracts associated with construction services (e.g., construction inspectors) would not be covered by FTCA; therefore, the personal services contractor should, where necessary, obtain appropriate liability coverage.

(4) Contractual Non-performance: If a tribe elects to provide the sanitation facilities through a contract with the Federal Government, the tribe may be allowed the opportunity to earn a profit (depends on type of contract; e.g., fixed-

[4] Torts are civil wrongs that are recognized by law as grounds for a lawsuit. Those wrongs result in an injury or harm which constitute the basis for a claim by the injured party. While some torts are also crimes punishable with imprisonment, the primary aim of tort law is to provide relief for the damages incurred and deter others from committing the same harms. The injured person may sue for an injunction to prevent the continuation of the tortious conduct or for monetary damages including both present and future expected losses. Torts fall into three general categories: intentional torts; negligent torts; and strict liability torts (e.g., defective products). A tort differs from a breach of contract in that the legal duty breached by the tort is one imposed by the state, whereas in a breach of contract, the obligation breached is one which the contracting parties have voluntarily assumed by signing the contract. [The Legal Information Institute]

[5] 28 U.S.C. Sections 2671-2680

[6] 28 U.S.C. Section 2679(b)(1)

[7] Department of the Interior and Related Agencies Appropriations, 1995, P.L. 103-332, 108 Stat. 2499, 2527 (1994).

[8] *ibid*. "(d) individuals providing health care services pursuant to these [personal services] contracts are covered by the Federal Tort Claims Act."

price vs. cost-reimbursement). With the opportunity to earn a profit comes the risk associated with having to perform in accordance with the provisions of the contract. Inability to perform may cost the tribe more than loss of its profit, including any additional procurement costs to satisfy its contractual obligation to the Federal Government.

Sec. 3. Choice of Work Instrument: On most IHS SFC construction projects, the MOA establishes the relationship among the participating parties, is the comprehensive agreement among all involved parties, and establishes the method of accomplishing the work. IHS policy on choosing the method of accomplishing the work requires a determination by the IHS and the tribe of the best approach and the relative capacities of the tribe, IHS, and others to perform the required project tasks. The key factors in the decision are (1) the desires of the prospective MOA parties, (2) the number and type of funding sources, (3) the business management practices and capabilities of the MOA parties, (4) the time available to accomplish the work, and (5) the past project performance history of the MOA parties. The objective of minimizing IHS involvement in the procurement actions of the tribe or other entities should also be a consideration in this decision. For each project, the ultimate decision to use any of the instruments cited in Section 1 is made by each IHS Area Director in accordance with these guidelines and in consultation with the Area SFC Program.

The flexibility of the MOA allows the tribes to participate to the fullest extent possible in the project to provide their sanitation facilities. The MOA allows the IHS to pursue the guiding principles of its management strategy of including the tribes in planning, procuring, construction, and evaluation. Using the MOA for tribal procurement allows tribes to be involved in procuring needed materials and services for their people. The government benefits by encouraging tribal self-governance while increasing tribal administrative capability which is an express Federal policy.

CHAPTER III. MOA Structure and Procedures

Sec. 1. MOA Structure

(a) Required MOA Format: At a minimum, each MOA will contain five basic sections: heading, preamble, agreement provisions, signature block, and project summary. The following is a brief description of each section. More specific details on required MOA clauses and recommended language are in Appendix A. Required sections include:

(1) Heading: Sets forth the title of the document and identifies the organizations or agencies that are party to the agreement.

(2) Preamble:
(A) Identifies the officials who are executing the agreement on behalf of the parties,
(B) cites the legal authority (P.L. 86-121) under which IHS will execute the agreement,
(C) incorporates the Project Summary by reference with exact title and date, and
(D) describes the background and purpose of the agreement.
(E) Where appropriate, the preamble will also include the legal authority of other public authorities.

(3) Agreement Provisions: Identifies the specific and authorized responsibilities of all parties to the agreement and the extent of participation of all parties to the agreement. [see (b) below]

(4) Signature Blocks: Provides for the signature and date of all parties to the agreement and, where appropriate, cites the authorization permitting the person to sign on behalf of their respective organization or agency (unless cited in the Preamble).

(5) Project Summary: The important point to keep in mind is that MOAs executed in connection with P.L. 86-121 projects are based upon a plan of action outlined in an approved Project Summary:
(A) Without the Project Summary, many of the provisions of the MOA would be meaningless. For that reason, the Project Summary is, by reference, incorporated into the MOA and is an integral part of it.
(B) Therefore, it follows that the two documents should be consistent with one another and as complete as circumstances indicate.
(C) Accordingly, when drafting and amending MOAs, the contents of the Project Summary must be thoroughly reviewed. If the Project Summary does not truly reflect the intentions of the parties, a revised Project Summary is required.
The Project Summary outlines a plan of action, alternatives considered, and engineering cost estimate to provide the sanitation facilities and technical assistance referenced by the MOA and includes a review and evaluation of potential environmental and cultural preservation requirements and issues that must considered (e.g., NEPA, NHPA, ESA, etc.).

(b) Required MOA Agreement Provisions: The required provisions for MOAs are listed below. Additional provisions may be required depending upon who controls the funds and the method of accomplishing the work. MOAs for pre-construction planning activities need only contain the applicable provisions (see Appendix A).

(1) Permission to enter upon tribal lands (tort claims);
(2) *Designation of party(s) responsible for rights-of-way;
(3) *Environmental and cultural requirements and responsibilities;
(4) Contributions and commitments of each party (monetary and non-monetary), including any project technical support amounts (see Chapter 9, Section VI in the Criteria document);
(5) *Fund control/expenditure provisions/cost principles;
(6) Method(s) of accomplishing the work;
(7) Authorized representatives for each MOA party;
(8) Degree of involvement/control by each party;
(9) *Minimum construction standards, if tribe or third-party doing the work.
(10) *IHS Role in construction inspection. [see (c)(2) below]
(11) Ownership and transfer of facilities/services/Federal interest;
(12) *Responsibility for operation and maintenance; development and enforcement of operation and maintenance ordinances;
(13) Specific performance periods, project schedule;
(14) Termination for inactivity;
(15) *Standard Termination Procedure [see Section 2(g)]
(16) *IHS MOA dispute resolution.

*Additional provisions required for sanitation facilities construction projects.

(c) Provisions for Tribal Procurement:

(1) Technical Assistance: The MOA is the authorizing document for providing technical assistance, providing technical services, and identifying IHS oversight procedures. The exact methods of work, degree of involvement by each party, and IHS responsibilities for technical assistance and technical supervision must be adequately detailed in this document to minimize agency liability and eliminate the possibility of individual employee liability. Using "as necessary" in combination with statements about the method of work or that IHS may or will provide technical assistance as necessary is not adequate.

(A) Do not include work items in the MOA that the IHS is not authorized to provide.

(B) Separate Responsibilities: IHS employees cannot represent the tribe, and tribal employees cannot represent the IHS. An explicit statement to this effect should be included in the MOA and a similar statement should be included in the tribe's construction contract.

(C) No Contractual Relationship: Technical services, technical assistance, or oversight responsibilities outlined in the MOA and provided by IHS staff cannot create or appear to create a contractual relationship with the tribal contractor, supplier, or other entity which is not a party to the MOA.

(2) MOA Provisions on IHS Inspection: The MOA must clearly identify the IHS role in construction inspection and require that tribal procurement documents also include the right of IHS employees to inspect the work. References to IHS rights and responsibilities should not identify specific individuals by either job title or name.

Sec. 2. MOA Procedures

(a) Document Disposition: The Area Office is the repository for all original project documents. Copies will be provided to all parties of the executed MOA.

(b) MOA Initiation: Projects are usually initiated by a request from an American Indian Tribe or Alaska Native Community eligible to receive assistance from IHS under current eligibility criteria. The project request is submitted on a standard form (Project Proposal form, IHS-62) or as a letter which provides the same information as the standard form The primary purpose of the form or letter is to document the request for IHS assistance. All such proposals must be acknowledged by the Area, and a notice of receipt sent back to the initiator.

The standard form or the request letter are the basis for preparing project documents. The Area may use tribal forms and letter requests as the basis for preparing project documents, when accepted by the appropriate Area official as an official request. When acknowledging receipt of the project proposal document, the response should be signed by the appropriate IHS official as designated by Area policy.

If the IHS decides to fund or otherwise participate in a project using project priority guidelines, the IHS will initiate consultations with the prospective MOA parties and prepare the draft MOA for review. (Note: P.L. 86-121 projects are discretionary; they are not an entitlement and are not competitive.) Attached to the MOA and incorporated into the MOA by reference is the Project Summary document which specifies the recommended project scope and estimated cost.

(c) Signatures: One original signature copy of the MOA, each with an attached copy of the Project Summary, will be circulated by IHS to all the parties to the agreement for signature approval. The authorized representative of each party will sign each MOA copy signifying approval of the recommended project and committing that party to the terms of the MOA. IHS will distribute copies of the fully executed MOA and Project Summary to each party to the MOA.

(1) Last Signatory: When IHS appropriated funds are committed to a sanitation facilities construction project, the last signatory to the MOA document shall routinely be the IHS Area Director. Exceptions include: On letter amendments for minor modifications, the IHS Area Director may sign the letter prior to receiving concurrence and signature from other parties. The letter amendments should include this or a similar statement: "It is understood by all parties that this agreement is contingent upon the approval and the execution of this agreement by all parties."

(2) Project Approval: All parties to the MOA except the IHS may sign the MOA before the IHS Area Director approves the project (by signing the Project Approval form) under the following conditions:

(A) The Project Summary has been reviewed and approved by the Director, Division of Sanitation Facilities Construction (DSFC) of the Area and is available for review by each person signing the MOA.
(B) The MOA includes this or a similar statement: "It is understood by all parties that this agreement is contingent upon approval of this project by the IHS Area Director or his designee, and execution of this agreement by all parties."

The objective is to allow Areas to submit the Project Approval form and MOA to the Area Director for signature as one package. In addition, it may reduce the

number of field visits by IHS staff to various organizations to discuss Project Summaries and MOAs and to obtain signatures on project documents.

An example of the Project Approval form is in the appendix of the Criteria document.

(d) MOA Contributions and Obligations: The sources of funding for sanitation facilities construction projects include congressionally appropriated funds, contributed funds from other Federal agencies, contributed funds from tribes, and contributed funds from other non-Federal entities. The MOA sets forth the respective contributions to be made by the MOA parties toward construction of a particular sanitation facilities project and is the instrument for obligating those contributed and appropriated project funds.

Depending upon the source of funds, the IHS SFC Program must use the appropriate method of accomplishing work as shown in Figure 3-1. Note that Federal procurement is always an option.

- Figure 3-1 A, typifies the traditional SFC project or direct service approach.
- Figure 3-1 B, shows the SFC project funded fully or partially, with or without the addition of IHS funding, by direct contributions from other Federal agencies. This type of project includes funds contributed from HUD/NAHASDA and EPA ISA programs. Only funds from HUD are specifically authorized by law[9] to be administered by IHS.
- Figure 3-1 C, includes the situation where another Federal agency provides a grant or loan directly to a tribe and, subsequently, the tribe contributes the funds to an IHS SFC project. Because the Tribe and the funding agency actually administer those grant or loan funds, P.L. 86-121 is the only authorized method of accomplishing the work.

Since the MOA is the instrument that obligates[10] sanitation facilities construction project funds, the total dollar amount of project funding from all sources must be explicitly stated in the MOA including design, support account, and construction amounts.

If part of or all of the funding for any project is from IHS appropriations, the maximum amount of IHS funds as stated in the MOA (not to exceed the funds available) shall be obligated with the MOA upon project approval and IHS funding. Funds transferred to IHS from other Federal and non-Federal entities as project contributions shall be obligated when received. The Area Financial Management office should be advised of the amount of funds committed.

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[9] 25 U.S.C. Sec. 1632(b)(3) Notwithstanding any other provision of law - (A) the Secretary of Housing and Urban Affairs is authorized to transfer funds appropriated under the Housing and Community Development Act of 1974 (42 U.S.C. 5301, et seq.) to the Secretary of Health and Human Services, and

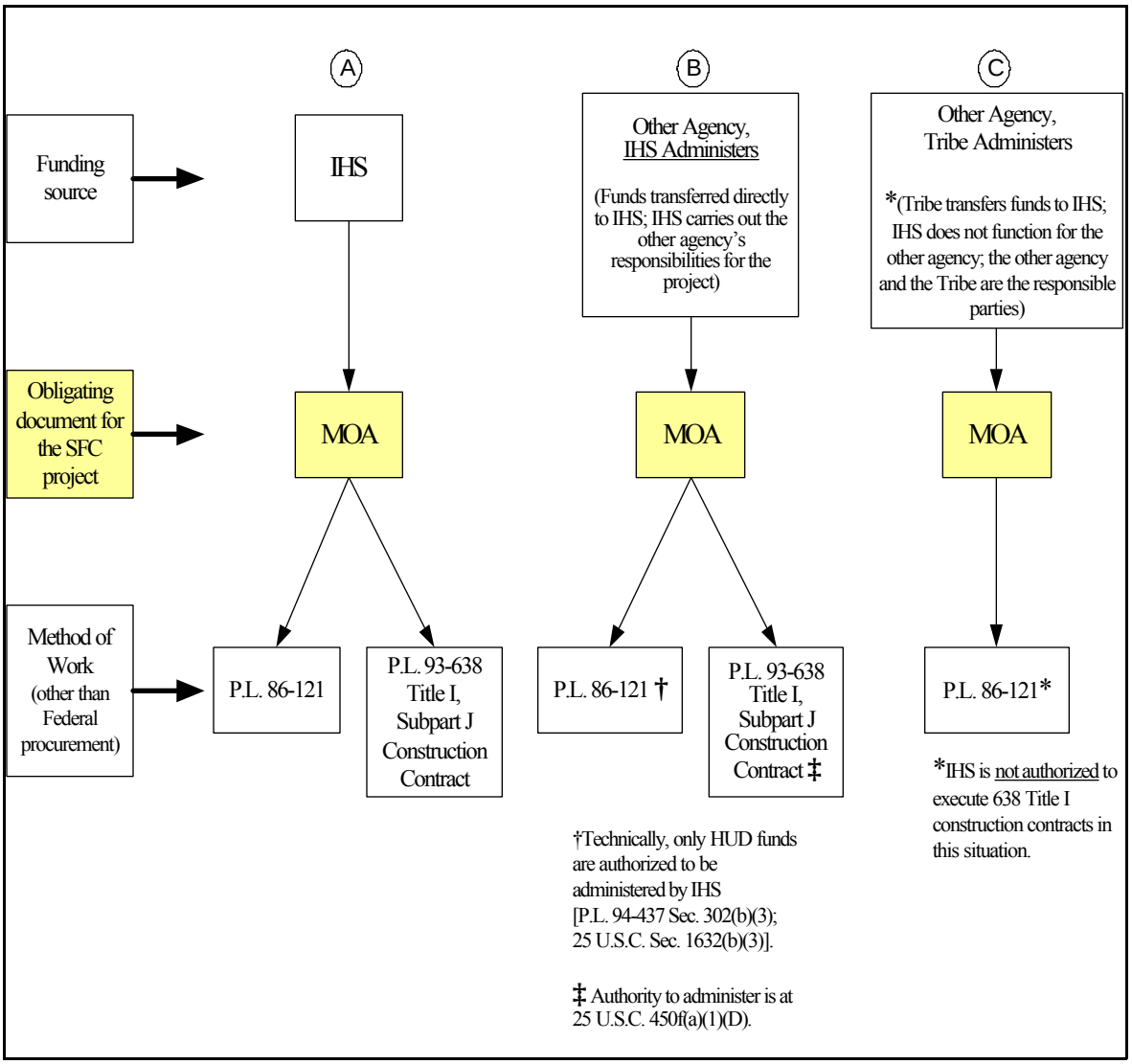
(B) the Secretary of Health and Human Services is authorized to accept and use such funds for the purpose of providing sanitation facilities and services for Indians under section 2004a of title 42 [this cite is P.L. 86-121].

[10] Under Federal law on obligation of appropriations, an "obligation" is some action that creates a liability or definite commitment on the part of the government to make a disbursement at some later time. The law also precludes an obligation unless it is supported by documentary evidence of a binding agreement between the parties; a binding agreement need not be a formal contract. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties. "The statute [31 U.S.C. Sec. 1501] requires documentary evidence of a binding agreement for specific goods or services. An agreement that fails this test is not a valid obligation." [GAO, Principles of Federal Appropriations Law, Vol. II, Chap. 7.] Therefore, the MOA with attached Project Summary together provide the "documentary evidence," "binding agreement," and "specific goods or services."

Normally, that maximum contribution amount must be recorded as an obligation; however, the contribution of funds can be conditional in the MOA (e.g., conditional upon IHS receiving a specific amount from a specific agency). Depending on the project specific circumstances and the conditional statements, some or all of the intended contribution may constitute a commitment upon approval of the project. For example, the Rural Development (RD) program may provide a loan to the Tribe for a sanitation facility, if IHS supports the Tribe's efforts. In the MOA, the Tribe agrees to contribute a specific dollar amount to IHS for the cost of project support and inspection services. Since the fund transfer did not take place at the time the MOA was signed, those funds cannot be obligated; however, the signatures of the parties commit them to providing the goods and services described in the Project Summary and MOA.

If the executed MOA contains provisions for a fund contribution from IHS to another party, the party that will receive and administer the funds must request the funds in writing in accordance with the provisions of the MOA and these guidelines. The total of all fund contributions cannot exceed the amount stated in the MOA. The MOA must specify the maximum amount of funds as a specific dollar amount that may be contributed by the IHS to the tribe, community, or other organization for the purposes specified in the MOA.

Fig. 3-1. Authorizations for Methods of Accomplishing the Work



(1) Requests for the funds identified in the MOA should be sent to the appropriate IHS field office and forwarded to the Area office SFC Program Director with appropriate documentation and approval recommendations as required by the Area office guidelines.
(2) MOA contribution requests may be processed only after the Area SFC Program Director signs the appropriate document for the disbursement. [See also Chapter VI, Section 3(a)(2)]. The Tribe or other MOA party will be given copies of Office of Management and Budget (OMB) A-87 (see Appendix D) and applicable copies of sections of these guidelines when funds are transferred to them.

(e) Non-Specific MOA: (See also Chapter I, Section 2(c)) A non-specific MOA does not obligate any IHS project or other funds or resources. A non-specific MOA must include provisions which clearly indicate the following:

(1) All actions and/or fund obligations must be activated by clauses in an MOA executed for implementation of a specific project.
(2) The non-specific MOA will be renewed at intervals which do not exceed five years.

The project MOA which implements actions and/or fund obligations must reference the applicable non-specific MOA.

(f) MOA Amendments: Amendments to the MOA can be initiated as necessary. All affected parties to the original MOA must approve and sign any subsequent amendments; all other parties should be notified. An MOA must be amended if any of the following conditions apply: (1) the scope of the project as described in the Project Summary changes significantly; (2) additional funds in excess of the amounts stated in the MOA are required to complete the project; (3) the method of accomplishing the work changes significantly, and (4) any other MOA provisions are modified.

(1) Letter Amendments: Whenever field conditions or changed circumstances make necessary a change in plans or in the agreed upon conduct of the project, modifications to the basic MOA shall be executed. Where the changes affect only the commitments of the parties, only a modification of the basic MOA is necessary. If there is a change in the scope of the project, both the MOA and the Project Summary must be amended. In most instances, minor modifications can be executed by an MOA letter amendment or combined Project Summary and MOA (PS/MOA) letter amendment, as appropriate, and signed by all affected parties. The PS/MOA letter amendments should include the applicable and appropriate changes to the information listed in Chapter 8, Section I of the Criteria document. Copies of amendments should be attached to the original copies of the MOA to prevent later misunderstandings.

(g) Standard MOA Termination Procedure: The standard MOA termination procedure is as follows: An MOA party may terminate its relationship with the other MOA parties prior to project completion upon 30 days advance notice in writing to all other parties. If the MOA is terminated by all parties prior to completion of the project, all unexpended funds will be returned to the contributors in a prorated manner and in accordance with the transfer provisions in the MOA. All in-place sanitation facilities will be transferred to the tribe or other party as designated in the MOA. The IHS may elect to transfer or retain any or all unused materials and equipment purchased with IHS funds and may request the Tribe transfer to IHS materials purchased by the Tribe with IHS funds. IHS will return unused IHS funds to bulk accounts at the Area office for commitment to other projects, as appropriate.

(h) MOA Disputes: Any disputes among the parties to an MOA regarding its provisions or the fulfillment of responsibilities under the MOA are expected to be resolved by the parties at the Area level. Areas should have policies and mechanisms in place for settling disputes. There are a number of options for alternative dispute resolution such as mediation and dispute review boards. If a dispute cannot be resolved at the Area level, then any party to the MOA can request a review by the Director, OEHE, IHS Headquarters. To conduct this review, the Director, OEHE, will appoint a Review Board comprised of:

(1) Director, OEHE, IHS, Headquarters;
(2) An Area Director from an Area not involved in the dispute;
(3) A Director, SFC Program, from an Area not involved in the dispute;
(4) Other experts that may be deemed appropriate, such as a representative from the Office of General Counsel (OGC), or the HHS Office of Grants and Acquisition Management.

The Review Board will conduct an inquiry into the dispute. The Board will invite each party to the dispute to submit relevant information supporting its position. The Board may conduct a portion of its inquiry onsite, as appropriate. Such inquiry and any deliberation necessary shall be completed within a maximum of 60 days after receipt by the Director, OEHE, of the request for review.

Upon completion of its inquiry and deliberation, the Review Board will issue its decision to resolve the dispute, along with the complete factual information record compiled on the dispute. The Review Board's decision will be binding on IHS and may not be appealed by the IHS Area involved.

The Tribe or third-party may appeal the decision to the Director, IHS. If such appeal is made, the Director, IHS, will render a final decision for the Agency within 60 days of receipt of the appeal. The complete informational record compiled by the Review Board will be the only factual information about the case considered by the Director, IHS, in evaluating the merits of the appeal.

(i) MOA Completion: The project is completed when all the MOA provisions are met, which may be some time after the scope of work (e.g., construction) is completed. Some MOA provisions which refer to all or part of the constructed sanitation facilities that are transferred to the Tribe or that are vested in the Tribe may continue to apply indefinitely; e.g., O&M responsibility. IHS will return unused IHS funds to bulk accounts at the Area office for commitment to other projects, as appropriate.

CHAPTER IV. MOA Administrative Requirements For IHS

Sec. 1. Accountability: IHS employees are responsible and accountable for the management and monitoring of Federal funds and other Federal resources. The Federal interest in a project is best served when adequate internal controls are instituted and the roles of all the Federal participants are well defined. IHS employees in responsible positions (e.g., inspectors, project engineers) must know the applicable Federal resource management requirements and must provide the necessary documentation for expending those resources. Financial transactions must comply with applicable procurement and acquisition requirements including:

- Approvals of resource commitment and expenditure obtained from the appropriate person;
- Timely and accurate filing of project reports;
- The project must comply with applicable laws and regulations;
- Project resources must be used efficiently; and
- The project objectives should be achieved effectively.

Sec. 2. Internal IHS Controls: Internal controls are methods and measures used to insure accountability, as described above. Certain basic standards must be followed:

(a) Standards of Internal Control:
(1) Documentation: All resource transactions must be clearly documented including fund transfers and contributions from Federal and non-Federal entities, equipment purchases, contracts, and payments. The documentation must be readily available.
(2) Recording and Execution of Transactions: Resource transactions must be recorded when executed by persons acting within the scope of their authority.
(3) Separation of Duties: To minimize the risk of loss to the government, key duties must be assigned to separate individuals including authorizing, approving, and recording resource transactions; issuing or receiving assets; making payments, and reviewing/auditing transactions or programs. These duties are outlined in more detail in Section 3.
(4) Supervision: Qualified and continuous supervision must be provided to assure approved procedures are followed. Lines of personal responsibility and accountability within each Area must be clear.

(b) Review Procedures: Review and approval procedures to control the expenditure of Federal resources must be established. The authority for the MOA comes from P.L. 86-121. The administrative controls on the use of the MOA were refined and strengthened since 1959 by issuance of program administration guidelines and periodic internal program management reviews. The MOA is not a field level agreement that is executed by project engineers. The MOA and MOA contribution must be reviewed and approved at the Area level by senior SFC Program managers and approved by the Area Director. The approval process provides a check and balance system and eliminates the potential for conflict of interest. The approval process is dependent on the roles of various Federal employees involved in an SFC project. Those roles are discussed in Section 3 in general terms; some specific roles are described throughout the rest of the document.

(c) Prohibited Practices: With the exception of those on an IPA or MOA detail to a tribe, IHS employees are prohibited from making financial or other obligations on behalf of a tribe (or other MOA party), including issuing directives to the Tribe's employees or Tribe's contractors. Verbal and written contact between IHS employees and a tribe's contractors shall be prefaced with the statement that, "IHS is providing technical assistance only and is not an agent of the Tribe."

(1) IHS employees are prohibited from signing (or co-signing) any tribal checks or having signatory authority on bank accounts, or signing contract documents including purchase orders, requests for quotation (RFQ's), etc.
(2) Checks, either from the Government or the Tribe, shall not include a Federal employee's name.
(3) Federal government letterhead paper and envelopes may not be used by a Tribe or Federal employees on behalf of a Tribe.
(4) Original tribal contract documents, including bids, shall be kept and processed at tribal offices, not at IHS offices.

In order to maintain internal checks at all times, Area SFC Program Directors and OEHE Directors, acting in their respective capacities, may not sign MOAs or provide final Area approval for fund obligations. Only the IHS Area Director has that authority.

Sec. 3. Roles of IHS Personnel: The major roles of IHS personnel are described below. These roles are not all inclusive, because additional specific duties may be required depending on the method used to accomplish the work. For example, SFC personnel may have additional roles if the method of work is tribal procurement (see Chapter VI). In addition, other Federal responsibilities may be described in regulations governing personnel, contracting, property, and other matters.

(a) Role of the IHS Project Engineer: The IHS project engineer is the first level of responsibility for the project. Activities of the project engineer typically involve project planning, design, and construction management. However, within the context of the MOA, the project engineer has another important function, that of the "project manager." Depending on the specific method chosen to perform the work under the MOA arrangement, the project engineer may have other additional functions such as being the Federal Contracting Officer's Representative where the facilities are provided by IHS. The primary responsibilities of the project engineer with respect to MOAs, in addition to his/her technical role, include:

(1) The project engineer is the official point of contact for routine matters and correspondence among all the MOA parties. The project engineer is responsible for coordination with all MOA parties and with other Federal officials.
(2) Upon request and as appropriate, the project engineer will:
(A) Provide technical assistance in the development of Project Proposals;
(B) Provide explanations of programmatic requirements, regulations, guidelines, and funding criteria;
(C) Provide direct consultation and assistance to MOA parties concerning programmatic or technical matters.
(3) Depending upon the availability of resources and as necessary, the project engineer will visit the project site to substantiate progress and compliance with MOA provisions, fund control/expenditure requirements, and all other applicable laws, regulations, and policies.
(4) The project engineer will identify potential or existing problems and share with the appropriate staff information and/or findings concerning those problems. As appropriate, the project engineer participates with other staff to resolve those problems.
(5) The project engineer is responsible for maintaining field level documentation pertinent to the MOA.
(6) Project engineers will not make final decisions on funding issues (except for SF-44s or IMPAC cards), but will provide advice and recommendations to supervisors in a timely fashion. The project engineer has the responsibility to exercise judgment and prudent stewardship over Federal funds in accordance with the highest standards of professional and ethical conduct.

(7) Project engineers are responsible for monitoring expenditures and construction progress and reporting this information to the District Engineer on a routine basis.

When an engineer is assigned to a tribal program under a P.L. 93-638 contract, the project engineer responsibilities described above are split between the tribal engineer and the IHS District Engineer or other designated IHS employee. The relationship is one of shared project responsibility between the tribe and the Federal government. The tribe's project engineer will perform the traditional project engineer functions having to do with project development, execution, and completion. However, the government responsibilities for assurance of the technical and administrative aspects of the project, in deciding compliance with the MOA provisions, fund release approvals, etc., shall be retained by the IHS District Engineer or other designated IHS employee.

(b) Role of the District Engineer: A primary role of the District Engineer is the supervision of the project engineers. In that role, the District Engineer is responsible for insuring that the project engineer is carrying out all of his responsibilities as project manager. Additionally, the District Engineer has the following MOA related responsibilities:

(1) Provide information, especially regarding fund obligations, and recommendations to the SFC Program Director and other Area office officials.
(2) Ensure that the provisions of the MOA are carried out.
(3) Recommend approval or disapproval to the SFC Program Director for all MOA contribution payments.
(4) Notify the Area Office that construction progress and expenditures are as projected, or advise the Area if otherwise.

When tribes have contracted for environmental health program positions under P.L. 93-638, the project engineer responsibilities are shared between the tribe's engineer and IHS personnel as described above in (a). The District Engineer may be assigned collateral duties as the government's representative on sanitation facilities projects funded under P.L. 86-121. Those duties include assuring technical adequacy of the facilities installed, reviewing management of the project funds, certifying fund releases, providing final government approval of completed facilities, closing out the project, and other non-contractible portions of the program.

(c) Role of the IHS Area SFC Program Director: The SFC Program Director is responsible for establishing Area specific MOA policies (consistent with this document) and related internal controls, for negotiating agreements among the MOA parties, and for reviewing the language of the MOA provisions. The SFC Program Director makes recommendations for project funding to the Area Director through the OEHE Director. The SFC Program Director does not have the authority to execute an MOA, but ensures that the terms of the MOA are carried out. The SFC Program Director has the following additional MOA related responsibilities:

(1) Makes recommendations to the OEHE Director and the Area Director regarding MOA approvals, MOA amendments, transfer agreements, and notices of completion, suspension, or termination of MOAs.
(2) Provides review and programmatic approval of all IHS MOA fund contributions consistent with the MOA and all internal controls.
(3) Insures that MOA and contract responsibilities and conditions are authorized by Federal laws and regulations and IHS authorities.
(4) Reviews tribal unit prices and tribal procurement payments.
(5) Insures that the method(s) of accomplishing the work are appropriate and in accordance with applicable laws, regulations, and policies.

(6) Reviews the tribal capacity to administer the project as outlined in the MOA.
(7) Insures that MOA time constraints and cash flow schedules are met and that IHS responsibilities and obligations are carried out in a timely manner; e.g., fund transfers and payments.
(8) Insures that proper documentation is in the official project files and that other internal control procedures are being followed.
(9) If appropriate, initiates a final project audit for all projects exceeding $25,000 and ensures the project is closed out.
(10) Conducts annual Service Unit or District level reviews of field activities to insure proper implementation of the MOA.
(11) Assists the Headquarters IHS in periodic Area reviews which include review of MOA practices.
(12) Maintains familiarity with these MOA guidelines and related policies, including OMB Circular A-87, and other documents applicable to the MOA.

(d) Role of the Director, OEHE: The Director, OEHE, at the Area shall review and recommend that the Area Director approve internal controls for MOA approvals and MOA resource transactions in the Area SFC Program. Subsequently, the OEHE Director is responsible for ensuring that those controls are followed. The OEHE Director shall be considered the external check for the SFC Program.

(e) Role of the Area Director: The Area Director is delegated the authority from the Director, IHS, to enter into MOAs. The Area Director relies on the Area OEHE program officers and the Area financial management staff for funds accountability. As authorized by P.L. 86-121, the MOA is used by Area finance officers as documentary evidence for obligating funds for sanitation facilities project construction. The Area Director and the Area finance office provide a check that is external to the SFC Program. The Area Director approves, monitors, and enforces the SFC Program guidance with respect to MOA approvals and internal fund controls.

(f) Role of the Headquarters SFC Program: The SFC Program at the IHS Headquarters (HQ) level establishes national MOA policies and guidelines that are consistent with OMB, HHS, and IHS regulations and is responsible for ensuring those policies and guidelines are carried out consistently among all IHS Area SFC Programs. This is accomplished by periodic reviews of all Area practices and Area-specific internal control guidelines and by a periodic review of MOA's for the inclusion of required provisions. The HQ SFC Program is responsible for implementing the basic internal control framework for the SFC Program, which is the basis for Area internal controls and includes these guidelines.

Sec. 4. Ethical Standards: When assisting the tribe or other MOA party to construct or procure facilities or services under an MOA, IHS employees shall observe all ethical and legal standards required of them as Federal employees. If they observe any practices by the tribe, its contractors, a third-party, or another Federal employee that appear to fall below those standards, they shall report their observations immediately to the IHS Area SFC Program Director for appropriate action.

CHAPTER V. Direct Provision By IHS

This chapter discusses construction of sanitation facilities using a Federal government contract or using IHS employed construction workers. The contractor in a Federal contract may be the Tribe that signed the MOA and making it appear that the Tribe is providing the facilities; however, that is not the case. When the Tribe contracts with the Federal government directly or after the MOA is signed by all parties, the Tribe is a Federal contractor providing the facilities for the government. Facilities constructed by the Tribe for IHS under a Federal contract must be transferred to the Tribe or other entity to own, operate, and maintain.

A Title I construction contract is a Federal contract; however, under a Title I construction contract, the tribe owns the constructed facility unless it requested otherwise. If the funds were contributed to the Tribe through an MOA and the Tribe provides the sanitation facilities, the owner of the facilities could be the Tribe or another MOA party that would own, operate, and maintain the new facilities.

An MOA for construction of sanitation facilities using IHS employed construction workers or force account has most of the MOA provisions listed in Chapter III including:

- Tribal Labor and Administrative Supervision;
- Labor;
- Construction Safety and Liability;
- Construction Account;
- IHS Contributions and Obligations.

Sec. 1. Government Contracting: A contract is a legal document which has several functions including communicating to the Contractor what the other parties to the contract want to build, where to build, what type of materials to use, and when the facility is to be completed. The rules for contract administration are in the FAR system supplemented with Buy-Indian Act and 638 Title I contracting regulations. All contract administration is done with the assistance of a contract specialist, project officer, and when applicable, Contracting Officer. Additional information on contract administration may be found in the FAR System.

There are several laws regulating wages and hours of workers employed on Federal contracts for public works or construction.

- The "standard workweek laws" limit the employment of laborers and mechanics on such projects to 40 hours per week and permit their employment in excess of that limit only upon condition that compensation at a rate not less than one and one-half times the basic-wage rate is paid for the excess hours (40 U.S.C. Sec. 328).
- The Davis-Bacon Act (40 U.S.C. 276a to 276a-5) provides that the minimum rates of pay for laborers and mechanics on certain Federal public-works contracts shall be those prevailing for the corresponding classes of workers in the locality as determined by the Secretary of Labor.
- The Copeland Anti-Kickback Act (40 U.S.C. 276c; 18 U.S.C. 874) prohibits the exaction of rebates or kick-backs from workers employed on the construction of Federal public works or works financed by the Federal Government and authorizes the Secretary of Labor to make regulations for contractors engaged on such projects.

In addition to the above statutes, there are several acts which require the payment of prevailing-wage rates, as determined by the Secretary of Labor, to laborers and mechanics employed on construction financed in whole or in part by loans or grants from the Federal Government or by mortgages guaranteed by the Federal Government. Those acts include

the National Housing Act, the Housing Act of 1949, the Federal Airport Act, and the Hospital Survey and Construction Act of 1946.

(a) Open market contracts: When the Federal government acquires goods or services that are not available from mandatory sources, they are procured on the "open market." Acquisitions from the open market sources generally are fully competitive but can be restricted to a class of contractor, such as Indian contractors (Buy-Indian) or small business enterprises. Justification is required for a sole-source contract; a "Justification for Non-competitive Acquisition" shall be prepared. For unrestricted contracts, bidders can be non-Indians, Indian-owned firms, tribes, tribal-owned entities, or any other combination of private enterprises or entities.

The Buy Indian Act (25 U.S.C. Section 47) is a "set-aside" authority, which exempts Buy Indian set-asides from competition requirements. Current regulations applicable to acquisitions by the IHS under the Buy Indian Act are at 48 CFR Subpart 370.5[11]. The Buy Indian Act (and other statutes) is applicable to the IHS because of the Transfer Act (42 U.S.C. Section 2001). Under the PHS Buy Indian regulations at 48 CFR Subpart 370.5, set-aside acquisitions are negotiated acquisitions but should be conducted as if they were formally advertised acquisitions where appropriate.

A contract may be awarded under the Buy Indian Act only if it is determined by the Contracting Officer that the contracted project is likely to be performed satisfactorily and is likely to be properly completed and maintained. If an Indian firm is awarded a Buy-Indian contract, it must conform to the same requirements as other non-Indian contractors with some exceptions. Those requirements include:

(1) Preference in awarding contracts (via an Indian set-aside) is given to Indian firms, which are defined as a sole proprietorship, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians; or a non-profit firm organized for the benefit of Indians and controlled by Indians.

(2) The degree of Indian ownership of an Indian firms shall be at least 51 percent during the period covered by a Buy Indian contract. [40 CFR 370.503(a)]

(3) An Indian firm may enter into a joint venture for a specific contract as long as the Indian firm is the managing partner, and the joint venture is approved by the Contracting Officer prior to award of a contract.

(4) Bid, performance, and payment bonds are required of contractors except an Indian tribe or public non-profit organization serving as governmental instrumentalities of an Indian tribe doing work on reservation land held in trust for that tribe. However, wholly separable, tribally owned business enterprises are required to be bonded.

(5) Under a prime contract awarded under the Buy-Indian Act, not more than 50 percent of the work to be performed may be subcontracted to non-Indian firms; i.e., at least 50 percent of the work must be performed by Indian firms or Indian subcontractors. [48 CFR Subpart 370.503(e)] For this purpose, work does not include procuring or providing materials, supplies, or equipment.

[11] Title 48--Federal Acquisition Regulations System; Chapter 3–Department of Health and Human Services; Subchapter T–HHS Supplementations; Part 370–Special Programs Affecting Acquision; Subpart 370.5--Acquisitions Under the Buy Indian Act.

(6) All contracts over $2,000 require Davis-Bacon wage rates except for contracts with tribal governments, where tribal government workers will perform the construction. [48 CFR 370.503(f)]).

(7) Buy-Indian contracts are subject to the requirements of Section 7(b) of P.L. 93-638, which requires that preference be given to Indians in employment, training, and subcontracting.

(8) Contracts to be awarded under the Buy Indian Act are subject to competition among Indians or Indian concerns to the maximum extent that competition is determined by the Contracting Officer to be practicable, pursuant to the FAR. When competition is not practicable, a "Justification for Non-competitive Acquisition" shall be prepared and approved by the Senior Contracting Officer for contracts up to $100,000 or, if over that amount, approved by IHS Headquarters Finance. Solicitations must be publicized in the Commerce Business Daily in accordance with the Competition in Contracting Act (CICA; 41 U.S.C. Section 253(a)(1)) and copies sent to the applicable tribe.

(b) 638 contracts: Tribes may elect to provide sanitation facilities under Title I of P.L. 93-638, as amended or, as it is commonly known, a "638 contract." Regulations for 638 construction contracts are found at 25 CFR 900, Subpart J, Sec. 900.110 et seq. The 638 contracts used in the SFC Program are generally of two types:

(1) A 638 administration contract is used for activities related to construction program administration and management.
(2) A 638 construction contract is a fixed-price or cost-reimbursement self-determination contract for a construction **project** [25 CFR Sec. 900.113(a)]. A construction contract may include planning services and construction management services.

These Self-Determination 638 construction contracts are not traditional "procurement" contracts. As authorized by P.L. 93-638, the FAR regulations apply only to the extent that they are necessary to insure that the contract is carried out in a satisfactory manner and are directly related to the construction activity (25 U.S.C. Section 450j).

Upon receiving an indication that a tribe is interested in pursuing either type of 638 contract, IHS personnel shall advise the Tribe to make their request known in writing to the Area Director, and the Area SFC Program Director shall be notified immediately. If a tribe or tribal consortium obtains a 638 contract which includes the local administration of the Sanitation Facilities Construction Program, an MOA may be used between the IHS and the tribe to obligate funds to a sanitation facilities construction project.

Funds that another agency has already awarded or allocated to tribes, but then passed to IHS to give to the tribe are not considered to be "administered by the Secretary" and may not be included in a 638 contract. If IHS accepts this type of contribution, which is not administered by the Secretary, then the MOA is the only instrument that may be used to transfer funds to the Tribe. [see Chapter I, Section 4(c)]

(c) 638 Title V: Participating Self-Governance Tribes may agree to undertake construction projects under section 509 of P.L. 93-638, as amended; the implementing regulations are at 42 CFR Part 137, Subpart N-Construction, Section 137.270 et seq. Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Self-Governance Tribes may enter into and administer self-governance construction project agreements for construction projects.

Self-Governance Tribes performing construction under section 509 are required to assume the IHS Federal responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act (NHPA), and related environmental laws. Self-Governance Tribes who undertake construction projects under Section 509 have the responsibility to complete construction project agreements and provide day-to-day management and administration for construction projects, within available funding.

Self-Governance Tribes also have the option of performing IHS construction projects under other legal authorities including Title I of P.L. 93-638, as amended, the Indian Health Care Improvement Act (P.L. 94-437), and P.L. 86-121.

Sec. 2. Government Force Account: During the project planning phase, it may be determined by the tribe and IHS that all or part of the proposed cooperative project should be built by government force account method [see also Chapter II, Section 1(a)]. Under the government force account method, the IHS oversees the execution of the project, schedules and directs the day-to-day operations at the job site through a project manager or foreman, and controls project expenditures. The materials used on the project may be purchased either by the Tribe in accordance with Chapter VI (Section 2, Tribal Procurement) of these guidelines, or by the IHS in accordance with the FAR. The workers on the project could be Federal employees, tribal employees, or a mix of workers. The IHS could procure materials, furnish construction equipment, arrange transportation, schedule work, and assure quality control for all or part of the project. The Tribe could provide skilled or unskilled workers paid with MOA contributed funds to work along with Federal employees on the project.

(a) Background: The government force account method, with some labor provided by the Indian Tribes, was the predominant method of accomplishing the work during the first 10 years of the program. In recent years as tribes developed more capability to manage their own projects, other methods of constructing sanitation facilities were created. Nevertheless, the intent remains that both the Federal government and the tribes will continue to work together to improve the health of the American Indian and Alaska Native people.

(b) Government Force Account Policies: Policies governing government employees doing construction work are established by the Office of Personnel Management and are not described in this Guideline; consult the Area personnel office for applicable policies. If the parties to the MOA choose to proceed with a project in the manner described above (government and tribal employees working together at a job site) as Government Force Account, the MOA parties need to understand the roles and limits of supervision. These roles must be understood by the parties and documented in the MOA.

(1) Roles and Limits of Employee Supervision: Employee supervision is a broad activity consisting of several significant authorities and responsibilities towards employees including hiring, directing, assigning, promoting, rewarding, suspending, disciplining, and removing employees. In the cooperative relationship established under the MOA to construct a sanitation project using a government foreman and local tribal employees, the authorities and responsibilities are shared between the two parties.

The role of the foreman is to be responsible for the technical direction of the local project workers in assigning, directing, and reviewing work and reporting on performance on a routine basis. If a problem develops regarding performance, attendance, or conduct on the project, the Foreman will convey this information to the tribal project administrator for appropriate action. The workers are generally residents in the community, who are hired as short term employees for the duration

of the construction project. The working relationship between the Foreman and tribal workers provides a way to train the tribal workers on proper construction techniques while insuring quality construction. Often, the project workers are employed later by the local government for future O&M activities. The knowledge gained during construction is valuable in insuring proper system O&M.

The role of the tribal project administrator is to be responsible for all other aspects of employing local project workers. These functions include hiring, evaluation of performance, suspending, rewarding, promoting, disciplining, and removing employees. Local workers must be hired in accordance with prevailing local, state, and federal labor laws and regulations and sound business practices. This requires processing all necessary paperwork with special emphasis on workman's compensation insurance, tax documents, time records, pay schedules, and payroll processing records. If assistance is needed in guiding the local government, professional services are suggested to accomplish the required tasks. This assistance usually is an allowable project cost.

The project wages for local workers are set by mutual agreement between the local government and the IHS. Federal wage requirements do not apply to local governments performing force account work, because they are in a position similar to municipal, state, or Federal employers for whom the Federal requirements do not apply. The waiver does not apply if the contractor is a private business corporation, whether or not owned by the Tribe or members of the Tribe or is an individual Indian contractor.

A list of needed technical skills, number of workers, and work schedules is developed during the project planning process by the project engineer, project foreman, and local officials including the tribal project administrator who will handle local worker hiring and administration. Using this planning data, the required number of workers are hired by the local government from available residents. If additional workers are needed or existing workers need to be released for poor performance, the project foreman communicates these needs to the appropriate tribal official, and the required actions are handled by the local government.

The cost of the Tribe's administrative supervision of its employees is an allowable project cost. This fee will be set after an evaluation of the extent of the tribal services to be provided.

(2) Liability and construction safety are other considerations and are discussed briefly in the following Chapters as they apply to direct provision by tribes and by third-parties. A more detailed discussion is found in Chapter 11 of the Criteria document.

CHAPTER VI. Direct Provision By Tribes

This chapter discusses the MOA method used to contribute funds to a tribe or tribal organization, when the Tribe or tribal organization provides the sanitation facilities and services. The Tribe may provide the sanitation facilities either (1) by tribal force account or (2) by tribal procurement. This chapter does not apply when tribes contract with IHS to provide sanitation facilities, after the MOA is signed (see Chapter V).

In addition to the Chapter III provisions, the MOA for accomplishing the work includes:

Tribal Procurement: (see also Appendix A).
- Tribal Contributions Section
- IHS Contributions and Role Section
- Procurement Standards
- Competitive Procurement Practices
- Indian Preference
- Required Notice to Prospective Bidders
- Wage Rates
- Bond Requirements
- Subcontract Limits
- Administrative Provisions
- General Provisions
- Special Provisions
- Submittal Requirements
- Final Inspection

Tribal Force Account: (see also Appendix A).
- General Provisions
- Abbreviated Cost Control Provision or Comprehensive Cost Control Provisions

Sec. 1. Tribal Force Account: This section discusses projects in which all or some funds are contributed to a tribe to provide sanitation facilities through tribal force account. Tribal force account normally refers to the method of construction where the tribe has control of construction and uses tribal employees to do construction work. Typically, construction management is coordinated with IHS, but remains a responsibility of the Tribe. For projects using tribal employees, but under the technical supervision of the IHS, refer to Chapter V, Section 2, Government Force Account Work. The requirements and roles of the Tribe, IHS field staff, and others under tribal force account are described in this section. The Tribe may have to procure materials and possibly specialized technical services, unless the materials and technical services are provided by IHS. Tribal procurement is discussed in Section 2 of this chapter.

The Tribe and IHS shall comply with all the provisions of subsections (a) through (f), below, for all projects in which the Tribe performs some of the work or constructs facilities using tribal force account, including determining tribal administrative capability, arranging for construction management by the Tribe, project planning, technical review, and cost estimating.

(a) Construction Management and Supervision: In the usual MOA relationship, the Tribe and the IHS agree to work together to accomplish a common goal, the construction of sanitation facilities. If the Tribe is constructing the sanitation facilities by force account, the Tribe is responsible for providing qualified construction supervision. Since IHS and the Tribe work cooperatively to accomplish the project construction, IHS must insure that the construction management and supervision provided by the Tribe is adequate. If the Tribe does not have a person with technical

expertise to supervise job site construction, an alternative is for the Tribe to contract with or hire someone with the expertise. Also, if agreed, the project construction may be guided at the site by an IHS employee working with and training a tribal construction supervisor. However, if an IHS employee effectively is the construction supervisor, this is considered to be Government Force Account work, and the principles in Chapter V must be implemented.

(1) Risk Sharing: The parties to the MOA share in some risk as in most cooperative relationships. Since funds for projects are limited, one risk is that the project cost may exceed available project funds and some or all of the proposed sanitation facilities may not be provided. The amount of financial risk (other than tort claims) assumed by each MOA party is proportional to the amount of funds contributed by that party. Each MOA party is responsible for resolving any tort claims against it. When cost overruns are discovered only at the end of the construction period, the Tribe assumes a risk that it will not be reimbursed by IHS because of lack of funds. Similarly, the IHS could determine that certain expenditures are not allowable under OMB Circular A-87 and not reimburse the Tribe. For tribal force account, profit is not allowed as it would be under a typical construction contract. Profit was defined in Chapter II.

(2) Tribal Administrative Capability: If the Tribe is to perform the work by force account, it must meet minimal standards for financial management, procurement management, and technical management to demonstrate its administrative capability. The extent of the controls and capabilities required will depend on the size, complexity, and duration of the project.

(A) Financial Management: The Tribe must have procedures and policies for payroll, accounting, budget control, and record keeping commensurate with the project scope, as described in Section 3. If the Tribe does not have staff to provide financial control, it must retain a Certified Public Accountant (CPA) or other similarly qualified individual for the project who can meet those requirements.

(B) Procurement Management: If the Tribe is to procure materials, it must have an acceptable contract administration system commensurate with the project scope, as described in Section 3. If the Tribe does not have the contract administration capability, it must obtain that function by retaining a CPA or another qualified agent, or it must obtain procurement services through another non-Federal MOA party.

(C) Technical Management: Because the Tribe has control over construction at the project site, the tribal employee in charge must have demonstrated experience in supervising similar types of construction successfully. The selection of and change of the onsite construction project manager is subject to the approval of the IHS.

(3) Limits to IHS Onsite Project Authority: When the work is performed by tribal employees under the direction of a tribal construction supervisor, the responsibility of IHS personnel at the job-site are generally limited to quality assurance and technical assistance. IHS staff may not function as supervisors of tribal force account workers.

The Tribe is responsible for providing the tribal construction supervisor and the tribal employees with the necessary skills for the job and that are mutually acceptable to the Tribe and IHS. IHS is responsible for assuring that the facilities are constructed by the Tribe in accordance with the plans, specifications, and the MOA. IHS oversight of quality assurance at the job site may require providing

some technical assistance to the tribal construction supervisor for solving problems in a cooperative manner (also see (e) below). If an IHS employee observes a problem with productivity or quality control at the job site, the IHS employee will advise the tribal construction supervisor or others, as appropriate, and work with the supervisor to resolve the problem. An IHS employee may provide technical assistance to tribal construction supervisors on skills improvement or construction techniques; however, this is not to be construed as supervision.

(b) Project Planning and Cost Estimating: Preconstruction planning is a vital part of force account construction. Although the Project Summary is part of the MOA and contains the preliminary cost estimate by IHS for the total cost of the project, the tribe that will be using force account construction methods must plan for how it will accomplish the work and develop its own cost estimate for the work. This step is necessary for the tribe to insure that it has the ability to perform the work cost-effectively and within the total project budget. If it cannot do the work cost-effectively with its own employees, then the tribe may contract with someone else to construct the facilities or request IHS to construct them.

(1) Technical Review: The IHS will work with the tribe to analyze detailed project plans to determine the proper use of labor, equipment, materials and services to complete the project tasks. This type of planning is necessary (1) to provide clarification of project design and identify incomplete plans, (2) to establish equipment needs, (3) to estimate project administrative support costs, (4) to anticipate payroll, insurance, and other cash flow needs during construction, and (5) to provide a basis for a cost control system for comparison of actual and anticipated costs during construction.

(2) Cost Estimating Basis: All tribally administered projects must use the Cost Principles established in OMB Circular A-87 (see Appendix D), which specifies the allowable project costs. Tribal cost estimates for allowable force account costs are divided into labor costs, equipment costs, material purchases (procurement), service contracts, and project administrative support costs. When those tribal cost estimates are converted to unit costs, they can be compared to unit costs for similar work performed on previous contract jobs. This comparison is helpful in supporting an IHS determination that tribal force account is a viable method of constructing sanitation facilities projects. Unit costs should not be used to "bid" on work under tribal force account; the unit cost must be adjusted for the specific project under construction.

(A) Labor Costs: Labor cost is a major component of construction. A careful review of the scope of a project will help the Tribe to estimate the anticipated labor needs and required skill levels. Meticulous project planning by the Tribe can establish the method of hiring, the definition of duties, the method to evaluate labor efficiencies, and the procedure for dismissal of unneeded or ineffective workers.

The wage rates for all workers, who are employees of the tribal group being served, will be based on the local wage rates for similar work as established by the Tribe and IHS. Under these conditions, the Federal Davis-Bacon wage rates do not apply as they would if the tribe engages a contractor to provide the facilities. The relationship between the funding source, method of construction, employer, and required wage rates shall be carefully reviewed during the project planning to make sure the proper rates apply. For force account construction, "time cards" and required review/certification of time cards are important for proper record keeping and project audits.

The tribe may pay its employees an incentive fee based on performance and/or cost containment provided that the tribe has a formally adopted incentive program established before the project award and approved by IHS. Incentive pay is an allowable cost under OMB Circular A-87. The pay must be reasonable as compared to similar work in the vicinity, and total wages plus incentive pay must not exceed prevailing wage rates.

(B) Equipment Costs: Another major construction cost is equipment, which may be owned by the tribe, the IHS, or a third-party. Proper project planning involves matching the project needs with the available equipment. The cost of equipment should be allocated at a rate which pays for ownership, maintenance, repair, fuel, oil, and depreciation. Other factors affecting cost, such as transportation, age, overhead, storage, use conditions, and disposal should be reviewed in establishing an equitable rate for each item used. There are standard construction industry reference manuals that provide assistance in establishing rates; e.g., R.S. Means Company Inc., which publishes construction cost information on several sectors of the construction industry. If a certain piece of equipment needs a major overhaul before it can be used, an equitable method of allocating the appropriate share of this cost to the project shall be determined. If a piece of equipment is to be used without charge or as part of an in-kind contribution, the terms of the use agreement should be documented to avoid later disputes. It is important to develop a method to document the use of each piece of equipment. This document should state the time allocated to the project and be certified by the IHS onsite representative. Failure to follow this policy can result in disputes and lack of data for audits.

Costs for equipment rented from independent contractors for tribal use may be allowable to the extent that the rates are reasonable after considering factors including rental costs of comparable equipment, market conditions in the vicinity, alternatives available, or the type, life expectancy, condition, and value of the property.

Policies and procedures regarding equipment rates, minimal usage periods, downtime, equipment reserve accounts, and equipment transportation are to be developed by each Area in accordance with applicable cost principles.

(C) Materials and Services Costs: Materials and services may constitute another major component of construction costs. Procurement of materials and services are discussed in Section 2 of this chapter.

(D) Indirect Costs and Project Administrative Support Fees: Indirect costs and project administrative support fees are discussed in Section 3 of this chapter.

(c) Insurance and Liability for Damage: For tribal force account work, the Tribe must obtain and maintain current insurance policies throughout the project construction including, (1) general public liability and property damage, and (2) workman's compensation coverage in accordance with applicable requirements. The Tribe and its insurance carrier are liable for damages or injuries to third-parties or tribal workers.

(d) Construction Safety: Safety at the tribal force account project site is the responsibility of the tribal construction supervisor. The tribal construction supervisor is responsible for complying with all applicable construction safety regulations. This should be explicitly stated in the MOA and in subsequent project documents. The onsite authorities and responsibilities shall be discussed during the project planning

phase and well defined in the MOA. The IHS may review tribal construction safety measures and advise the tribe of any significant safety issues, in order that the Tribe may take appropriate action. However, such advice will not relieve the Tribe of its liability if accidents occur.

(e) Construction Inspection: The MOA must clearly identify the IHS role in construction inspection and require that tribal procurement documents also include the right of IHS employees to inspect the work. References to IHS rights and responsibilities should not identify specific individuals by either job title or name. IHS is responsible for necessary project construction inspection for all force account work unless specific agreements to delegate or contract this responsibility are made. This responsibility includes assurance of compliance with plans, specifications and applicable shop drawings, materials approval, testing verification, and final acceptance. IHS employees can inspect the construction and advise the tribe and/or the tribal contractor whether the construction meets the design intent and minimum applicable standards. However, all direction to the contractor must come from the Tribe. If daily inspection responsibility is delegated, the IHS shall remain in an oversight role to resolve major problem situations.

(f) Warranties: Warranties of one-year duration should be obtained from vendors on all purchased equipment, materials, and supplies. For tribal force account work, the IHS and other project participants (funding or in-kind contributors) warrant workmanship in proportion to their original contribution or for the work for which they were responsible (subject to availability of funds) unless the tribe agrees to warrant the work in the MOA or other arrangements are made. The warranty period for workmanship shall be for a period of one year from the date of transfer or one year from the date on which the tribe obtains beneficial use of the facilities, whichever occurs first.

(g) Cost Control: In addition to (a) through (f) above, cost control is an important part of the tribal force account method of providing sanitation facilities. Significant increases in actual costs over estimated costs could force a major reduction in the scope of facilities provided or place tribal and IHS resources at undue risk. The Tribe and IHS must adopt procedures that provide adequate protection to both parties without creating high costs or undue burden for either party. A properly used cost control system provides the greatest protection to the Tribe. Before receiving its final contribution from IHS for facilities constructed or services provided, the Tribe must certify that the total fund contributions they received from IHS were expended for allowable costs as prescribed by OMB Circular A-87 and that the Tribe did not make a profit.

(1) Abbreviated Cost Control System: The Abbreviated Cost Control System is for tribal force account projects where the estimated total cost of construction in the Project Summary is less than the cost control ceiling set by the IHS Area SFC Program. That ceiling may be set by the Area based on local practice and experience up to a maximum of $400,000 (over 75 percent of sanitation facilities construction in PDS were at or below this value for FY1995 through FY2000). For force account work estimated to cost less than the ceiling established by the Area (Area ceiling not to exceed the upper limit stated above), the tribe may follow the procedures described in this section. This type of cost control system is used for small construction projects, when there would be no additional benefit to the government to require the comprehensive controls in paragraph (2). The abbreviated cost control system does not relieve the tribe from using sound project management practices.

(A) Requirements When Tribal Force Account Project Amount is Below Cost Ceiling: In addition to the requirements of subsections (a) through (f),

the Tribe will prepare a detailed cost estimate for the proposed work including the estimated amounts for labor, equipment, materials, and services. The total amount of those estimates may be converted to unit costs for the work to be performed. Those estimated unit costs are compared to unit costs for similar work completed previously by the Tribe or by contractors of the Tribe or of IHS. In making that comparison, the Tribe and IHS determine if tribal force account is a viable method to construct the proposed facilities.

When the determination is made to use the tribal force account method, the Tribe can propose those unit costs as anticipated allowable costs to construct facilities under the project. By carefully reviewing the unit costs with the Tribe in the planning stage, IHS can confirm that the unit costs are not expected to result in any measurable profit or loss and that the unit costs are reasonable and allowable. The unit costs are subject to the approval of the Area SFC Program Director.

Once the Tribe proposes the unit costs and IHS approves them, those costs will be the basis for contributions of federal project funds to the Tribe. Actual contributions from IHS will be determined by multiplying the number of units actually constructed by the approved unit costs, adjusted by the project administrative support fee established in accordance with Section 3(a)(5).

During project construction and execution, if the Tribe encounters conditions where the approved unit costs are not valid for some or all of the remaining work, the Tribe should contact IHS to discuss the possibility of revising the unit costs. Since the revised unit costs will apply to future work, the Tribe must notify IHS immediately upon discovery of the significant condition that justifies a change in unit costs. In such cases, IHS shall promptly evaluate the condition and determine what adjustment in unit cost, if any, is appropriate, subject to the approval of the SFC Program Director. Conditions that may require revising the unit costs include differing site conditions and changes in personnel, material, and equipment costs. Changes in unit costs may also require adjusting the scope of the project, which may require an amendment to the MOA.

Under this system, cost control is achieved by thorough analysis of project plans and specifications; planning, estimating, developing and comparing unit costs against other similar construction costs; and then applying the agreed upon unit costs as allowable costs.

(2) Comprehensive Cost Control System: A cost control system to track project costs and financial status during construction shall be agreed upon by the IHS and the Tribe before each project starts.

- The purpose of the cost control system is to prevent cost overruns.
- Cost control measures consist of project status reviews, record audits, and coordination of all project activities with the IHS contact designated in the MOA.

Once the project construction starts, the Tribe must maintain current cost records for use in comparing expenses with previously developed budget and cash flow estimates. When cost overruns are not discovered until the end of the construction period, the Tribe is at a risk that it will not be fully reimbursed from IHS, because its costs are considered unallowable or have exceeded the maximum funding amount specified in the MOA.

(A) Budget Development: With IHS assistance, the Tribe will develop a tribal project budget for force account work for each of the cost categories

described in Section 1(b)(2). This mutually agreed upon budget is a non-contractual agreement; therefore, fixed price bids are not allowed, because it may imply a contractual arrangement. The reasons for developing the budget are:

- To let all parties know the total amount of funds available for the designated portion of work to be accomplished by the tribe,
- To establish targets for reasonable costs for units of work to be performed,
- To develop a working capital advance, as necessary, and
- To establish a cash flow and reimbursement schedule.

Once established, this budget becomes the basis for controlling project costs during construction.

(B) Roles of Project Personnel in Cost Control: The Tribe and IHS must identify people who will perform various essential roles during the project for the purposes of keeping records and providing approvals.

(i) Tribal Construction Supervisor: The tribal construction supervisor is the construction site manager for tribal force account. The tribal construction supervisor is responsible for supervising tribal employees, for tracking the project status, for equipment and personnel usage, and for insuring that the information is recorded on a routine basis (production reports, time cards, equipment time sheets). Adjustments to construction techniques, equipment utilization, and crew management required to improve efficiency are the tribal construction supervisor's responsibility.

(ii) IHS Project Engineer: The IHS project engineer represents the Federal Government's interest in the cooperative project. The IHS project engineer, or his/her designated representative (inspector) is responsible for reviewing cost data for labor, equipment, and materials on a regular basis on behalf of the IHS. The IHS project engineer shall keep a log of all construction activities (through inspections, oversight visits, and communications) and insure receipt from the Tribe of all required reports. The IHS project engineer is responsible for comparing the work accomplished against the approved project budget and for certifying work accomplished and costs incurred.

(iii) Project Office: The Tribe's project accounting office or its designated accounting firm is responsible for filing the time sheets, making the charges against the correct charge codes, and preparing the necessary reports for cost control reviews and requests for funds from IHS.

(C) Cost Control Review and Reporting Requirements: Prior to the start of construction, a project review and reporting schedule shall be established for each project. On a regular basis, the tribal project administrator or designated accounting firm shall provide to IHS an up-to-date accounting of all charges for labor, administrative support costs, equipment, materials, and procured services, and an up-to-date accounting of all cash flow transactions including payroll. These reports shall be prepared in an agreed format, so that they can be compared with the project budget and current project production status.

(D) Cost Overruns/Corrective Action: Prior to starting each project, the IHS and the Tribe will review the Area's policies and procedures regarding cost overruns or exceeding the project budget. Should the monitoring information

indicate that the project will exceed the budget or otherwise is in financial distress, the IHS project engineer shall first verify that the information is reasonably accurate and then shall notify the District Engineer. The Tribe is to be notified to make corrective actions for solutions to minor problems. This plan is to be documented and communicated to the District Engineer and Area SFC Program Director.

The SFC Program Director will initiate more extensive reviews for major cost overruns. The SFC Program Director will take appropriate action, involving the Area Director, if necessary. Appropriate actions may include (A) initiating major changes through the tribe in the utilization of labor, equipment, and materials to improve efficiency, (B) assistance in identifying additional funding, (C) changes to the payment methods, (D) revising the scope of work, (E) government takeover of the project subject to approval by the Area Director, and (F) suspending the project and/or terminating the project. The IHS project engineer shall followup to verify that the approved actions are taken and closely monitor the Tribe until such time as the problem is resolved.

Sec. 2. Tribal Procurement: This section covers projects in which the Tribe decides to provide the required sanitation facilities and services for its direct benefit using its own internal procurement system. IHS provides technical assistance and contributes funds to the Tribe for the approved cost of the sanitation facilities and services.

The IHS and the Tribe will decide mutually and spell out in the MOA whether construction (and design, as appropriate) is accomplished through tribal procurement. Factors relevant to such a decision include previous experience in doing tribal procurement, existence of an established procurement system, financial stability, and administrative capability.

The parties to an MOA are required to comply with administrative procurement standards stated in this section. Most of the common standards governing payments, allowable costs, changes, real property, equipment, competitive procurement, and records are discussed in these guidelines. Each Area must have a set of guidelines that explain the contract review procedures for project engineers who are responsible for tribal contract projects.

The SFC Program has assisted tribes in administrative capability building by allowing tribes to procure sanitation facilities construction themselves with substantial IHS SFC Program involvement, thereby promoting self-determination. An alternative to this method is the 638 Indian Self-Determination contract, which was described in Chapter 5, Section 1(b). The 638 construction contract is another method available to provide sanitation facilities which does not alter a tribe's option to procure materials and services with funds contributed under an MOA. The advantage of the MOA method is that it tends to be a faster process.

(a) Procurement Standards: The Tribe must use a system of contract administration that ensures performance by its contractors in accordance with the terms and conditions of the contract. The Tribe is responsible for the settlement of all contractual and administrative issues arising from their procurement action, in accordance with good administrative practice and sound business judgment. Those issues include but are not limited to source evaluation, protests, disputes, and claims.

No employee, officer or agent of the Tribe can participate in the 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. A conflict of interest would arise when any of the following individuals or organizations has a financial or other interest in the firm selected for the award: a tribal employee, officer, or agent; any immediate family of or partner of that tribal employee, officer, or agent; or any organization which

employs or is about to employ any of the previously mentioned individuals. A tribe cannot contract with a tribally-owned enterprise if the Tribe administers the procurement. There cannot be tribal preference, nor special advantages or privileged information provided to tribal members or businesses. The tribal officers, employees, or agents can neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors.

(b) Competition Requirements: All procurement transactions will be conducted to provide full and open competition unless justification is made for restrictive or sole source procurement. These types of justification, such as exigency (urgent need), critical schedule, and equipment compatibility, will be reviewed and approved by the IHS SFC Program Director. Tribes will conduct the procurement in a manner that prohibits the use of local geographical preferences in the evaluation of bids or proposals.

(1) Indian Preference: If a tribe has enacted an Indian preference ordinance of general applicability and agrees to apply the terms of that ordinance, the Indian preference requirements of that ordinance may apply in lieu of IHS requirements as long as the effect is similar to that of IHS requirements.

In the absence of a formally adopted Indian preference policy by a tribe, preference shall be given in the award of construction and services contracts to those firms (or joint ventures) whose levels of ownership and control by enrolled Indians (or Alaska Natives) each equal at least 51 percent of the total on a continuing basis for the duration of the contract [see P.L. 93-638, as amended, Section 7(b)]. Firms (or joint ventures) who satisfactorily document such ownership and control at the time of bid or quotation shall have a prescribed amount of their total bid price deducted from the bid price when compared with other bids. The amount shall be set at a reasonable rate (normally between 5 percent and 10 percent) by the tribe and IHS. Once this deduction is made for qualified Indian firms (or joint ventures), the award will be made by the tribe to the responsive, responsible bidder with the lowest resulting comparative bid price. However, the actual amount of the contract shall be the original bid price prior to Indian preference adjustment.

(2) Solicitations: Except as allowed for an exigency under (b) above, all procurement shall be based on firm fixed price and shall be competitive. The following requirements apply:

(A) Materials, Construction, and Services (non A/E) Estimated at Less than $2,000: The Tribe shall solicit a verbal or written quote from one or more sources qualified to do the work. The Tribe shall award a purchase order to the qualified source with the lowest quote.
(B) Materials, Construction, and Services (non A/E) Estimated at More than $2,000 and Less than $25,000: The Tribe shall solicit a written quote from a minimum of three (3) sources qualified to do the work and likely to submit a quote. The Tribe shall award a purchase order to the responsive, responsible source with the lowest quote.
(C) Materials, Construction, and Services (non A/E) Estimated at $25,000 or more: Upon IHS approval, the Tribe shall advertise formally for a minimum of 15 calendar days for sealed bids to be opened publicly at a specified time, date, and place. The Tribe shall award a contract to the responsive, responsible source which has submitted the lowest bid price.
(D) Architect/Engineer (A/E) Services: The Tribe shall solicit competitive proposals from potentially interested professional firms. The Tribe shall establish objective selection criteria before soliciting proposals. Using those criteria, a three-member board will decide which firm is most qualified to

perform the work. If IHS project funds are involved, at least one Registered Professional Engineer from IHS shall serve on the Board. The Tribe shall attempt to negotiate with this firm to set fair and reasonable compensation. If negotiations with one firm are not successful, the Tribe may proceed to negotiate with the next most qualified firm. This process may continue until agreement is reached.

(3) Required Notices to Prospective Bidders: Tribes shall notify the vendors and contract bidders of the following:

(A) Indian Preference policy for contracts and subcontracts
(B) Minimum percentage of the work that must be performed by the prime contractor
(C) Responsibility of the Tribe for compliance with and enforcement of the contract (i.e., the contract is not a Federal contract)
(D) Restrictions on liens (state lien laws may not apply)
(E) The remedy for disputes
(F) The role of the IHS; e.g, as technical advisor, in construction inspection, and for approvals. [see (f)(2)(L) and (f)(2)(M), below.]

(c) Wage Rates: At minimum, Davis-Bacon wage rates are required for all construction contracts over $2,000 executed by a tribe and funded by Federal agencies, except where the Federal funding is specifically exempt from Davis-Bacon requirements. The Tribe is responsible for reviewing payroll information submitted by the contractor for compliance with Davis-Bacon requirements.

(d) Bond Requirements:[12] For construction contracts exceeding $100,000, contractor bonds are required. The IHS may accept the bonds policy and requirements of the tribe, provided the IHS determines that its interests are adequately protected; for their benefit, the tribe may require bonds on lower amounts. In lieu of such a determination, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price.

(2) A performance bond on the part of the contractor for 100 percent of the contract price.

(3) A payment bond on the part of the contractor for 100 percent of the contract price.

Bonds may be required for contracts valued at less than $100,000 if local conditions such as the potential for liens on non-trust land or other circumstances warrant.

(e) Subcontract Amount: Prime contractors will be required to perform at least thirty-three and one-third (33-1/3) percent of the total amount of the work in the contract using their employees and equipment. [Note that this tribal contract percentage is lower than the Federal Buy-Indian contract requirement of 50 percent.] Copies of subcontract agreements may be required to verify the amount of work performed. The purpose of this requirement is to prevent all of the work from being brokered and to ensure that the contractor is available to perform warranty work.

(f) Specific Contract Provisions

(1) General Provisions: Paragraphs 1-45 of "Schedule B, General Conditions" in Appendix B shall be included in their entirety in the tribal solicitation and contract, unless the Area SFC Program Director determines that the tribal

[12] Miller Act, 40 U.S.C. Sec. 270a

procurement system includes equivalent provisions. The Area SFC Program Director may add provisions to addresss project requirements.

(2) Administrative Provisions: A tribe's contract must contain the following provisions:

(A) Administrative, contractual, or legal remedies for instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (except for small purchases).

(B) Termination for cause and for convenience of the Tribe including the manner by which it will be executed and the basis for settlement. (Contracts exceeding $10,000).

(C) Compliance with the Executive Order 11246 as amended, Equal Opportunity in Federal Employment[13]. (Contracts and subcontracts exceeding $10,000.)

(D) Compliance with the Copeland Anti-Kickback Act.

(E) Compliance with the Davis-Bacon Act. (Contracts exceeding $2,000).

(F) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act. (Construction contracts in excess of $2,000)[14].

(G) IHS requirements for reporting.

(H) IHS or Tribal Indian preference requirements.

(i) Contact the Tribal Employment Rights Office (TERO) of the Tribe.

(ii) The TERO may impose certain requirements via taxes, fees, wage rates, employment policies or ordinances that may affect the contractor.

(iii) The contractor is required to comply with all lawful tribal requirements in the performance of the work.

(I) Access by the Federal government and the Tribe to any books, documents, papers, and records of the contractor, which are directly pertinent to the specific contract for the purpose of making an audit or examination of excerpts and transactions.

(J) Retention of all required records for three years after the Tribe makes final payment and all other pending matters are closed.

(K) Compliance with all applicable environmental laws and EPA regulations including Executive Order 11738[15]. (Contracts exceeding $100,000).[16]

(L) An explicit statement that IHS employees cannot represent the Tribe, and tribal employees cannot represent the IHS.

(M) The right of IHS employees to inspect the work of the tribal contractor or subcontractors.

(g) IHS Technical Assistance: IHS may provide technical assistance and technical services to the Tribe or another party to the MOA that utilizes their own procurement system for a number of different purposes related to the provision of sanitation

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[13]". . . all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: "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. . . .," etc. [E.O. 11246]

[14]Note: On certain Federal contracts, 40 U.S.C. 329(c) (Pub. L. 87-581, title I, Sec. 103) states that Sections 103 and 107 do not apply to a contract in an amount that is not greater than $100,000.

[15]E.O. 11738 prohibits grants to facilities that are in violation of those environmental acts.

[16]Common Rule, 45 CFR 92.36(i).

facilities authorized by P.L. 86-121. Examples of such technical assistance activities include assisting with contract administration, construction staking, preparation of plans and specifications, etc.

Technical services, technical assistance or oversight responsibilities outlined in the MOA and provided by IHS staff cannot create, or appear to create, a contractual relationship with the tribal contractor, supplier, or other entity who is not a party to the MOA. Examples of inappropriate activities include acting as the Tribal contracting officer's representative, performing procurement functions (obtaining quotes), acting as receiving agent, or performing any activity which may be interpreted as the IHS acting as an agent of the Tribe or other party.

IHS staff providing technical assistance or technical services shall have training and experience comparable to that required of Government employees who are authorized to act for the Government on similar matters; e.g., engineers should not be charged to provide technical assistance on contract administration without adequate training.

(h) IHS Oversight Inspection Responsibility: IHS has the responsibility to insure that tribal procurement procedures are adequate to protect the Federal government's interests and insure that the purposes of the MOA and Project Summary are accomplished. IHS inspection of facilities constructed through tribal procurement is part of this oversight responsibility; IHS employees or contracted representatives must complete an appropriate level of inspection on each project.

(1) Inspection of Tribal Contractor's Work: IHS employees can inspect the construction and advise the Tribe whether the construction meets the minimum standards stated in the contract. This does not necessarily imply compliance with the Tribe's contract, but the Tribe's contract should be such that the contract's minimum standards are met or exceeded. IHS can advise the Tribe (not the contractor) whether the construction meets the IHS interpretation of the contract requirements. IHS cannot be the Tribe's construction inspector for these reasons:

(A) Doing so could create, or appear to create, a contractual relationship between the contractor and the IHS.

(B) Construction inspection activities by IHS employees "could create explicit or implicit obligations" on behalf of the Tribe.

(C) The government employees would be working beyond the scope of their duties and would be jeopardizing those protections extended to federal employees working within the scope of their employment.

(2) Communication Between IHS and Tribal Contractors: In order to minimize the possibility of creating or appearing to create a contractual relationship or the possibility of IHS employees representing the Tribe, the following guidance is provided:

(A) If directed by the Tribe, contractors may submit copies (originals sent to the Tribe) of information such as submittals, progress payments, change order requests, etc., directly to the appropriate IHS office when technical assistance is required or requested by the Tribe.

(B) All direction to the contractor shall come from the Tribe. IHS should submit any and all recommendations to the Tribe for its decision.

(C) All discussions about the contract with the Tribe's contractor that include IHS employees shall be conducted by and with direct participation of tribal employees.

(D) IHS may not make commitments or give direction to the Tribe's contractor.

(E) IHS should not communicate in writing to the Tribe's contractor.

(i) IHS Approvals: IHS should review and approve tribal solicitation and contract documents in accordance with the terms and provisions of the project MOA and as described below. IHS Area procedures should be such that any recommendation to a tribe by an IHS official is adequately reviewed; e.g., evaluating change order requests. Certain activities are not appropriate when they create or appear to create a contractual relationship with the Tribe's contractor. An example of an inappropriate IHS activity is the approval of a payment from the Tribe to its contractor.

(1) Approval of Contract Documents and Unit Costs: The MOA shall require that the IHS Area-level representative designated in the MOA must approve the Tribe's proposed contract documents and costs before the Tribe advertises contracts, awards contracts, makes contract changes, or obligates itself in other transactions. The MOA shall prescribe the methods by which unit costs and work authorizations will be approved. The parties must recognize that any increase in previously agreed upon unit costs may result in a reduced scope of work (e.g., fewer houses served), unless additional funds are made available.

(2) Final IHS Approval of Construction: The Tribe must conduct a final inspection of the facilities provided under the contract and include the contractor, IHS representatives, and other interested parties. The Tribe should be advised that final acceptance and payment for the work by the Tribe should not occur until the contractor has corrected all deficiencies identified during the final inspection and until the work is in full compliance with the plans, specifications, and other contract requirements.

The inspections by IHS insure that the completed work complies with all Government requirements. The final IHS contribution for the project will not be released to the Tribe until the IHS has participated in a final inspection and determined that the work complies with all Government requirements.

(j) Legal Review: The Tribe may request an attorney review the proposed procurement documents for the project. If legal review is included as an MOA provision, the IHS may contribute funds for the reasonable cost of contract review by a local attorney.

Sec. 3. Procedures Common to Tribal Force Account and Tribal Procurement:

(a) Tribal Fund Controls

(1) Tribal Financial Management Standards: The Tribe must provide the following controls in its financial management system if it receives Federal funds for a sanitation facilities project:

(A) Financial Reporting: An accurate, current, and complete disclosure of the financial transactions of the project must be made in accordance with the financial reporting requirements of the MOA and in accordance with these guidelines. The requirements for cost accounting reports for tribal force account are covered in Section 1(g).

(B) Accounting Records: The Tribe must maintain records which adequately identify the source of the Federal funds and how those funds were expended.

(C) Internal Controls: Effective control and accountability must be maintained for all cash, real and personal property, and other assets acquired by the Tribe.

(D) Budget Analysis: Actual expenditures must be compared with budgeted amounts for each project.

(E) Allowable Costs: Applicable OMB cost principles (OMB Circular A-87) and the terms of the MOA will determine if project expenditures are reasonable, allowable, and allocable.

(F) Source Documentation: Accounting records must be supported by source documents including canceled checks, paid bills, payrolls, time and attendance records, and contract documents.

(2) MOA Contribution Payments

(A) Contributions: Proposed contributions to the Tribe from IHS and other sources shall be as provided for in the MOA. Total amounts contributed will be for work accomplished; e.g., for approved tribal contract amounts plus appropriate administrative support fees. The purpose, timing, maximum amount, and method of requesting contributions will be clearly stated in the MOA.

(B) Financial Account: The Tribe must maintain a separate financial (bookkeeping) account for each project that it is administering, not necessarily a separate bank account.

(C) Cash Flow Schedule: The Tribe must submit a project cash flow schedule. The Tribe and IHS must minimize the time elapsed between fund transfer from IHS to the Tribe and disbursement by the Tribe.[17]

(D) Advances[18]: The IHS may provide a contribution to the Tribe in advance of construction to purchase or rent equipment and materials to prepare for construction.

(i) This initial advance should be kept to the minimum necessary and shall not exceed 25 percent of the tribal project budget.[19] Upon initiation of construction, the Tribe may request additional funds consistent with the approved project budget, work accomplished, and cash flow schedule.

(ii) Advances proposed in the cash flow schedule must be tied to anticipated expenditures in the next time interval and must minimize the time between transfer of funds and disbursement by the tribe, tribal organization, or contractor.[20] Before issuing subsequent advances, IHS will compare previous advances versus actual expenditures by the Tribe. Based on this information, adjustments may be made in the cash flow schedule.

(iii) Interest in excess of $100 per year earned on advances must be returned to the project account.[21]

(3) Allowable Costs: The criteria in OMB Circular A-87 (see Appendix D) and those costs agreed upon in the MOA will determine all allowable costs under the project including special requirements for non-Federal funds. Some examples of expenses that may not be charged to the project include bad debts, some consultant fees, fees for some types of legal work, bonus payments to contractors,

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[17]Common Rule, 45 CFR Subtitle A, HHS, Sec. 92.20(b)(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.

[18]"Also, since the authority to advance funds must, at least in a general sense; be founded on the program legislation, ..." [[GAO, Principles of Federal Appropriations Law, Vol. II, Page l0-47] See next footnote.

[19]This advance percentage is generous and Areas should adhere to it. Consider that there is a general prohibition against making advance payments under government contracts at 31 U.S.C. Sec. 3324(b) which states, "An advance of public money may be made only if it is authorized by . . . a specific appropriation or other law . . .," and 41 U.S.C. Sec. 255(f)(2), "Advance payments made under subsection (a) of this section for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract."

[20]*Id.*

[21]Common Rule, 45 CFR Subtitle A, HHS, Sec. 92.21(e)(i).

damages from lawsuits, fund-raising expenses, entertainment, interest, fines, and penalties.

(4) Indirect Costs: Indirect Cost Negotiation (IDC) Agreements are established between many tribes and the Federal Government in accordance with OMB Circular A-87. IDC Agreements establish standard rates for the indirect costs incurred by tribes that administer their programs. During the drafting of the Project Summary and the development of the cost estimate, the Tribe and the IHS decide whether the IDC Agreement rates or the Project Administrative Support Fees, described below, will be used for the project. Federal funds passed through the Tribe to construction contractors and subcontractors are typically not included in IDC Agreements, although a few IDC Agreements may allow the rate to apply to pass-through funds.

(5) Project Administrative Support Fees: Project Administrative Support Fees (ASF) may be paid to the Tribe for program administration when the Tribe does not have an IDC Agreement. The ASF is intended to cover the cost of that portion of the salaries and benefits of those tribal employees associated with project administration as well as all other allowable costs not specifically allocated to the project. Such fees shall be established jointly by the Tribe and IHS to reflect anticipated costs under a given MOA, but cannot exceed the amounts stated in Table 6-1 for tribal procurement and tribal force account. In the absence of data to support different fees, the following sliding scale shall be used for tribal construction and supply contracts:

Table 6-1. Tribal Procurement Administration Support Fees

Cumulative Dollar Amount	Administration Fee (Not to Exceed)
$0 to $25,000	4 percent of the contract amount
$25,000 to $200,000	$1,000 plus 3 percent of the contract amount in excess of $25,000
above $200,000	$6,250 plus 2 percent of the contract amount in excess of $200,000

Table 6-2. Example calculation of ASF, assuming contract amount is $250,000

Cumulative Dollar Amount from first column Table 6-1	Project Cumulative Dollar Amounts	Administration fee percent from Table 6-1			
$0 to $25,000	$25,000	x	4.00%	=	$1,000
($200,000 - $25,000) =	$175,000	x	3.00%	=	$5,250
($250,000 - $200,000) =	$50,000	x	2.00%	=	$1,000
	$250,000	Calculated ASF (about 3% of project cost)		=	$7,250

For force account work performed by the Tribe, the administrative fee shall be paid to the Tribe in proportion to tribal disbursements for force account labor. For the force account portion of the project, the maximum amount for the ASF shall be 10 percent of the labor disbursement amount. This amount shall be reduced proportionately on projects where IHS or other party performs the planning and administrative functions, or where economies of scale call for a reduction in the ASF. Each Area should develop additional guidance on the proper fees for these project services specific to the Area.

(6) Unexpended Funds: The tribe shall return unexpended funds within [*] days after the completion of the project construction phase. [*select period from 30 to 90 days]

(7) Project Audits: The MOA must include a provision that the IHS shall have access to all tribal project records and that the IHS may request a project audit by the Tribe at any time. If appropriate, compensation for the audit may be provided to the Tribe.

(8) Budget Changes: Any changes by the Tribe in the project scope and/or project budget must be reviewed and approved by IHS as stated in the MOA.

(9) Prohibited Practices:
(A) Funds for construction projects under an MOA may not be loaned or intentionally invested.
(B) Funds from one IHS funded construction project cannot be used for cash flow or other unauthorized purposes for another IHS funded construction project.

(10) Financial Reporting: If financial reports are required by IHS, the frequency will not exceed once per quarter. The financial reports should contain sufficient information to allow tracing project expenditures to insure that Federal funds were not used in violation of any restrictions or prohibitions. Financial reports are separate from the cost accounting and progress reports for project construction which may be required monthly or weekly, depending on the size of the project.

(11) Project Closeout Requirements: The IHS will close out the project in accordance with Area guidelines and the Criteria document when it determines that all applicable administrative actions and all required project work are complete. A closeout report from the MOA participants may be required by IHS after completion of the project and the return of all unused funds.

(b) Tribal Records and Property Management
(1) Retention and Access Requirements for Records: Except as provided below, project records must be retained for three (3) years from the project completion date. These records shall include all financial records, supporting documents, and procurement documents including but not limited to time sheets, canceled checks, invoices, purchase orders, and contracts. The Tribe must make these records available upon request by the IHS, the U.S. Comptroller General, or their designated representatives.

If any litigation, claim, negotiation, audit, or other action involving the records begins 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 the action, or until the end of the 3-year period, whichever is later.

(2) Equipment: Title to equipment acquired by the Tribe for its exclusive use under a project vests with the Tribe upon acquisition. The Tribe must maintain property records for that acquired equipment. The MOA will describe equipment use and designate ownership.

If IHS provides Federally-owned equipment to the Tribe for use on the project, the title will remain with the Federal Government unless otherwise officially transferred. The Tribe must maintain and manage the equipment in accordance with IHS policy and any applicable use permit or agreement.

(3) Real Property: Title to real property acquired by the Tribe under the project vests in the Tribe upon acquisition. In the case of sanitation facilities or related improvements to real property on tribal lands, ownership vests with the Tribe.

(4) Supplies: Ownership of construction materials and supplies properly acquired by the Tribe under the project vests in the Tribe upon acquisition. If, after construction is completed, more than $5,000 of unused tribally-procured supplies and materials remains, the IHS and the Tribe must work out an agreement for the disposition of those items.

CHAPTER VII. Third-Party MOAs

Other Federal agencies or non-Federal third-parties may express an interest in participating in a sanitation facilities project; participation may consist of contributing funds, doing the work themselves, procurement, or a combination of the former. Third-party participation may be advantageous if the third-party has the construction expertise or the administrative capability to provide the sanitation facilities. For some projects, the circumstances will dictate whether the actual construction and project administration must or should be carried out by a third-party; e.g., when the non-tribal third-party owns the existing sanitation facilities.

Third party MOAs, in addition to the Chapter III provisions, include provisions for:

- Contributions
- Transfer and Ownership
- Lead Agency

Sec. 1. Eligible Third-party Participants: Third-parties are parties to the MOA other than the IHS and the Tribe receiving the Federal assistance. The third-parties can be entities created within state and local governments, regional or rural water/sewer districts, water associations, housing authorities, and private corporations which perform a regulated public function; e.g., a private water company. Third-parties could include Federal-state regional commissions, private foundations, and community groups. Third-parties can also include other Federal agencies, Indian housing authorities, non-IHS Indian health clinics, or other non-profit organizations as defined in Chapter I.

Although almost any organization defined in Chapter I, Section 2(b) can be a third-party for purposes of contributing resources towards a project, there are limitations with respect to who can actually accomplish the work. A third-party may accomplish the work under an MOA if it has an interest in the facilities or services to provide and if the MOA calls for substantial involvement by IHS in carrying out the project for the benefit of eligible American Indians or Alaska Natives. A procurement contract must be used if the Government's principal purpose is to "acquire" an intermediary's services and the intermediary has no interest in Indian health; e.g., contracting with a well drilling company.

Sec. 2. Administration by a Third-party: On some P.L. 86-121 projects, the IHS project funds and other contributions are transferred to the third-party to administer the project and perform the actual construction using IHS requirements. The third-party receiving the funds may be responsible for the overall project including the preliminary activities, design, bidding, construction, and closeout stages. Although such projects are usually completed by competitive bid (open market) contracts, the projects may be completed by force account construction, or by a combination of force account and contract procedures.

(a) Third-party Force Account: If approved by the IHS, the third-party performing the work may elect to construct the project by force account. The third-party must comply with all IHS requirements as described in Chapter VI, Section 1 of these Guidelines, substituting the "third-party" for "tribe."

(b) Third-party Procurement: If approved by IHS, the third-party performing the work may elect to construct facilities using its own procurement procedures. The third-party shall comply with all IHS requirements as described in Chapter VI, Section 2 of these Guidelines, substituting the "third-party" for "tribe."

(c) Procedures Common to Third-party Force Account and Procurement: The provisions of Chapter VI, Section 3 of these Guidelines shall apply (substituting the "third-party" for "tribe") for projects where a third-party performs the work using either force account or procurement.

Sec. 3. Transferring Facilities to a Third-party: Where community facilities are owned (upon acquisition) or transferred to a non-Indian third-party, the MOA shall provide for equitable user fees for Indian residents, taking into account the value of any capital improvements made or funded by IHS.

Sec. 4. Administrative Policies and Procedures:

(a) Sometimes, if there are two or more organizations or governmental entities as parties to the MOA, the Tribe may have to comply with each party's regulations and requirements. To the extent practicable, the participating agencies should reach an agreement as to which agency's regulations and requirements will govern the execution of the project to alleviate any regulatory burden on the Tribe.

(b) When another agency enters into an interagency agreement to transfer project funds and responsibilities to the IHS, IHS administrative policies and procedures will generally apply (e.g. procurement, environmental review, and audit procedures) subject to any specific mutually agreed upon provisions in the interagency agreement.

(c) The IHS SFC Program performs an environmental review and determination on IHS funded sanitation facilities construction projects except P.L. 93-638 Title V construction projects. The environmental review (including NHPA review) insures that the IHS considers the environmental consequences of its proposed actions, applicable permits are obtained, and appropriate procedures are implemented.

(1) The IHS is responsible for the NEPA environmental determination of an IHS funded project or for its portion of the work on a project when another authorized entity is designated as the responsible agency in the MOA or in a separate lead agency agreement. The IHS responsibility on multi-agency projects is dependent on several conditions including the degree of IHS involvement, funding, and the type of project.

(2) On P.L. 93-638 Title V construction projects, the Tribe assumes all the Federal environmental and historic preservation responsibilities as mandated in Section 509 of that Act.

(3) If the IHS references another agency's environmental document in its environmental determination, the IHS must have a copy of the other agency's environmental statement in the project file.

(4) On projects where contributed funds are not transferred directly to the IHS (i.e., another Federal agency is responsible for the environmental and historic preservation requirements of the project), before the IHS participates in the project to provide sanitation facilities, the IHS shall make its own environmental determination. The IHS may review the other agency's environmental document and supplement that environmental document to meet IHS needs.

(A) Normally, on NAHASDA[22]/HUD projects and CDBG[23] projects, the Tribe assumes the Federal responsibility for NEPA and NHPA, or HUD is responsible for the NEPA environmental determination, for the entire housing project including any sanitation facilities for the project. The responsibility of the Tribe or HUD does not change even if funds are contributed to the IHS for construction of the sanitation facilities. (Rationale: If the Tribe or HUD did not fund the construction of the houses, the IHS would not be participating in the project.) Nevertheless, IHS must make its own environmental review and determination.

(B) Agencies that provide grants or loans are responsible for performing the NEPA environmental determination prior to award; e.g., EPA Clean Water Act and Safe Drinking Water Act Indian Set-Aside programs and Rural Utilities Service/Rural Development grants or loans. Nevertheless, IHS will make its own environmental review and determination if it participates in a project funded by those other agencies.

(C) If funds are transferred from IHS to another Federal agency, prior to executing the transfer of funds, the agencies should decide which party will perform the environmental review and determination and the agencies should document that decision in writing.

(d) Although the MOA could designate the lead agency, the preferred method is to use a separate agreement designating a lead agency among the participating Federal agencies and the Tribe. A separate agreement would prevent the MOA execution from being delayed because of disagreements over the lead agency responsibilities or over which agency is the lead agency.

[22]Native American Housing Assistance and Self-Determination Act

[23]Community Development Block Grant

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APPENDIX A

MOA Provisions

MOA PROVISIONS

Set forth in this Appendix are clauses for MOAs; the principal clauses were reviewed by OGC. All MOA's must have a heading, preamble, agreement provisions, and signature blocks as described in Chapter III, Section 1(a). In addition, all MOAs must have certain agreement provisions, which are listed in Chapter III, Section 1(b). Although the clauses included in this appendix are examples, it is expected that similar, if not identical, clauses will be used by each Area. Those clauses marked with a (**r**) are to be used nearly verbatim. The clauses are arranged as follows:

A1. Heading
A2. Preamble
A3. General Provisions
- Tribal Lands
- Homes Served
- IHS Contributions
- Representatives
- Transfer of IHS Owned Facilities
- Transfer of Tribal Owned Facilities
- Operation and Maintenance Fees and Ordinances
- Project Schedule
- Tribal Financial Management Standards and Procedures
- Project Closeout
- Warranties
- MOA Disputes
- MOA Termination
- Signature Blocks
- *[attached Project Summary]*

A4. Provisions for Government Force Account
A5. Provisions for Tribal Procurement
A6. Provisions for Tribal Force Account
A7. Provisions for Third Party MOAs
A8. Example USDA RUS MOA
A9. Example NAHASDA/HUD MOA

AUTHORITY

The IHS MOA is a legal obligating instrument entered into by the IHS and the Tribe to create, fund, and sometimes construct sanitation facilities projects authorized by Public Law 86-121, 42 U.S.C. 2004(a). Other agencies (EPA, RUS, TDHE) may also be a party to the MOA when they contribute funds to the IHS project; the IHS MOA documents their contributions to the project. Nevertheless, the MOA is primarily an agreement between the IHS and the Tribe; therefore, the MOA should not be used to impose another agency's requirements on the IHS or the Tribe.

r A1. HEADING:

MEMORANDUM OF AGREEMENT
Between
THE INDIAN HEALTH SERVICE
and
(Name of Indian Tribe, Band, Group, or Community)

(Reservation, Location)

Public Law 86-121
Project YY-XXX

Use "Between" for 2 party MOAs and "Among" for more than 2 parties.

or

MEMORANDUM OF AGREEMENT
Among
THE INDIAN HEALTH SERVICE

(Name of Indian Tribe, Band, Group, or Community)

and
THE DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE

(Reservation, Location)

Public Law 86-121
Project YY-XXX

r A2. PREAMBLE:

1. This agreement is made between the Indian Health Service, acting through the Director, _____ Area Indian Health Service, Department of Health and Human Services, under and pursuant to the provisions of Public Law 86-121 (42 U.S.C. 2004a; 73 Stat. 267), and the Indian Tribe, Band, Group, or Community), (Reservation, Location), hereinafter called the (Tribe) (Band) (Group) (Community), acting through the (Organization Designated to Represent the Indians).

2. WHEREAS, the (Tribe) (Band) (Group) (Community) is desirous of obtaining (satisfactory water supply) and (adequate waste disposal) facilities for (location), and

3. WHEREAS, the (Tribe) (Band) (Group) (Community), acting through the (Title of Person Designated to Represent the Indians), by a project proposal submitted to the Indian Health Service, dated _____, requested assistance under Public Law 86-121 in the (construction, improvement, installation, rehabilitation, etc.,) of (water supply, sewage disposal, refuse disposal, etc.,) on the (Reservation, Location), and

4. WHEREAS, the Indian Health Service is desirous of assisting in the (construction, provision, rehabilitation, etc.,) of (water supply, sewage disposal, and refuse disposal) facilities for the Indians on the (Reservation, Location), as a means of improving the health of the residents, and

5. WHEREAS, the (Tribe) (Band) (Group) (Community) have reviewed and concur with the provisions of the attached Project Summary.

6. NOW THEREFORE, in order to carry out the project as set forth in the attached Project Summary entitled, _____, and dated _____, the parties mutually agree:

A3. GENERAL PROVISIONS

Tribal Lands

1. That the Tribe hereby grants permission for the IHS and its representatives to enter upon or across tribal lands for the purpose of carrying out the project outlined in the attached Project Summary and as provided for in this agreement and further agrees to waive all claims which may arise by reason of such entry upon Tribal lands, except those that may be recognized under the Federal Tort Claims Act.

2. That the Tribe will obtain all rights-of-way on or over Tribal lands as in the judgment of the IHS may be necessary for the provision and operation of any facilities provided for hereunder and waives any claims for compensation and damages therefor.

3. That the Tribe will provide without charge to the IHS all tribal land necessary and required for the construction of the facilities as provided for in the Project Summary. All interests in such lands, easements, and rights-of-way shall remain with the Tribe, except as otherwise provided for in this Agreement.

Historic preservation, cultural properties, discovery:

4. That the Tribe will provide, without charge, assistance in complying with the regulations (36 CFR 800) implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) by informing IHS of any traditional cultural properties which might be affected by construction of the project. The Tribe shall take appropriate steps to identify traditional cultural properties which could be affected by the project, including contacting traditional cultural leaders or other tribal members who may have knowledge about such locations, sites, or objects.

5. That the IHS shall consult with the Tribe regarding excavations that may result in inadvertent discovery of human remains in accordance with the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001) and the implementing regulations at 43 CFR Part 10. This Agreement shall serve as official notice to the Tribe that the proposed sanitation facilities construction may result in inadvertent discoveries, and that any such discoveries shall be subject to the above regulations, including consultation between the IHS and the Tribally designated cultural resources representative and disposition of human remains or related cultural items. If the Tribe is administering construction of the sanitation facilities, through a Tribal contract or force account, it shall assume full responsibility for compliance with 43 CFR Part 10. [Note: The IHS remains responsible for complying with the regulations implementing Section 106 of the National Historic Preservation Act regarding post-review discoveries at 36 CFR 800.13]

Homes Served

6. That the Tribe shall provide a prioritized list of Indian homes to be served under this project. Changes or deletions of homes may be made by the Tribe at any time prior to actual construction providing that such changes are made in writing by the appropriate Tribal official. All homes must be found to meet eligibility and feasibility criteria by the IHS. The actual homes to be served under this project will be determined by the IHS from the applications submitted by the Tribe.

7. That the Tribe shall assure and provide for, at no cost to the IHS: water and sewer lines to be extended to a point five feet outside homes approved for service; power and adequate electrical facilities, including proper electrical service entrance, to be available at each home; and homes to be properly winterized, including skirting for mobile homes, to protect facilities from freezing.

8. That the IHS shall make final determinations and notify the Tribe on whether individual participants and sites qualify for sanitation facilities, taking into account the recommendations by the Tribe.

9. If additional participants are to be served, a letter amendment to this agreement is required by IHS and the Tribe prior to any additional construction. This amendment will describe the numbers and types of additional services to be provided, and the maximum additional contribution, if any, to be made by IHS.

10. That the IHS reserves the right to delete from the project any home for which eligibility requirements have not been met by (date), and to withdraw from the project any or all funds intended to serve those homes.

Tribal Contributions

11. That the Tribe will contribute to the IHS prior to the start of construction the sum of $_____ as a contribution on its behalf toward the provision of the facilities described in the attached Project Summary. These funds will be administered in accordance with regulations governing operations of the IHS.

IHS Contributions

12. That the IHS will provide without charge to the Tribe:

a. All materials, supplies, equipment, and labor for the installation of (individual or community) water supply and (individual or community) waste disposal facilities as provided for in the attached Project Summary, and not otherwise provided for in this agreement.

b. The instructions as to the proper utilization, maintenance, operation, and protection of the facilities provided for herein.

Project Funding Synopsis

13. Project Funding (not to exceed) [List total fund contributions from all participants, including IHS P.L. 86-121 project funds.]:

IHS	$
Tribe	$
[TDHE]	$
[Others]	$
TOTAL	$

14. The IHS shall utilize project funds in the amount of $_____ for IHS project technical support expenses. Project technical support expenses shall include IHS expenditures for technician and clerical salaries, GSA vehicles, and miscellaneous project related expenses.

15. The IHS will release contributions to the Tribe as provided for in Paragraph _____ of this MOA, upon:

a. Execution of this Agreement by all parties,
b. Receipt of written request from the Tribe for the required funds, and
c. Certification from the IHS Project Engineer that the amount of funds requested is required to make timely payments in accordance with the project budget for the supplies, materials, equipment, and services being obtained under the provisions of this Agreement.
d. Approval by the IHS Area office.

Representatives

16. That the Tribe will provide one or more representatives to coordinate the conduct of tribal participation under this agreement, including: active promotion of attendance of Indian beneficiaries at meetings, obtaining consent of each participating Indian family on forms furnished by the IHS; obtaining cooperation of tribal members in the fulfillment of labor responsibilities assumed by the Tribe under this agreement; and attendance at the final inspection.

17. That the IHS Project Engineer shall coordinate IHS participation in the project.

Transfer of IHS Owned Facilities

18. r That in consideration of the contributions made and the responsibilities undertaken herein by the Tribe, upon completion of the project, the IHS will transfer all rights, title, and interest to the Tribe without charge, the community facilities, including all rights-of-way, materials, supplies, and equipment provided therefor and incorporated therein pursuant to this agreement.

19. r That the Tribe hereby agrees to accept the transfer of such community facilities and to operate and properly and efficiently maintain and repair said facilities and equipment as the property of the Tribe so as to keep them in an effective and operating condition.

20. That in consideration of contributions made and the responsibilities assumed herein by the Tribe and the individual Indian residents of the (community or reservation) upon completion of the project, the IHS will transfer to the head of each Indian household without charge the individual facilities and appurtenances provided for in this agreement, and the head of each household will thereafter be responsible for the maintenance and repair of such individual facilities as his own property so as to keep them in an effective and operating condition.

21. That when the community facility or each operational unit of the community facility is completed, it will be inspected by the IHS with representatives of the Tribe to detect possible construction deficiencies. A punch list of these deficiencies, if any, will be complied and agreed upon. These deficiencies will be corrected by the responsible construction agency. At that time, a final inspection of the facility or operational unit of the facility will be made. When acceptable to all parties, ownership of the facility or operational unit

will be transferred to the Tribe and it will be placed into operation so as to provide services to the consumer. When operation commences, the operation and maintenance of the facilities will become the responsibility of the Tribe.

Transfer of Tribal Owned Facilities

22. That all parties understand that the facilities constructed (including equipment, land, and supplies purchased) under this agreement with IHS or contributed funds are at no time the property of the IHS, but rather belong to the tribe, which shall operate and maintain such facilities properly, until or unless transferred to other parties.

23. That, because the IHS will not at any time own the facilities constructed, no formal transfer agreement may be necessary. IHS may develop a transfer agreement or, in lieu of a transfer agreement, the IHS will notify the Tribe by registered mail when IHS participation in the project is complete.

24. That the Tribe shall transfer on-site water and waste facilities to individual homeowners. Upon completion of the construction the homeowners are responsible for operation and maintenance of the facilities. Facilities constructed under this agreement at all times belong to the Tribe until transferred to individual homeowners or other parties.

Operation and Maintenance Fees and Ordinances

25. That the Tribe will establish connection fees and user rates and collect such charges from individuals served by the system as are necessary to sustain the operation, maintenance, and repair of the community water supply and sewerage systems. As an alternative, the Tribe may provide this revenue from another dedicated revenue source.

26. That the Tribe agrees to enact and enforce appropriate ordinances or regulations governing: (1) Connection to the community water supply and sewage systems by the residents of the (community or reservation); (2) the methods and materials to be used in making connections to the community water supply and sewage systems in a safe and sanitary manner; and, (3) the continued operation, maintenance, and repair of individual water supply and waste disposal facilities in a safe and sanitary condition by the persons served thereby.

Project Schedule

27. That in the interest of coordination, understanding, and economy, before construction of the project begins, the IHS Project Engineer in consultation with the Tribe shall prepare a work plan and priority for the scheduling and conduct of the project. The work plan will specify the facilities to be installed and a time schedule (and budget) for completing the work. The work plan may be modified or amended by the Project Engineer when necessary to carry out the project.

28. That it is important that the installation of the water supply and waste disposal facilities provided for herein be completed as soon as is practicable in accordance with the schedule of the IHS project officer.

29. r In the event that actual construction of this project cannot be initiated for any reason by ___[date]___, the IHS reserves the right to cancel the project and use the funds earmarked therefor for other projects which lack impediments to prompt construction. If the condition which impeded construction is resolved following such cancellation, the IHS will give high priority to funding the project from appropriated sanitation facilities funds available at the time or from future appropriations for sanitation facilities.

Tribal Financial Management Standards and Procedures

30. The Tribe shall provide the following features in its financial management system:

a. The Tribe shall maintain original accounting records which accurately identify the source and application of all project funds it receives. The source documentation shall include cancelled checks, paid bills, payrolls, time and attendance records, purchasing documents, and financial records. Accurate, current, and complete project records shall be reported in accordance with other provisions of this Agreement.

b. The Tribe shall maintain effective controls and accountability for all cash, real and personal property, and other assets acquired.

c. The Tribe shall compare actual Tribal expenditures with budgeted amounts for the project.

d. Applicable OMB cost principles (OMB Circular A-87) and the terms of this Agreement shall govern in determining the reasonableness, allowability, and allocability of all costs under the project.

31. The Tribe shall maintain a separate financial account for the project.

32. The Tribe shall submit a projected cash flow schedule. The Tribe and IHS shall minimize the time elapsed between fund transfer and disbursement.

33. Interest in excess of $100 per year earned on cash advances (Federal funds) must be returned to the IHS project account.

34. Funds for construction projects under this Agreement shall not be borrowed or intentionally invested. Funds from one IHS funded construction project shall not be used for cash flow or other unauthorized purposed or for another IHS funded construction project.

35. Project support fees not to exceed the amount of $ _____ will be paid to the Tribe in lieu of indirect costs. These fees are to cover the cost of a portion of the salaries and benefits of those tribal employees associated with project (not program) administration. For force account work performed by the Tribe, the administrative fee shall be paid to the Tribe in proportion to tribal disbursements for force account labor. Direct costs such as printing, copying, advertising, and accounting fees may be paid in addition, if approved in advance by the Director, Sanitation Facilities Construction.

36. Any proposed changes by the Tribe in the project scope and/or budgeted costs must be reviewed and approved by IHS as provided for in this Agreement.

Project Closeout

37. The IHS will close out the project when it determines that all applicable administrative actions and all required project work has been completed. The Tribe shall return unexpended funds within **[†]** days after the completion of the project construction phase. The Tribe shall submit a closeout financial report after completion of the project and return of all unused funds. **[†enter period from 30 to 90 days]**

38. Except as otherwise provided, project records shall be retained for three years from the project completion date. These records include all financial records, supporting documents, procurement documents, titles, equipment records, including but not limited to: time sheets, cancelled checks, invoices, purchase orders available upon request by the IHS, Inspectors General, or other designated representatives. The Tribe shall be subject to audit in accordance with the requirements of the Single Audit Act.

39. 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 shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the three-year period, whichever is later.

Warranties

40. That the IHS (Tribe) to the extent economically feasible, will obtain a 1-year warranty for the Tribe and head of household from the IHS (Tribal) contractors, suppliers, and manufacturers on equipment, work, and supplies provided by them. The IHS shall assist the Tribe or head of household in obtaining the benefits and protection of all warranties on equipment or work provided under this Agreement. In the event of a problem occurring within the first year of installation with the design or construction of IHS (Tribal force account) installed facilities, equipment, or work not protected by the warranties of the suppliers or manufacturers, the IHS will correct the problem, subject to the availability of funds and staff resources, as determined by the IHS.

MOA Disputes

41. The parties to this Agreement agree to resolve all disputes regarding the provisions of this agreement among the parties through the IHS Area's established administrative procedures, first. If a dispute cannot be resolved locally, the parties agree that the next administrative procedure is an appeals board established at the IHS headquarters level, which will make a recommendation to the IHS Director, who will exercise final authority for the IHS in the administrative review of all disputes.

MOA Termination

42. r Any party to this Agreement may terminate its relationship with the other parties prior to project completion upon __ days notice in writing to all other parties.

Signature Blocks

43. IN WITNESS WHEREOF, the parties have subscribed their names:

For the Tribe:

(Signature) _____

(Title of Signer) (Date)

Having been duly authorized to enter into this agreement on behalf of the (name of tribe), as evidenced by the attached copy of the resolution made by the (organization designated to represent the Indians).

For the Indian Health Service:

(Signature) _____

Director, (name of IHS Area) (Date)

Department of Health and Human Services

Project Summary

Attach copy of Project Summary.

A4. PROVISIONS FOR GOVERNMENT FORCE ACCOUNT

Tribal Labor and Administrative Supervision

The Tribe will be responsible for the active administrative supervision of Tribal workers in the fulfillment of labor responsibilities assumed by the Tribe under this agreement. This supervision shall include: 1) Hiring, 2) General Assignment, 3) Timekeeping, 4) Paying, 5) Promoting, 6) Rewarding 7) Suspending, 8) Disciplining, and 9) Removing employees. The technical direction to the Tribal employees will be provided by the IHS Project Engineer and by the Foreman who will be responsible for Specific Assignment, Technical Direction, and Review of work on a routine basis. The Administrative supervision will include hiring in accordance with all prevailing local, state and Federal laws and regulations as well as sound business practices. An allowable Tribal charge of two percent of the Construction Account for administrative supervision is an acceptable project cost. This payment includes compensation for all administrative project support costs related to the administrative supervision function for this project. The cost of accounting, tax filing and insurance processing are not included in the administrative project support cost. These services are an allowable project cost. Assistance is generally needed in guiding the local government, so professional services (i.e., CPA firm) are recommended to accomplish these tasks. Payment for these services is an allowable project cost.

Labor

The Tribe will hire the labor force to construct the project facilities. The IHS project engineer working with the Project Foreman and Tribal Project Administrator will determine what positions, technical skills, number or workers and work schedules are necessary for the project. A list of local worker applicants will be reviewed by the foreman for particular positions based upon background, training, experience, and references. Qualified workers will be hired by the Tribe and assigned to work under the technical supervision of the IHS Project Foreman. For pay purposes, time sheets will be submitted by the Project Foreman to the Tribal Project Administrator on a bi-weekly basis. Attendance and performance standards will be developed during the project planning phase. Problems with individual worker compliance with these standards shall be immediately brought to the attention of the administrative supervisor. If existing workers need to be released for poor performance or additional workers are needed, the Project Foreman communicates these needs to the Tribal Project Administrator and the required actions are handled by the local government.

Construction Safety and Liability

The local project management and technical direction is normally provided by the IHS Foreman. The Foreman's role also includes the responsibility for providing proper and safe tools and equipment, instruction on proper safety practices, and assurance that they are being reasonably followed. All Tribal workers must be covered by proper workman's compensation insurance. This will normally be covered through a separate workmen's compensation insurance policy retained by the Tribe. The Foreman has the authority to immediately remove any worker whose performance or conduct creates an apparent safety problem, after which the incident will be reported to the Tribal Project Administrator. The IHS assumes the responsibility to work out any third party liability problems. This responsibility only covers the construction work area. The Tribe should carry insurance to cover its normal actions which are not involved in the construction effort.

Construction Account

a. A "Construction Account" entitled the _____ will be established as a separate checking account in the Tribe's name at a bank insured by the Federal Deposit Insurance Corporation.

The IHS will contribute to $_____to the Construction Account. These funds will be available to pay: (1) a percentage of local labor costs based on the HHS wage rates established for P.L. 86-121 projects for each of the separate trades involved plus taxes and insurance premiums; (2) Bookkeeping and accounting services; (3) supplies and materials to be approved in advance by the project engineer; (4) An administrative project support cost; and (5) other specialty contracts and contingencies as determined necessary by the project engineer.

b. The Tribe must recognize that IHS's contribution of funds to the Construction Account generally will not be sufficient to cover all of the above cost items plus the full HHS wage rates for local labor. The Tribe has two options:

Option 1: The Tribe can provide additional funds from its own sources or sources other than IHS and pay its workers the full HHS wage rates plus pay the necessary taxes and insurance premiums, or,

Option 2: The Tribe may pay its workers less than the full HHS wage rates (usually in the range of 50 to 60 percent of the HHS wage rates) plus pay the necessary taxes and insurance premiums from that share of funds set aside in the Construction Account by the project engineer to cover the labor costs.

c. If the Tribe is unable to provide a labor force to meet the needs and skills which are necessary for completion of the project within the budget and time schedule as determined by the Project engineer, it may be necessary to hire labor from outside the Tribe. Any outside labor hired by the Tribe will be initially paid at the rates established for all local workers.

If at a future date, the Project Engineer and Tribal Project Administrator determine that it is necessary to authorize a higher rate, it may be done provided that this higher rate does not exceed the full P.L. 86-121 wage rate.

d. A CPA or CPA firm (will be/may be) hired and paid with funds from the Construction Account by the Tribe to: Issue paychecks bi-weekly to project employees; keep payroll records; complete quarterly and annual tax statements; make required deposits of withheld taxes; pay liability insurance, unemployment insurance, and workmen's compensation premiums; make payroll deductions; and provide regular statements on the account to the Tribe and the Project Engineer. It is further agreed by all parties that IHS, represented by its Project engineer, has the responsibility to assure that all payments made from the Construction account are justified and supported by appropriate documentation, records, invoices, etc. Furthermore, the IHS reserves the right to halt the project at any time if discrepancies involving the Construction Account funds arise until such time that the discrepancies are resolved to IHS's satisfaction. All payments from the Construction Account must be approved in advance by the IHS project engineer.

e. The IHS may also contribute additional sums to the Construction Account to permit the Tribe to the purchase materials, supplies, or services determined necessary for the project by the Project Engineer. Such purchases must be authorized in advance by the IHS project Engineer and be done in accordance with appropriate local regulations.

f. The Tribe will return to IHS any Construction Account funds not used for project labor or previously agreed upon materials, equipment, or services upon request by the Project Engineer. The Construction Account will be subject at any time to an audit by the Project Engineer and/or a CPA or CPA firm.

IHS Contributions and Obligations

The IHS, represented by its Project Engineer, Project Foreman, Employees, and Contractors, is responsible for designing, scheduling, selecting, purchasing materials and equipment, arranging for transportation, and constructing the sanitation facilities. All work will be done under the technical supervision of the IHS Project Engineer and Foreman.

A5. PROVISIONS FOR TRIBAL PROCUREMENT

Tribal Contributions Section

1. That the Tribe shall provide for construction through its procurement system of all water and sewage facilities described in the Project Summary; that the Tribe shall procure the facilities in accordance with this Agreement and in compliance with applicable Federal requirements.

2. That the Tribe shall submit to Indian Health Service for review and approval before advertising all proposed solicitations estimated to cost $_____ or more; that the Tribe shall make such adjustments in the solicitation as determined necessary by IHS.

3. That the Tribe shall develop and submit to IHS for approval a proposed construction contract showing proposed unit costs, based on bids received, for construction of sanitation facilities to be installed. The Tribe shall negotiate these unit costs if necessary to receive approval from IHS. These unit costs shall govern for the duration of the Tribal contract under which they are proposed. No work shall be performed prior to written approval by IHS of the corresponding unit costs.

4. If additional or special units of work are needed for specific sites during execution of the project, the Tribe shall submit a list of proposed costs for negotiation on those items. Costs for the additional or special items shall then govern either for the duration of the Tribal contract, or for just those sites specified in the proposal, as agreed at the time. Major modifications to the construction contract (such as adding facilities not included in the Project Summary or requiring additional project funds) shall not be executed without written approval by the IHS Associate Director, Office of Environmental Health and Engineering, _____ Area.

IHS Contributions and Role Section

5. That the IHS shall review and approve (or reject with justification and explanation) proposed solicitations before advertising by the Tribe.

6. That the IHS shall review and approve proposed unit costs for all items of work under the project. Once approved by IHS, these unit costs shall govern all work for the duration of the Tribal contract under which they are proposed. Unit costs for additional or special units of work required at individual sites shall be negotiated before the IHS authorizes work for the site or group of sites affected. All unit costs are subject to approval by the Director, Sanitation Facilities Construction prior to the award of any contract or the start of any construction involving those items of work.

7. The IHS shall provide to the Tribe an amount not to exceed r $_____ for administration and construction of the proposed facilities. The IHS Area Director may increase this amount subject to the availability of funds, and will notify the other parties in writing of any changes. The exact amount to be provided shall be the sum of the following items:

   a. Actual cost of construction contracts;

   b. Contract administrative support fee to be paid to the Tribe in lieu of indirect costs. This fee is to cover a portion of the cost of administering construction contracts under the project. The contract administrative support fee shall be as follows:

   Contract Amount and Administrative Fee

$0 to $25,000:	Four percent of the contract amount.
$25,000 to $200,000:	$1,000 plus three percent of the contract amount in excess of $25,000.
Above $200,000:	$6,250 plus two percent of the contract amount in excess of $200,000.

   c. Actual cost of construction of facilities by tribal force account, including labor, equipment, material, supplies, and services;

   d. Tribal force account support fee to be paid to the Tribe in lieu of indirect costs. This fee is to cover the cost of a portion of the salaries and benefits of those tribal employees associated with project (not program) administration. The tribal force account support fee shall be r _____% of the tribal disbursements for force account labor; and

   e. Direct costs such as printing, copying, advertising, and accounting fees may be paid if approved in advance by the IHS Director, Division of Sanitation Facilities Construction.

8. The IHS contributions to the Tribe shall be made on a quarterly basis in amounts recommended for approval by the IHS District Engineer based on cost estimates for construction projected during the upcoming quarter. Supplemental requests for funds may be made should costs exceed the quarterly estimate. Any funds paid and not expended within a given quarter shall be applied toward the next quarterly estimate and the contribution adjusted accordingly.

9. The maximum expenditure for work under any Tribal contract shall not exceed the amount estimated in the Project Summary for that portion of facilities without an amendment to this Agreement.

10. At no time during the project will the Tribe represent the IHS nor will the IHS represent the Tribe in contract administration matters.

11. The IHS will, at the request of the Tribe, provide oversight and technical assistance on contractor submittals, progress payments, change order requests, and other project related information submitted by the tribal contractor and make recommendations to the Tribe.

12. The IHS shall utilize project funds in the amount of $_____ for IHS project technical support expenses. Project technical support expenses shall include IHS expenditures for technician and clerical salaries, GSA vehicles, and miscellaneous project related expenses.

13. The IHS and Tribe shall inspect all sanitation facilities constructed through Tribal procurement to insure construction meets minimum IHS standards. The procurement documents shall also note that the IHS inspector does not have authority to modify the contract or issue direction to the contractor. Following construction inspection, the IHS will advise the Tribe on whether the construction meets the IHS interpretation of the contract requirements.

Procurement Standards

14. The Tribe shall use a system of contract administration that ensures performance by its contractors in accordance with the terms and conditions of the contract and in compliance with OMB Circular A-102 as adopted by HHS at 45 CFR 92. (See Appendix F of this Guideline) The Tribe shall be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement. These issues include, but are not limited to source evaluation, protests, disputes, and claims.

15. No employee, officer or agent of the Tribe shall participate in the 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: (a) the employee, officer, or agent, (b) any member of his immediate family, (c) his or her partner, (d) or an organization which employs, or is about to employ any of the above, has a financial or other interest in the firm selected for the award.

16. The tribal officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors.

Competitive Procurement Practices

17. All tribal procurement under this Agreement shall be competitive and based on firm fixed prices unless approved by the Director, Division of Sanitation Facilities Construction, for reasons of public exigency, critical schedule constraints that could not have been anticipated, or essential equipment compatibility for operation and maintenance. The following requirements apply:

    a. Materials, Construction, and Services (non A/E) Estimated at More than $2,000 and Less than $25,000: The Tribe shall solicit a written quote from a minimum of three (3) sources qualified to do the work and likely to submit a quote. The Tribe shall award a purchase order to the responsive, responsible source with the lowest quote.

    b. Materials, Construction, and Services (non A/E) Estimated at $25,000 or more: The Tribe shall advertise formally for a minimum of 15 calendar days for sealed bids to be opened publicly at a specified time, date, and place. The Tribe shall award a contract to the responsive, responsible source which has submitted the lowest bid price.

    c. Architect/Engineer (A/E) Services: The Tribe shall solicit competitive proposals from potentially interested professional firms. A three-member selection board for the Tribe shall establish objective selection criteria before soliciting proposals. If IHS project funds are involved, at least one Registered Professional Engineer from IHS shall serve on the Board. The Tribe then shall select the firm determined by those criteria to be most qualified to perform the work. The Tribe shall attempt to negotiate with this firm to set fair and reasonable compensation. If negotiations with one firm are not successful, the Tribe may proceed to negotiate with the next most qualified firms. This process may continue until agreement is reached.

Indian Preference

18. If the Tribe has enacted an Indian preference ordinance of general applicability and agrees to apply the terms of that ordinance, the Indian preference requirements of that ordinance shall apply in lieu of IHS requirements as long as the effect is similar to that of IHS requirements. The Tribe may not give preference to tribal members or tribal companies only, nor limit preference geographically, including restriction to those within reservation boundaries.

19. In the absence of a formally adopted Indian preference policy by the Tribe, preference shall be given in the award of construction and service contracts to those firms (or joint ventures) whose levels of ownership and control by enrolled Indians (or Alaska Natives) each equal at least 51 percent of the total on a continuing basis for the duration of the contract. Firms (or joint ventures) which satisfactorily document at the time of bid or quotation such ownership and control shall have an equal to _ percent(‡) of their total bid deducted from the bid price for comparison with other bids. Once this deduction is made for qualified Indian firms (or joint ventures), the award will be made by the Tribe to the responsive, responsible bidder with the lowest resulting bid.

    (‡)--This percentage shall be set jointly by IHS and the Tribe at a level within the range of 5 to 10 percent.

Required Notice to Prospective Bidders

20. The Tribe shall notify the vendors and contract bidders of the following:

    a. Indian Preference Policy for contracting/subcontracting.

    b. Minimum percentage of work to be performed by the prime contractor (33 1/3%, unless otherwise specified).

    c. Responsibility of the Tribe for compliance with and enforcement of the contract (i.e., the contract is not a Federal contract).

    d. Restrictions on liens (state lien laws do not apply on Federal trust land).

    e. Remedy for disputes, as provided for under General Provisions.

    f. The role of the IHS.

Wage Rates

21. Davis-Bacon wage rates shall apply for all construction contracts exceeding $2,000 in value executed by the Tribe and funded by Federal agencies, except for work funded with HUD CDGB funds[24]. The Tribe is responsible for reviewing payroll information submitted by the contractor for compliance with Davis-Bacon requirements. (See Chapter 6, Section 2 and Appendix B, Schedule C of this Guideline) Unless it requests IHS to obtain wage rates, the Tribe shall request applicable wage rates directly from U.S. Department of Labor.

Bond Requirements

22. For construction contracts on Federal trust land exceeding $100,000, the Tribe shall require bid, payment, and performance bonds, as described below. For construction contracts on non-trust land in excess of $5,000, payment and performance bonds shall be required. The IHS may accept the bonding policy and requirements of the Tribe, provided that IHS determines that its interest is adequately protected. In lieu of such a determination, the minimum requirements shall be as follows:

    a. A bid guarantee from each bidder equivalent to five percent of the bid price.

    b. A payment bond on the part of the contractor for 100 percent of the contract price.

    c. A performance bond on the part of the contractor for 100 percent of the contract price.

Subcontract Limits

23. The prime contractor shall be required to perform with its employees and equipment at least 33.3 percent of the total amount of the work included in the contract. Copies of subcontract agreements may be required to verify the amount of work performed.

[24](Reference HUD statute and regulations at 42 U.S.C. 5307(e)(2); 24 CFR 1003.603)

Administrative Provisions

24. The Tribe's contract shall contain the following provisions:

a. 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 (except small purchases).

b. Termination for cause and for convenience by the Tribe including the manner by which it will be effected and the basis for settlement. (Contracts exceeding $10,000).

c. Compliance with the "Equal Employment Opportunity" Executive Order 11246 as amended. (Contracts and subcontracts exceeding $10,000.)

d. Compliance with the Copeland "Anti-kickback" Act.

e. Compliance with the Davis-Bacon Act. (Contracts exceeding $2,000).

f. Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act. (Construction contracts in excess of $2,000).

g. IHS requirements for reporting, as called for in this Agreement.

h. IHS Indian preference requirements.

i. Access by the Federal government and the Tribe to any books, documents, papers, and records of the contractor which are directly pertinent to the specific contract for the purpose of making an audit, examination, excerpts, and transactions.

j. Retention of all required records for three years after the Tribe makes final payment and all other pending matters are closed.

k. Compliance with all applicable environmental laws and EPA regulations including Executive Order 11738. (Contracts exceeding $100,000).

General Provisions

25. In the absence of an equivalent set of General Provisions approved by the Area SFC Division Director for construction contracts, Paragraph 1-43 of the General Provisions in Schedule B, Appendix B of this Guideline shall be included in their entirety in the Tribe's solicitation and contract. For procurement less than $25,000, the Area SFC Division Director may approve a condensed set of these General Provisions that protects the IHS and Tribe's interests.

Special Provisions

26. Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in its solicitation and contract the Special Provisions shown as Schedule D, Appendix B of this Guideline.

Submittal Requirements

27. Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in it's solicitation the submittal requirements shown as Schedule F, Appendix B of this Guideline.

Final Inspection

28. The Tribe shall conduct with the contractor, IHS representatives, and other interested parties, a final inspection of the facilities provided under the contract. Final acceptance and payment for the work by the Tribe shall not occur until the contractor has corrected all deficiencies identified at the final inspection and until the work is in full compliance with the plans, specifications, and other contract requirements.

29. Work will be inspected by IHS to insure that the work performed complies with all the terms and conditions of the Tribal contract. Final IHS contribution for the work performed will not be released to the Tribe until such time as the IHS participates in a final inspection and determines that the work complies with all contract requirements.

A6. PROVISIONS FOR TRIBAL FORCE ACCOUNT

General Provisions

1. The Tribe agrees to construct the proposed sanitation facilities, with its own construction employees, in accordance with plans and specifications prepared or approved by IHS.

2. The Tribe and IHS agree to work cooperatively to complete preconstruction planning activities including equipment, material and manpower needs, wage rates, qualifications necessary for the project superintendent, construction management, and the project schedule. The Tribe shall then complete a detailed construction cost estimate to demonstrate how the work will be performed within the project budget.

3. The Tribe and IHS acknowledge that project funding is limited to the amount shown in the Project Summary. If the Tribe's cost exceed the estimate in the Project Summary, the scope of the project may need to be reduced. Cost overruns discovered near the end of the project, or after completion of the construction, may not get reimbursed due to a lack of funds. Any proposed change in the project scope or budget must be approved by IHS prior to implementation.

4. The construction shall be performed by the Tribe in accordance with plans and specifications prepared or approved by IHS. IHS is responsible for construction inspection, approval of materials, quality control testing and final acceptance of all work. Final payment to the Tribe shall not be approved until after IHS has conducted the final inspection and approved the work.

5. The Tribe agrees that, 1) all of their employees working on construction of the project shall be covered by applicable workmen's compensation insurance, 2) a general public liability and property damage insurance policy shall be in force throughout the construction period.

6. The Tribe agrees to demonstrate to the satisfaction of IHS that, a) adequate financial controls are in place to identify the source and disbursement of all funds, b) they will utilize a cost accounting system that will compare actual costs with budgeted amounts, c) accounting records will be supported by source documents, d) their procurement system complies with IHS requirements.

7. The Tribe may not receive a profit, in excess of allowable costs, as approved by IHS in accordance with the allowable cost provisions of OMB Circular A-87.

9. The Tribe is responsible for jobsite safety and for compliance with all applicable State and Federal health and safety requirements. The IHS Project Engineer may stop work if a safety problem is unresolved by the Tribe.

10. The Tribe is responsible for resolving all tort claims, contractual disputes, protests and claims resulting from their activities on this project.

Abbreviated Cost Control Provision:

11. The Tribe and IHS shall agree on unit prices for the work to be performed. After appropriate deductions for cash advances, IHS shall contribute funds to the Tribe for the quantity of work performed at the agreed upon unit prices, plus the project administrative support costs, if applicable.

Comprehensive Cost Control Provisions:

12. The Tribe will develop a projected cash flow and a construction budget to estimate costs for the work. IHS will contribute funds to the Tribe for their actual costs for the construction including the agreed upon administrative support fees.

13. The Tribe and IHS shall agree upon a cost control system to track project costs and accomplishments prior to construction. The Tribe shall provide to IHS, on a monthly basis, a financial and progress report showing: 1) a current accounting of all income, obligations and disbursements for labor, equipment, materials, administrative support costs, and budgeted amounts, 2) construction progress and a revised progress schedule if necessary.

14. If the Tribe experiences cost increases, above the amount estimated prior to construction, IHS will recommend corrective actions to reduce costs. Major cost overruns may require a revised scope of work, suspension of construction or other cost reduction initiatives.

A7. PROVISIONS FOR THIRD PARTY MOAs

Preamble

1. WHEREAS, the (Third Party) has expressed an interest in managing the administration and construction of the off-site facilities to be installed under this project; and

   WHEREAS, the IHS is desirous of assisting the (Third Party), which is assisting the Tribe in the provision of sanitation facilities to serve Indian people, and

   WHEREAS, the Tribe agrees that the (Third Party) shall perform the work, and

Contributions

2. That IHS will provide to the (Third Party) ($___), ([all] materials, supplies, equipment, labor, tests, consultations, inspections necessary) for construction of the sanitation facilities in accordance with the attached Project Summary.

Transfer and Ownership

3. That all parties understand that the facilities constructed (including equipment, land, and supplies purchased) under this agreement with IHS funds are at no time the property of the IHS, but rather belong to the (Third Party), which shall operate and maintain such facilities properly, until or unless transferred to the Tribe or other parties.

Lead Agency

4. That the (Third Party) is the lead agency for this project; the requirements of (Third Party) shall govern the financial and procurement practices of the (Third Party, or, Tribe) in the provision of the sanitation facilities. [Note: Prior to executing the MOA, the IHS shall decide if it must address any Federal requirements; e.g., NEPA, historic preservation, etc.]

A8. Example RUS MOA

The project in the MOA example, PO-02-J47, was possible because the IHS and USDA-RUS executed a Memorandum of Understanding (MOU) outlining the procedures that the two agencies would use under various methods of project implementation, including tribal procurement. The IHS/USDA-RUS MOU contained provisions that should not or could not be inserted into the MOA.

Project PO-02-J47 was executed in this manner because both the Tribe and USDA-RUS requested that the IHS administer the project to address concerns about project administration and quality control. The previously executed the MOU on project implementation had prepared both agencies for execution of the project MOA allowing the Tribe to construct the project by tribal procurement. All payments were on a reimbursable basis.

After the MOA (funded by USDA-RUS dollars) was signed, and the contract package was 95% ready for bid solicitation:

1. IHS notified USDA and Tribe that it was prepared to begin bid solicitation (Letter No. 1) and requested that the loan closing documents be processed.
2. IHS/Tribe solicited bids.
3. IHS/Tribe evaluated bids and made a determination to award.
4. IHS requested USDA funds be sent to IHS (Letter No. 2, applies to both Tribal and IHS contracts).
5. The IHS contract was awarded, and the Tribal contract gets Unit Cost Approval after the USDA funds were contributed to IHS.
6. As work on the IHS/Tribal contract was completed and acceptable pay requests were received, funds were either paid to the contractor (IHS contracts) or were transferred to the Tribe as reimbursements (Tribal contracts).

For either IHS contracts or for Tribal contracts, the USDA funds are contributed to IHS after bids are opened and before award. Because of the short turn around, IHS asked that all loan documents anticipate the need for a quick turnaround, including authorization to close the loan before IHS or the Tribe begins bid advertisement.

The MOU only applies in the state of Washington. Oregon and Idaho elected not to execute umbrella MOUs; however, IHS uses the same basic project specific MOA in both states.

A8. Example RUS MOA

MEMORANDUM OF AGREEMENT
AMONG
INDIAN HEALTH SERVICE,
THE DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE
AND
THE SAUK-SUIATTLE INDIAN TRIBE
OF THE
SAUK-SUIATTLE INDIAN RESERVATION
WASHINGTON

PUBLIC LAW 86-121
PROJECT PO-02-J47

This Agreement is made among the Indian Health Service, hereinafter called IHS, acting through the Director, Portland Area Indian Health Service, U.S. Department of Health and Human Services, under and pursuant to the provisions of Public Law 86-121 (73 Stat. 267); the U.S. Department of Agriculture, Rural Utilities Service hereinafter referred to as USDA-RUS, acting through the Program Director, Rural Utilities Service, of the Washington State Office; and the Sauk-Suiattle Indian Tribe of the Sauk-Suiattle Indian Reservation, hereinafter called the Tribe, acting through the Chairperson of the Tribal Council.

WHEREAS, the Tribe desires to construct improvements to the Sauk-Suiattle community water and sewer systems for the homes and offices located on the Sauk-Suiattle Indian Reservation; and

WHEREAS, the Tribe has requested IHS assistance with the construction of improvements to the Sauk-Suiattle community water and sewer systems; and,

WHEREAS, IHS desires to assist in the construction of improvements to the community water and sewer systems on the Sauk-Suiattle Indian Reservation; and,

WHEREAS, the Tribe has submitted an application for financial assistance to USDA-RUS for financial assistance in constructing improvements to the Sauk-Suiattle community water and sewer systems; and,

WHEREAS, the Tribe has received a preliminary indication that the application is eligible for approval*; and*

WHEREAS, the Tribe and USDA-RUS desires IHS to manage the project to assist in quality control; and

WHEREAS, the framework for the IHS and USDA-RUS partnership was established in the attached Memorandum of Understanding entitled "MEMORANDUM OF UNDERSTANDING BETWEEN UNITED STATES DEPARTMENT OF AGRICULTURE, WASHINGTON STATE RURAL UTILITIES SERVICE AND UNITED STATES INDIAN HEALTH SERVICE."

NOW THEREFORE, in order to carry out the project as set forth in the attached Project Summary/Preliminary Engineering Report entitled " PROJECT SUMMARY/PRELIMINARY ENGINEERING REPORT, COMMUNITY WATER SUPPLY AND WASTE DISPOSAL FACILITIES, FOR THE SAUK-SUIATTLE INDIAN TRIBE, SAUK-SUIATTLE INDIAN RESERVATION, WASHINGTON, PL-86-121, IHS PROJECT NO. PO-02-J47, NOVEMBER 2001," the parties mutually agree:

TRIBAL CONTRIBUTIONS

1. That the Tribe shall provide a representative to coordinate participation under this project.

2. That for all facilities constructed by the Tribe, the Tribe shall contribute "in-kind" legal, administrative, and contracting services valued at $32,200.00 as described in the Project Summary/Preliminary Engineering Report.

3. That the Tribe shall enter into an agreement with USDA-RUS for financial assistance in the amount of $644,000.00 to be applied towards the eligible costs of the facilities described in the Project Summary/Preliminary Engineering Report. That this agreement shall include provisions for execution of loan closing.

4. That the Tribe agrees that the USDA-RUS may close the loan prior to bid solicitation by the Tribe.

5. That the Tribe agrees that the USDA-RUS funds may be advanced to IHS upon receipt by USDA-RUS of a written request from IHS supported by a valid unit cost proposal.

6. That the Tribe shall provide all materials, supplies, equipment, and labor to construct all facilities as described in the Project Summary/Preliminary Engineering Report.

7. That for all the work performed by the Tribe, the Tribe shall obtain from the contractor(s), suppliers and manufacturers on equipment, work, and supplies provided by them to the extent feasible a one-year warranty from the date of completion and approval of contribution by IHS. Under this warranty, the contractor will be obligated to repair or replace, as necessary, at no cost to the IHS nor the Tribe, any system or components that fail during that first one-year period.

8. That for the facilities to be constructed by the Tribe, the Tribe shall provide for construction through its procurement system of all water and sewer system improvements described in the Project Summary/Preliminary Engineering Report, that the Tribe shall procure the materials and completed facilities in accordance with this Agreement and with the requirements of Addendum A, entitled "Requirements for Tribal Procurement of Sanitation facilities under P.L. 86-121."

9. That the Tribe shall carry out its responsibilities under the project in accordance with the requirements of Addendum B, entitled "Requirements for Fund Control, Allowable Costs, Records and Property under P.L. 86-121 MOA."

PERMISSION TO ENTER TRIBAL LANDS AND RIGHTS-OF-WAY

10. That the Tribe hereby grants permission to USDA-RUS and IHS and their representatives to enter upon or cross lands of the Sauk-Suiattle Indian Reservation to carry out this project as outlined in the attached Project Summary/Preliminary Engineering Report and as provided for in this Agreement, and further agrees to waive all claims which may arise by reason of entry upon such lands, except those which qualify under the Federal Tort Claims Act.

11. That the Tribe shall provide, at no cost to IHS, all required lands, easements, and rights-of-way necessary over lands controlled by the Tribe for construction of community water and sewer system improvements and appurtenances as described in the attached Project Summary/Preliminary Engineering Report. All interests in such lands, easements, and rights-of-way shall remain with the Tribe, except as otherwise provided for in this Agreement.

CONSTRUCTION COSTS

12. That the Tribe shall develop and submit to IHS for approval by the Director, Division of Sanitation Facilities Construction, Portland Area IHS (DSFC), a schedule of proposed unit costs for construction of sanitation facilities to be installed by the Tribe. The Tribe shall negotiate these unit costs if necessary to receive approval by the Director, DSFC. These unit costs shall govern for the duration of this project. No work shall be performed prior to written approval by IHS of the corresponding unit costs.

13. If other special units of work are needed during execution of the project, the Tribe shall submit a list of proposed costs for negotiation on those items. Costs for the special items then shall govern either for the duration of the project, or for just those sites specified in the proposal, as agreed at the time.

14. That IHS shall review and negotiate proposed unit costs for all items of work under the project. Once accepted by IHS, these unit costs shall govern all Tribal work for the duration of the project. Unit costs for special items of work shall be negotiated before IHS authorizes work. All unit costs are subject to approval by the Director, DSFC.

INDIAN HEALTH SERVICE CONTRIBUTIONS

15. That IHS shall designate a Project Engineer to manage the Project on behalf of the Tribe, as described in this Agreement and the attached Project Summary/Preliminary Engineering Report.

16. That for all facilities constructed by the Tribe, IHS shall provide, without charge to the Tribe, engineering design, plans, specifications, site drawing, and advisory construction inspection services, as described in the Project Summary/Preliminary Engineering Report. Advisory construction services for

contracts procured by the Tribe shall be provided as technical assistance to review compliance with minimum IHS standards.

17. That the IHS shall submit plans and specifications for the proposed water and sewer facilities improvements to the Tribe, and USDA-RUS for review and comment prior to construction.

18. That IHS shall provide final approved construction documents, including plans and specifications, to the Tribe prior to bid advertisement upon notification from USDA-RUS that the loan closing documents have been executed.

19. That IHS approval of the Tribe's unit cost proposal shall be contingent upon receipt of USDA-RUS funds by IHS as provided in Paragraph 24 of this Agreement.

20. That for approved work completed by the Tribe and upon receipt of the Tribe's request for contribution, IHS contribute to the Tribe funds in an amount not exceed $587,687.81 without an amendment to this Agreement. The contribution(s) shall be made on the following terms:

a. That for each work item for which a contribution is requested, construction of all approved facilities has been completed and the Indian Health Service has determined the work to be in compliance with the approved plans and specifications.

b. That the Tribe has submitted a signed "Request for Contribution" listing the work items completed, the cost for each work item at the approved cost times the quantity of item completed, the amount of the requested current contribution, the grand total cost of work completed to date, and the total of contributions approved through the previous request.

c. That the Tribe has submitted acceptable as-built drawings and required test results and samples for which a contribution is requested. IHS will not authorize payment until 100% of the required data is provided.

21. That the amount(s) of contribution(s) calculated in the attached Project Summary or any subsequent amendments may include an additional project support fee of 2 percent of the cost of procured services for administering contracts under the project, subject to the ceiling in Paragraph No. 20 for total contribution(s).

22. That IHS shall provide instructions on the proper utilization, maintenance, operation and protection of facilities provided.

DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE

23. That USDA-RUS shall provide a representative to coordinate participation under this Project.
24. That USDA-RUS shall advance funds to IHS in the amount of $644,000.00 for the USDA-RUS portion of the costs of the project upon receipt of a written request from IHS supported by a valid unit cost approval. USDA-RUS shall advance USDA-RUS funds to IHS within 10 days of receipt of the IHS request.

FINAL INSPECTION

25. That representatives from the Tribe, USDA-RUS and IHS shall conduct a joint final inspection of the community water system improvements to determine that such facilities were constructed in an acceptable manner.

SPECIAL PROVISIONS FOR PROJECT FUNDING

26. That if actual costs of providing the improvements to the community water and sewer systems are less than the total amount of funds provided under this project, then surplus funds will be returned to USDA-RUS, unless the parties mutually agree otherwise. Alternatively, if the projected cost of improvements to the community water and sewer systems exceeds the total funds provided by the USDA-RUS, then IHS and the Tribe will notify USDA-RUS immediately. The Tribe will perform no additional work beyond the amount of funds available until the parties have provided additional funds. Any additional contribution requested of any party shall be subject to the availability of funding and prior approval.

TRANSFER AND OWNERSHIP OF FACILITIES

27. Facilities constructed by the Tribe under this Agreement at no time are the property of IHS but rather belong to the Tribe until and unless transferred to other parties.

28. That because the IHS will not at any time own the sanitation facilities constructed by the Tribe, no formal transfer agreement will be necessary for these facilities. In lieu of the transfer agreement, the IHS will notify the Tribe when IHS participation in the project is complete.

29. That IHS shall provide to the Tribe copies of as-built drawings for all sanitation facilities constructed by Tribe under this project.

PROJECT TECHNICAL SUPPORT

30. That from the total amount of funds made available to this project, an amount up to 10%, will be deducted by IHS to fund the Project Technical Support Account; that this account shall be used to cover technical support costs such as technician's wages, travel and other support costs; clerical support; testing, printing, and other indirect technical support costs associated with the planning, design and construction of IHS sanitation facilities projects.

TERMS OF AGREEMENT

31. That this Agreement shall take effect upon:

a. Approval by all parties, and.
b. Execution of the loan closing documents by the Tribe and USDA-RUS in accordance with Paragraph 4 of this Agreement.

32. That this Agreement shall remain in effect at least until the earlier of the following dates:

a. The date when all terms of this Agreement have been met, or
b. December 31, 2003.

33. That the parties reserves the right to withdraw from this Agreement at any time after the date set forth in Paragraph No. 32b. If this agreement is ended prior to completion of construction of the sanitation facilities, then all such facilities partially or fully completed at that time shall become the property of the Tribe.

CONCURRENCE WITH PROJECT SUMMARY/PRELIMINARY ENGINEERING REPORT

34. That each party to the Agreement has received and concurs with the Project Summary/Preliminary Engineering Report for Project PO-02-J47 upon which this Agreement is based.

IN WITNESS TO THE TERMS OF THIS AGREEMENT, the parties have subscribed their names.

FOR THE SAUK-SUIATTLE INDIAN TRIBE:

Date	Chairperson, Sauk-Suiattle Indian Tribe, having been duly authorized to enter into this Agreement on behalf of the Sauk-Suiattle Indian Tribe, as evidenced by the attached Resolution made by the Council.

FOR THE DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE:

Date	Program Director, Rural Utilities Service U.S. Department of Agriculture, Rural Development

FOR THE INDIAN HEALTH SERVICE:

Date	Director, Portland Indian Health Service U.S. Department of Health and Human Services

ADDENDUM A to MOA, PO-02-J47

REQUIREMENTS FOR TRIBAL PROCUREMENT OF SANITATION FACILITIES, INCLUDING MATERIALS, CONSTRUCTION, AND SERVICES UNDER P.L. 86-121 MOA .

A. PROCUREMENT STANDARDS:

The Tribe shall use a system of contract administration that ensures performance by its contractors in accordance with the terms and conditions of the contract and compliance with OMB Circular A-102 (45CFR92). The Tribe shall be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement. These issues include, but are not limited to source evaluation, protests, disputes, and claims.

No employee, officer or agent of the Tribe shall participate in the 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: (a) the employee, officer, or agent, (b) any member of his immediate family, (c) his or her partner, (d) or an organization which employees, or is about to employ, any of the above, has a financial or other interest in the firm selected for the award.

The tribal officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors.

B. COMPETITIVE PROCUREMENT PRACTICES:

1. Competition - All tribal procurement under the MOA shall be competitive and based on firm fixed prices. The following requirements apply:

   a) Materials, Construction and Services (non A/E) Estimated at Less than $2,000: The Tribe shall solicit a verbal or written quote from one or more source qualified to do the work. The Tribe shall award a purchase order to the qualified source with the lowest quote.

   b) Materials, Construction and Services (non A/E) Estimated at More than $2,000 and Less than $100,000: The Tribe shall solicit a written quote from a minimum of three (3) sources qualified to do the work and likely to submit a quote. The Tribe shall award a purchase order to the responsive, responsible source with the lowest quote.

   c) Materials, Construction and Services (non A/E) Estimated at $100,000 or more: The Tribe shall advertise formally for a minimum of 15 calendar days for sealed bids to be opened publicly at a specified time, date, and place. The Tribe shall award a contract to the responsive, responsible source which has submitted the lowest bid price.

   d) Architect/Engineer (A/E) Services: The Tribe shall solicit competitive proposals from potentially interested professional firms. The Tribe shall establish objective selection criteria before soliciting proposals. The Tribe then shall select the firm determined by selection criteria to be most qualified to perform the work. The Tribe shall attempt to negotiate with this firm to set fair and reasonable compensation. If negotiations with one firm are not successful, the Tribe may proceed to negotiate with the next most qualified firm. This process may continue until agreement is reached.

2. Indian Preference: If the Tribe has enacted an Indian preference ordinance of general applicability and agrees to apply the terms of that ordinance, the Indian preference requirements of that ordinance shall apply in lieu of IHS requirements as long as the effect is similar to that of IHS requirements. The Tribe may not give preference to tribal members or tribal companies only, nor limit preference geographically, including restriction to those within reservation boundaries.

   In the absence of a formally adopted Indian preference policy by the Tribe, preference shall be given in the award of construction and service contracts to

those firms (or joint ventures) whose levels of ownership and control by enrolled Indians (or Alaska Natives) each equal at least 51 percent of the total on a continuing basis for the duration of the contract. Firms (or joint ventures) which satisfactorily document at the time of bid or quotation such ownership and control shall have an amount equal to 5 percent of their total bid deducted from the bid price for comparison with other bids. Once this deduction is made for qualified Indian firms (or joint ventures), the award will be made by the Tribe to the responsive, responsible bidder with the lowest resulting bid.

C. REQUIRED NOTICE TO PROSPECTIVE BIDDERS:

The Tribe shall notify the vendors and contract bidders of the following:

a) Indian Preference policy for contracting/subcontracting.

b) Minimum percentage of work to be performed by the prime contractor (33-1/3%, unless otherwise specified).

c) Responsibility of the Tribe for compliance with and enforcement of the contract (i.e., the contract is not a Federal contract).

d) Restrictions on liens (State lien laws do not apply on Federal trust land).

e) Remedy for disputes, as provided for under General Provisions (Schedule B in the Appendix).

f) The role of the IHS, such as technical advisor and construction inspector for the Tribe.

D. WAGE RATES:

Davis-Bacon wage rates shall apply for all construction contracts exceeding $2,000 in value executed by a Tribe and funded by Federal agencies, except for work funded with HUD CDBG funds. The Tribe is responsible to review payroll information submitted by the contractor for compliance with Davis-Bacon requirements, in accordance with attached Labor Provisions (Schedule C in the Appendix).

Unless it requests IHS to obtain wage rates, the Tribe shall request applicable wage rates directly from U.S. Department of Labor.

E. BONDING REQUIREMENTS:

For construction contracts on Federal Trust Land exceeding $100,000, the Tribe shall require bid, payment, and performance bonds, as described below. For construction contracts on non-trust land in excess of $5,000, payment and performance bonds shall be required. The IHS may accept the bonding policy and requirements of the Tribe, provided that IHS determines that its interest is adequately protected. In lieu of such a determination, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price.

(2) A payment bond on the part of the contractor for 100 percent of the contract price.

(3) A performance bond on the part of the contractor for 100 percent of the contract price.

F. SUBCONTRACT LIMITS:

The prime contractor shall be required to perform with its employees and equipment at least 33.3 percent of the total amount of the work included in the contract. Copies of subcontract agreements may be required to verify the amount of work performed.

G. ADMINISTRATIVE PROVISIONS:

The Tribe's contract shall contain the following provisions:

a) 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 (except small purchases).

b) Termination for cause and for convenience by the Tribe including the manner by which it will be effected and the basis for settlement. (Contracts exceeding $10,000.)

c) Compliance with the "Equal Employment Opportunity" Executive Order 11246 as amended: (Contracts and subcontracts exceeding $10,000.)

d) Compliance with the Copeland "Anti-kickback" Act.

e) Compliance with the Davis-Bacon Act. (Contracts exceeding $2,000.)

f) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standard Act. (Construction contracts in excess of $2,000.)

g) IHS requirements for reporting, as called for in the MOA.

h) IHS Indian preference requirements.

I) Access by the Federal government and the Tribe to any books, documents, papers, and records of the contractor which are directly pertinent to the specific contract for the purpose of making an audit, examination, excerpts, and transactions.

j) Retention of all required records for three years after the Tribe makes final payment and all other pending matters are closed.

k) Compliance with all applicable environmental laws and EPA regulations including Executive Order 11738. (Contracts exceeding $100,000.)

H. GENERAL PROVISIONS:

In the absence of an equivalent set of General Provisions approved by the Area SFC Branch Chief for Construction contracts, Paragraph 1-43 of the General Provisions appearing as Schedule B in the Appendix shall be included in their entirety in the Tribe's solicitation and contract. For Procurement less than $100,000, the Area SFC Division Director may approve a condensed set of these General Provisions that protects the IHS and Tribe's interests.

I. SPECIAL PROVISIONS:

Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in its solicitation and contract the Special Provisions shown as Schedule D in the Appendix.

J. SUBMITTAL REQUIREMENTS:

Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in its solicitation the submittal requirements shown as Schedule F in the Appendix.

K. FINAL INSPECTION:

The Tribe shall conduct with the contractor, IHS representatives, and other interested parties, a final inspection of the facilities provided under the contract. Final acceptance and payment for the work by the Tribe shall not occur until the contractor has corrected all deficiencies identified at the final inspection and until the work is in full compliance with the plans, specifications, and other contract requirements.

Work will be inspected by IHS to insure that the work performed complies with all the terms and conditions of the Tribal contract. Final IHS contribution for the work performed will not be released to the Tribe until such time as the IHS participates in a final inspection and determines that the work complies with all contract requirements.

ADDENDUM B to MOA, PO-02-J47

REQUIREMENTS FOR FUND CONTROL, ALLOWABLE COSTS, RECORDS, AND PROPERTY UNDER P.L. 86-121 MOA.

A. PROJECT FUND CONTROL

1. Tribal Financial Management Standards

The Tribe shall provide the following features in its financial management system:

a) Financial Report: The Tribe shall disclose accurate, current, and complete financial results of the project in accordance with the financial reporting requirements of the MOA.

b) Accounting Records: The Tribes shall maintain records which adequately identify the source and application of funds provided.

c) Internal Controls: The Tribe shall maintain effective control and accountability for all cash, real and personal property, and other assets acquired.

d) Budget Control: The Tribe shall compare actual expenditures with budgeted amounts for the project.

e) Allowable Costs: Applicable OMB cost principles (OMB Circular A-87) and the terms of the MOA shall govern in determining the reasonableness, allowability, and allocability of all costs under the project.

f) Source Documentation: The Tribe shall support its accounting records with source documents such as cancelled checks, paid bills, payrolls, time and attendance records, and contract documents.

2. IHS Contributions under the MOA

a) Contributions: Proposed contributions to the Tribe from IHS and other funds shall be as provided for in the MOA. The purpose, timing, maximum amount, and procedure for approving and disbursing contributions shall be spelled out in the MOA.

b) Financial Account: The Tribe shall maintain a separate financial account for the project.

c) Cash Flow Schedule: The Tribe shall submit a projected cash flow schedule. The Tribe and IHS shall minimize the time elapsed between fund transfer and disbursement.

d) Advances: The IHS may provide a contribution to the Tribe in advance of construction to purchase or rent equipment and materials to prepare for construction. This initial advance may be an amount up to 25 percent of the Tribal project budget. Upon initiation of construction, the Tribe may request additional funds consistent with the pre-approved project budget, work accomplished, and cash flow schedule. Advances proposed in the cash flow schedule shall be tied to anticipated expenditures during the next time interval, and the advance will be made as close as possible to the time the funds are to be expended. Before issuing subsequent advances, IHS shall compare previous advances versus actual expenditures by the Tribe. Based on this information, adjustments may be made in the cash flow schedule. Interest in excess of $100 per year earned on advances must be returned to the IHS.

e) Unexpended Funds: The Tribe shall return unexpended funds within 30 days after the completion of the project construction phase.

f) Prohibited Practices: Funds for construction projects under an MOA shall not be borrowed or intentionally invested. Funds from one IHS funded

construction project shall not be used for cash flow or other unauthorized purposes for on other projects.

3. Allowable Costs

OMB Circular A-87 (see Exhibit 1 in the Appendix) shall govern the determination of all allowable costs under the project, except as spelled out in the MOA, including special requirements for non-Federal funds. Some examples of expenses that are not allowed to be charged to the project include bad debts, some consultant fees, fees for some types of legal work, bonus payments to contractors, damage judgment suits, fund-raising expenses, entertainment, interest, and fines and penalties, including parking tickets. See Exhibit 1 for a further explanation.

a) Administrative Project Support Fees: Administrative project support fees may be paid to the Tribe in lieu of indirect costs (which typically are paid for program administration). The Administrative project support fee is intended to cover the cost of a portion of the salaries and benefits of those tribal employees associated with project administration. Such fees shall be established jointly by the Tribe and IHS to reflect anticipated costs under a given MOA. In the absence of data to support different fees, the following sliding scale shall be used for tribal construction and supply contracts.

Amount	Admin. Project Support Fee, Not to Exceed:
$0 to $25,000	4 percent of total
$25,000 to $200,000	3 percent of total
above $200,000	2 percent of total

Examples - The fees for projects of various sizes would be:

Size	Fee
$ 20,000 x 4% =	$ 800
$100,000 x 3% =	$3,000
$300,000 x 2% =	$6,000

For force account work performed by the Tribe, the administrative fee shall be paid to the Tribe in proportion to tribal disbursements for force account labor. A maximum amount for administrative support shall be 10 percent of the labor disbursement amount. This amount shall be reduced proportionately on projects which have the planning and administrative functions performed by the IHS or other parties.

b) Direct costs such as printing, copying, advertising, and accounting fees may be paid in addition, if approved in advance by the Director, Division of Sanitation Facilities Construction.

c) Budget Changes: Any proposed changes by the Tribe in the project scope and/or budgeted costs must be reviewed and approved by IHS as provided for in the MOA.

4. Audits and Reports

a) Audits: The Tribe shall be subject to audit in accordance with the requirements of the Single Agency Audit Act (OMB A-102,P). The IHS shall have access to all tribal project records, and the IHS Area Director may at any time request a project audit, as necessary.

b) Financial Reporting: If financial reports are required by IHS, the frequency shall not exceed once per quarter. Financial reports are separate from cost accounting and progress reports for project construction, which will be required monthly. Financial reports may only include those items described in 45CFR92.41.

c) Project Closeout Requirements: The IHS will closeout the project when it determines that all applicable administrative actions and all required project work has been completed. The Tribe shall submit a closeout financial report after completion of the project and return of all unused funds.

B. PROJECT RECORDS AND PROPERTY MANAGEMENT

1. Retention of and Access to Records

Except as otherwise provided, project records shall be retained for three years from the project completion date. These records include all financial records, supporting documents, procurement documents, including but not limited to: time sheets, cancelled checks, invoices, purchase orders, and contracts. The Tribe shall make these records available upon request by the IHS, Inspector General, or their designated representatives.

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 shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the 3-year period, whichever is later.

2. Equipment

Title to equipment acquired by the Tribe for its exclusive use under a project vests with the Tribe upon acquisition. The Tribe shall maintain property records for such equipment acquired. The ownership and use of equipment shall be as provided in the MOA.

If IHS provides Federally-owned equipment to the Tribe for use on the project, the title shall remain with the Federal Government unless otherwise officially transferred. The Tribe shall maintain and manage the equipment in accordance with IHS rules and the applicable use permit or agreement.

3. Real Property

Title to real property acquired by the Tribe under the project vests in the Tribe upon acquisition. In the case of sanitation facilities or related improvements to real property, ownership vests in the Tribe upon installation by the Tribe and upon acceptance by the Tribe of facilities constructed by it contractor(s) on tribal lands.

4. Supplies and Materials

Title to supplies to be consumed during the project vests in the Tribe upon acquisition by the Tribe. Title to materials to be incorporated into sanitation facilities or into other related improvements to real property under the project vests with the Tribe upon acquisition.

If at the end of a project, residual supplies or materials worth more than $100 in total value remain, the disposition of such supplies or materials shall be as prescribed in the transfer agreement.

PROJECT SUMMARY/PRELIMINARY ENGINEERING REPORT
COMMUNITY WATER SUPPLY AND WASTE DISPOSAL FACILITIES
FOR THE
SAUK-SUIATTLE INDIAN TRIBE
SAUK-SUIATTLE INDIAN RESERVATION
WASHINGTON

PL-86-121
IHS PROJECT NO. PO-02-J47
NOVEMBER 2001

I. Synopsis

This project recommends that the Indian Health Service (IHS) assist the Sauk-Suiattle Indian Tribe in constructing improvements to the Tribe's community water and sewer systems on the Sauk-Suiattle Indian Reservation, located near Darrington, Washington. The community water system improvements consist of a new community water well, abandonment of an existing well, a new control system installed in the existing pumphouse, construction of a new water storage tank, and abandonment of the existing concrete tank. The community sewage system improvements include installation of five aerobic treatment systems with low-pressure drainfields to replace the existing communal septic systems.

The facilities proposed under this project will be constructed on the Sauk-Suiattle Indian Reservation. The Indian Health Service and the Tribe will obtain any necessary permits. The IHS will provide all engineering, design, construction plans and specifications and advisory construction inspection services. The Tribe will construct the facilities through Tribal Procurement methods.

The U. S. Department of Agriculture-Rural Utilities Service (USDA-RUS) will fund $644,000.00 through a grant/loan agreement with the Tribe. IHS will provide "in-kind" engineering and project management services valued at $54,740.00 (8.5%). The Tribe will contribute legal, administrative, and contracting "in-kind" services valued at $32,200.00 (5%). Therefore, total "in-kind" contributions amount to $86,940.00, with a total project cost of $730,940.00.

II. Background Information

The Sauk-Suiattle Indian Reservation is located in south central Skagit County in western Washington. It is bordered on the east by the Sauk River, on the west by state highway 530 and on the north and south by farmland and wilderness. The 25-acre Reservation was created in 1980 through a conversion of fee to trust land. The Reservation is surrounded by mountains, which are heavily forested. The climate is mild and wet.

The elevation of the area is approximately 800 feet above mean sea level. The average temperature range is 28 degrees Fahrenheit (minimum) to 76 degrees Fahrenheit (maximum); the annual precipitation averages 75 to 80 inches.

The total population of the Tribe is approximately 243 people with 50 members living on site in a 25-acre, 20-unit subdivision.

In January of 2001, IHS completed an engineering study of the Sauk-Suiattle community water and wastewater systems. The study consisted of inspection and evaluation of the water system including the water storage reservoir, water wells, pump house, gate valves, fire hydrants, individual water meters, and water mains. The study identified deficiencies in the water system that included the following:

1. Damaged or missing water meters.
2. Community well within 100' of existing drainfield.
3. Inadequate wellhead protection.
4. Excessive leaking in community concrete water storage reservoir.
5. Inadequate system pressure (static and dynamic).
6. Inadequate fire flow storage in tank.
7. Existing community well threatened by encroaching Sauk River.

The existing identified deficiencies do not constitute any imminent health threats. However, the potential exists for several avenues of contamination to the groundwater, which provides drinking water for the community. The other deficiencies are also significant, resulting in O&M difficulties, aesthetic concerns, and lack of fire protection.

Deficiencies in the wastewater facilities were also identified in the study; these are identified in the following list:

1. Existing septic tanks are over 20 years old, and are likely unable to prevent infiltration from groundwater or exfiltration into the environment.
2. Inadequate vertical separation exists between the drainfields and the seasonal high groundwater table, resulting in contamination to the groundwater during the rainy season.
3. Proximity of some drainfields to the encroaching Sauk River poses a risk of exposure, pollution to the river, and subsequent loss of service of the drainfields.
4. Likely pollution of the groundwater coupled with proximity to the community wells poses a risk of contamination to the Tribe's water system.

These deficiencies are of a serious nature, and although no contamination has yet been identified, the risk is clearly present. Contamination to the Tribe's drinking water poses a particularly dangerous risk, as no alternative water supply sources exist in the extremely limited property available to the Tribe for development.

III. Existing Facilities

Water

The Sauk-Suiattle community water system consists of two wells. A summary of the wells follows.

Well	Year Built	Casing Size	Depth	Static Level	Flow	Pump/Motor Size
1	1981	6 inch	51 feet	9 feet	35 gpm	1-½ Hp
2	1983	8 inch	58 feet	20 feet	45 gpm	2 Hp

Well #1 and #2 operate alternately to provide for all the water demands in the community. Raw water is pumped through the pumphouse, where it is treated with sodium hypochlorite and fluoride which are injected into the system by chemical feed pumps. Community usage averages 400,000 gallons-per-month or 13,300 gallons per day (gpd). Peak water use has reached 15,000 gpd in the summer. Winter water use reduces to an average of 9,000 gpd.

The Sauk-Suiattle community water system contains one water storage reservoir. A summary of the reservoir follows.

Reservoir	Year Built	Type	Material	Capacity	Condition
1	1982	20' X 60' Standpipe	Concrete	141,000 gallons	Marginal

The concrete reservoir is the only storage reservoir for the entire community. For the past several years, it has experienced leakage through the walls and insufficient system pressure. The external leakage is believed to be the result of corrosive water (pH ~6.2). The pH of the water will shortly be raised to a more neutral level with soda ash chemical treatment equipment being installed with funding from the EPA under IHS Project PO-01-J17. In 1996 under IHS Project PO 95-866, the tank leakage problem was addressed by installing a coating on the interior surfaces, using an epoxy primer and a urethane elastomer topcoat. Despite these efforts, leaks redeveloped after two years and continue to be observed on the outside of the tank at present. Although the tank is fully functional, uncertainties exist regarding the structural integrity, and the functional service life of the tank is unknown.

The Sauk-Suiattle Tribe owns and operates the community water system. The Tribe has the appropriate resources to assume the O&M responsibilities for the water system improvements proposed by this project. The cost estimate for this project does not include any additional equipment and training to the Tribal Water & Sewer Department because the recommended water system improvements will not significantly increase the O&M time and cost requirements and responsibilities for the Tribe.

Sewer

Wastewater from the homes and community buildings on the Reservation is treated and disposed of by conventional septic tank and communal drainfield systems. There are four communal drainfields, disposing of collected effluent from three to eight homes each. These drainfields are located behind the homes, just inside the outside perimeter of the housing area.

The septic systems were constructed in 1981 when the homes were built, and since this time, no modifications have been made to these systems. Although these septic tanks have reportedly been periodically pumped, there is no record of a routine pumping schedule, posing the concern that solids may have overflowed to the drainfields. Currently, there is no evidence of failure in the drainfields; however, there have been occasional complaints from several homeowners of excessive ponding water over the drainfields. The source of the ponding water has yet to be confirmed as originating from a drainfield.

The soils in the area are relatively coarse, and have provided satisfactory drainage. The subsurface flow is fed by drainage from the nearby mountains. The valley is relatively narrow, and is subject to rapid changes in groundwater levels during peak runoff times of

the year. In addition, the groundwater moves quickly to the nearby river, where it could easily contaminate this surface source. Test pits have shown the water table to exist in the range of two to six feet below the ground surface. Furthermore, the presence of certain types of grasses nearby (Reed Canary), suggest the likelihood of wetlands in these areas, which could impact adjacent drainfield performance.

Washington State standards for conventional onsite septic systems mandate that at least three feet of vertical separation must exist between the drainfield floor elevation and the seasonal high water table or a confining layer. During the winter months, this standard is violated. During the wet seasons (fall, winter, spring), the water table is high enough that final treatment by unsaturated soil is not occurring. Therefore, conventional septic tank/drainfields in this community are likely polluting the groundwater table during high water table periods of the wet season. The proximity of some of these drainfields (within 100' from community wells) has already been addressed in this report.

The presence of individual septic tanks on shared drainfields presents more potential problems. If a septic tank is not pumped regularly (once every 2-3 years for normal use), solids will likely enter the drainfield, causing it to fail. As the existing septic tanks are 20 years old, it is very likely they have not been pumped often enough to prevent solids overflow events. Although no clear evidence exists of acute drainfield failure, various residents have made occasional complaints of standing water and odors. This suggests the possibility of chronic failure, or slower drainage than desired.

One additional concern must be addressed. The communal drainfield on the east side of the Reservation is located within 20-feet of the present bank of the Sauk River. The river has eroded this bank recently, and could eventually uncover this drainfield, resulting in pollution to the river, and loss of function in the drainfield for the residents.

The Tribe has the appropriate resources to assume the O&M responsibilities for the sewer system improvements proposed by this project. The cost estimate for this project does not include any additional equipment and training to the Tribal Water & Sewer Department because the recommended sewer system improvements will not significantly increase the O&M time and cost requirements and responsibilities for the Tribe.

IV. Alternatives Considered and Analyzed

Alternative A: No Action

Alternative B: Replace water meters, install hydropneumatic pressure tank, and provide conventional mound systems over existing subsurface systems.

Alternative C: Replace water meters, construct 150,000 gallon welded steel standpipe, drill new community well to replace community well #2, abandon existing concrete standpipe, install communal aerobic treatment units with at-grade disposal fields.

Alternative D: Replace water meters, construct 150,000 gallon welded steel standpipe, drill new community well to replace community well #2, abandon existing well #2 and concrete standpipe, install communal effluent pumping stations with community package treatment plant and community drainfield.

Alternative Analysis

Alternative A: If no action is taken, the situation will only get worse, leading to potential events that will pollute the river, and possibly the community wells. Existing septic tanks are already showing evidence that exchange with the surrounding environment is occurring.

Alternative B: Although this alternative would correct the deficiencies that currently exist, it would not provide the most desirable solution. A hydropneumatic pressure tank would indeed provide sufficient pressure to eliminate nuisance low pressures in the system, but additional mechanical equipment (high service discharge pumps) would be required to provide for adequate flows in the event of a fire. This additional equipment would be cumbersome to operate and maintain. While conventional mound systems would provide adequate vertical separation with the seasonal high groundwater, they do not provide the advanced level of treatment that aerobic treatment sewage treatment systems do. This is especially significant if breakout of partially treated sewage effluent develops at various points along the toe of the mound, which would cause public health risks. The size and height of a mound system can be a detriment at some sites as well.

Alternative C: Alternative C includes drilling a new well to replace community well #2, resulting in two benefits: first, the threat of intrusion by the encroaching river would be removed, and second, the new well could be located up-gradient from the existing drainfields-thereby eliminating risk of contamination by same. It would remove the existing concrete standpipe, which is at best an aesthetic problem (chronic leaking), and at worst, at potential risk for structural failure. Aerobic sewage treatment would serve to provide a high quality of effluent, rich with oxygen, and treated to tertiary levels, including on average 70% nitrate removal. At-grade drainfields would provide minimal aesthetic concerns for height, standing approximately 30" above the ground, and would present a much lower risk for breakout, as the effluent is highly treated and thus less likely to form bio-matt forming clogging layers in the soil.

Alternative D: The recommended improvements for Alternative D to the water system are identical to Alternative C. In sewage treatment and disposal however, infrastructure development would be excessive, including the addition of several effluent collection chambers with pumps, and a centralized package treatment system. After treatment, a centralized and relatively large drainfield would be needed, sized for the total sewage flow. Currently, the only land that is potentially available is located in the center of the trust property, and surrounded by all of the homes. In addition, effluent from a package treatment plant is typically treated to a secondary level, which is of significantly lower quality than tertiary treated effluent. This would clearly be an unacceptable option to the Tribe, as aesthetic and safety concerns would ensue.

V. Recommended Alternative

Alternative C is the recommended alternative. Alternative C provides the best long-term solution to the chronic water pressure problems while providing fully adequate fire flows, pressures, and storage volume. No additional pumps or mechanical equipment is necessary. The recommended water system improvements include abandonment of community well #2, drilling a new well up-gradient, and at an acceptable distance from the nearest drainfield, replacing faulty and missing individual water meters, abandoning the existing concrete water storage tank, constructing a 150,000 gallon welded steel standpipe and abandoning the existing concrete tank, abandoning all septic tanks, installing new septic tanks and connecting them to new communal aerobic treatment units, and

constructing communal at-grade drainfields above the existing drainfields for final disposal of the highly-treated effluent.

Upon completion of the improvements proposed under this project, all water and sewer system components will comply with current state and federal design standards. This will result in better water service to the residents with increased pressure and fire flow. The recommended advanced aerobic sewage treatment system will protect the environment as well as help prevent contamination of the Tribe's water systems. O&M costs will not significantly increase and Tribal O&M personnel will be able to operate and maintain the recommended improvements with minimal training.

A summation of the existing water and sewer facilities and the respective recommended improvements follows:

Well #1

Well #1is located near the community service building, and marginally outside the tolerable radius of horizontal separation from the nearest communal drainfield. This well is to remain in service, and will require no modifications. However, the protection of the groundwater pumped by this well will be improved, as a result of the nearest drainfield being replaced with an aerobic treatment system and an at-grade drainfield. This well will be further protected with installation of the recommended lining of the adjacent drainage ditch (either bentonite or concrete, which channels storm water runoff.

Well #2

Well #2 is located in the southeast corner of the reservation, and will be abandoned under the recommended alternative. A new well, expected to be similar in pumping capacity will be drilled at an alternate location, and will be connected to the community water system. A new submersible well pump, piping and controls will also be provided. Two potential sites exist for the new well: the southwest corner of the Reservation, behind the community services building, or a location to the north of the present tribal trust property, likely to be converted to trust land in the near future.

Pump/Motor Selections for Proposed Well

The new well pump is expected to be the same size at Well #2, which is approximately 45 gpm.

Water Well Capacity/Adequacy

The demands of the community can be met by either well. Two wells are in use, to provide redundancy in the system, thereby providing backup in the event of a failure in either of the wells. As the Reservation has been developed to capacity, there will be no need to provide additional supply than is currently required.

Pump Controls for Wells #1 and #2

The pump control system consists of separate control panels for well #1 and #2 installed in 1981 and 1983, respectively. Each pump's automatic mode of the control is connected to electrodes that are suspended in the water storage reservoir. The controls operate the water well pumps in a lead-lag mode in response to the level of water in the reservoir. There is

no alternator to switch the pumps in lead-lag sequence. A panel selector switch allows both pumps to be run on either automatic, hand, or off.

It is recommended that the existing controls be replaced, with new control wires connected to the proposed new well (#2). A remote telemetry unit (RTU) type of control system will be installed to provide automated control and alarm monitoring and warning capabilities.

Water Storage Reservoir

The existing water storage reservoir will be abandoned in place under the proposed alternative. This will entail draining the tank, disconnecting control connections, and isolating it from the water system with gate valves. It is recommended this tank be utilized as a backup storage facility should the new tank ever need to be drained for O&M such as cleaning or inspections.

It is proposed that a new 150,000-gallon (100' height X 16' diameter) welded steel standpipe be constructed under this alternative. The new tank will be located adjacent to the existing tank. The new reservoir will increase existing system pressure from of approximately 30 psi to 43 psi, and will provide sufficient pressurized storage for a fire flow requiring 500 gpm for one hour at any fire hydrant on the water system.

Water Distribution System

The existing water distribution system is composed of 6-inch PVC piping and is still in good operating condition. The piping is also adequate for potable needs and fire flow. However, the lack of readily identifiable and functional individual water meters at every service connection poses operational problems. In the event that an individual home needs to be isolated from the system, it would be extremely difficult in some situations to accomplish this, due to the lack of adequate water meters.

Recommended Alternative C proposes that all individual water meters be replaced with new ones, to be located within 5-feet outside of the property boundary of each home. This will provide for improved operations and maintenance by being able to monitor individual water usage to better detect leaks or excessive use.

Septic Tanks

There are approximately 22 septic tanks currently in operation; 20 of them serve individual homes, and two of them serve community buildings (community service building, and tribal office). Due to the age of these septic tanks, and from field observation, it is apparent that some (if not all) of these septic tanks are not watertight. Furthermore, without regular pumping, many of these tanks have acquired significant accumulation of solid material, rendering them insufficient in their ability to treat conventional sewage.

It is proposed under the Alternative C, that all of these septic tanks be replaced with 1,000 gallon, concrete, two-compartment septic tanks, meeting current design standards. This will serve to protect the environment, and improve efficiency of operations. The old septic tanks will be abandoned, which will require the pumping of all remaining sewage and solids, breaking the lid, and backfilling with approved fill material.

Aerobic Treatment Units

In order to provide advanced treatment to ensure protection to the environment as well as compliance with Washington State regulations, it is recommended that aerobic treatment systems be provided with UV disinfection, and at-grade drainfields for final disposal. This will be accomplished by installing four or five communally sized aerobic treatment units (each capable of handling daily loads from 4-5 houses), and connecting them to the new septic tanks.

Additionally, a small duplex pumping station will be required for each unit. This serves to provide regular dosing to the new at-grade drainfields, thereby optimizing treatment efficiency of the process.

At-Grade Drainfields

As land is extremely limited on the Reservation, it is proposed that at-grade bed type drainfields be installed directly above the existing conventional septic systems. These mounds will be approximately 2.5-feet high, and will be constructed using chamber units to house the small-diameter pressurized pipes for distribution. Cover soil will be provided over each at-grade drainfield.

The at-grade drainfields will provide year-round greater than 1-foot of separation from the floor of the drainfield and the worst-case seasonal high groundwater level, which would be the groundwater table surfacing. One-foot of separation is recommended as a minimum separation distance from advanced aerobically treated sewage effluent and the seasonal high groundwater level.

Funding For Proposed Improvements

The USDA-RUS will provide all funding under this project with grant/loan funds. The IHS will provide in-kind contributions in the form of engineering services, which shall include preliminary design evaluations, surveying, formal design, drafting, and inspection services. In addition, the IHS will provide technical assistance to the Tribe during construction in support of the tribally administered construction contract. The Tribe will provide in-kind contributions as well, for contract administration.

VI. Environmental Review

The Tribe and IHS have conducted an environmental review of the proposed facilities under this project in accordance with NEPA and related environmental laws, regulations, and Executive Orders. The Tribe submitted a complete environmental report accompanying its application for financial assistance to the USDA-RUS in September 2001.

No significant environmental effects resulting from this project have been identified; therefore a full environmental assessment is not required. The cumulative effect of this project will be an improvement in the health of Indian people served by the Sauk-Suiattle community water and sewer systems. The project qualifies for IHS' categorical exclusion from full consideration under NEPA and related environmental laws, regulations, and Executive Orders.

VII. Effect on SDS

This project was included in the Portland Area IHS Sanitation Deficiencies System (SDS) report for FY 2001 and scored very high. However, due to funding constraints for HUD-funded homes, the IHS was unable to provide funding for this project. Upon completion, this project will reduce the level of sanitation deficiencies in the Portland Area IHS.

VIII.

ADP Coding:
19-H1-FFZ ; Existing Indian homes
3-E2-FFZ; Existing non-residential

Notes: E1- Existing Home
E2- Non-Residential
H1-HUD Home
FZ - Above minimal community water and sewer, both previously served, and no solid waste facilities

IX. Cost Estimate, Funding Summary, and Project Schedule

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT COST	TOTAL COST
	Water Supply				
1.	Well head protection - drainage ditch lining	1	LS	$ 2,000.00	$ 2,000.00
2.	Well drilling mobilization	1	LS	$ 3,000.00	$ 3,000.00
3.	Well Abandonment	58	LF	$ 54.80	$ 3,178.40
4.	Drill new 8" well with casing	60	LF	$ 55.00	$ 3,300.00
5.	Submersible pump & wiring	1	LS	$ 10,000.00	$ 10,000.00
6.	Extend control and power wire	500	LF	$ 5.00	$ 2,500.00
7.	Stainless steel well screen	5	LF	$ 75.00	$ 375.00
8.	Water analysis	1	LS	$ 3,000.00	$ 3,000.00
9.	Test pumping	1	LS	$ 2,400.00	$ 2,400.00
10.	Replace old control system with RTU system	1	LS	$ 25,000.00	$ 25,000.00
11.	4" PVC water piping for new well	500	LF	$ 18.00	$ 9,000.00
12.	Abandon existing tank in place	1	LS	$ 3,000.00	$ 3,000.00
13.	Welded steel standpipe, 150,000 gallons, 100'X16' w/foundation, piping, paint, and appurtenances	1	LS	$ 240,000.00	$240,000.00
14.	Tank foundation soil test	1	LS	$ 9,000.00	$ 9,000.00
15.	Individual water meter replacement	23	EA	$ 250.00	$ 5,750.00
	Subtotal - Water Supply				**$321,503.40**
	Waste Disposal				
16.	Septic tanks, concrete, 1000-gallon, two compartment	20	EA	$ 1,200.00	$ 24,000.00
17.	Aerobic treatment units	5	EA	$ 14,500.00	$ 72,500.00
18.	Pump vault w/dual submersible pumps & controls	5	EA	$ 4,500.00	$ 22,500.00
19.	Low-pressure dosed drainfield, at-grade	5	LS	$ 12,000.00	$ 60,000.00
20.	Existing septic tank abandonment	20	EA	$ 250.00	$ 5,000.00
21.	Effluent drainage line, 4" PVC	2000	LF	$ 8.25	$ 16,500.00
	Subtotal Waste Disposal				**$200,500.00**
	Total Construction Cost				**$522,003.40**
	Contingencies @ 10%				$ 52,200.34
	Subtotal				$574,203.74
	Tribal Administration @ 2%				$ 11,484.07
	Maximum IHS Contribution to the Tribe				**$585,687.81**
	IHS Project Technical Support (PTS) @ 10%				$ 58,568.78
	Total Project Cost				$644,256.60
	Total Rounded Cost to Nearest $1,000				**$644,000.00**

In-Kind	
IHS Engineering and Project Management Services @ 8.5%	$ 54,740.00
Tribal In-Kind Legal and Administration Services @ 5%	$ 32,200.00
Total In-Kind Contributions	**$ 86,940.00**
Total Project Cost Including In-Kind Contributions	**$730,940.00**
Funding Summary	
IHS in-kind contribution	$ 54,740.00
Tribal in-kind contribution	$ 32,200.00
USDA-RUS grand/loan	$ 644,000.00
Total Project Cost	$ 730,940.00

Proposed Project Schedule

MOA Approval	January 1, 2002
Begin Design	January 15, 2002
Complete Design	May 15, 2002
Construction Bid	June 15, 2002
Construction Start	August 1, 2002
Construction Completion	December 1, 2002
Final Report	June 15, 2003

X. Signature Page

Prepared By:

_____

Michael Young, P.E., Project Engineer Date
Seattle District Office

Reviewed By:

_____

Michael Weaver, P.E., DEE, District Engineer. Date
Seattle District Office

Recommended By:

_____

Kelly R. Titensor, P.E., Director, DSFC Date
Portland Area IHS

Approved By:

_____

Richard R. Truitt, P.E., Associate Director, OEH&E Date

DEPARTMENT OF HEALTH & HUMAN SERVICES

PUBLIC HEALTH SERVICE
INDIAN HEALTH SERVICE
1220 THIRD AVE., ROOM 476
PORTLAND, OR 97204

Memorandum

Date: April 5, 2002

A8. Example RUS MOA

From: Director, DSFC, OEH&E/PAO

Re: Memorandum of Understanding, RUS and IHS

To: Portland Area DSFC engineering staff

The Department of Agriculture Rural Utilities Service (RUS) and IHS executed a Memorandum of Understanding (MOU) on March 13, 2002. This agreement is intended to streamline the development and management of sanitation facilities projects that include RUS funds.

A copy of the signed MOU is attached. The terms of this MOU apply for all FY 2002 and future projects

In order to implement the provisions of the MOU for the contribution of RUS funds to IHS as described in Sections A and B, RUS and IHS have agreed on a two-step procedure as described in the following:

Step 1: IHS will send a written request to the RUS Rural Development Specialist requesting that the tribe and RUS execute any required loan closing and/or grant documents. This request is drafted by the Project Engineer or District Engineer and signed by the Director, DSFC. The request should be sent to RUS when bid solicitation is scheduled to be no less than approximately 45 days in the future. Upon execution of these documents, RUS will notify IHS. Bid solicitation will begin upon receipt of this notification from RUS.

Step 2: After bids/proposed costs have been received and reviewed and IHS has determined that a contract may be awarded (FAR contracts) or that a unit cost may be approved (tribal procurement), IHS will send a second written request to RUS that funds be transferred to IHS. This request is drafted by the Project Engineer or District Engineer and signed by the Director, DSFC. A copy of the bid abstract must be included as an attachment to the request. Award of the contract or unit cost approval shall be contingent upon receipt of the RUS funds.

Please note that this procedure will apply for both FAR contracts and tribal procurements where IHS will issue a unit cost approval. Tribal procurement includes any means the tribe may use to perform the work, typically contracting or force account.

Sample letters are attached for reference.

If you have any questions or comments, please contact me.

Kelly Titensor, Director
Division of Sanitation Facilities Construction, PAO

Attachments

RECEIVED
APR 0 1 2002
PAO/OEHE

MEMORANDUM OF UNDERSTANDING BETWEEN UNITED STATES DEPARTMENT OF AGRICULTURE, WASHINGTON STATE RURAL UTILITIES SERVICE AND UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, PORTLAND AREA INDIAN HEALTH SERVICE

This Memorandum of Understanding (MOU) is made and entered into by the Rural Utilities Service, hereinafter referred to as RUS, an Agency of the Rural Development Mission Area, United States Department of Agriculture, and the Indian Health Service, hereinafter referred to as IHS, an Operating Division within the United States Department of Health and Human Services.

I. PURPOSE

The purpose of this MOU is to establish the framework of partnering and streamlining between RUS and the IHS in Washington State for providing assistance to American Indians in the development and construction of water, waste water, and solid waste facilities.

The MOU will be supplemented, as necessary, by individual Memoranda of Agreement (MOA) developed and executed by representatives of the participating agencies and the Tribes, to meet specific project requirements.

II. AUTHORITY

The MOU is entered into pursuant to the authority of P.L. 86-121, "The Indian Sanitation Facilities Act," and the "Consolidated Farm and Rural Development Act," as amended (7 U.S.C. 1926). The Nationwide MOU between IHS and RUS and signed on October 20, 2000, also serves as the foundation and parent document to this Washington State MOU and is considered to be, by this reference, a part of this document.

III. UNDERSTANDINGS – DELIVERY OF SERVICES

IHS and RUS will use one of the following direct service methods based on the individual project and Tribal request for these services:

A. <u>IHS Federal Procurement – All funding Managed by IHS</u>

- An MOA will be developed between IHS, RUS, and the Tribe based on individual project criteria, such as project budget, IHS charges, and environmental classification.
- IHS will serve as lead agency for all environmental evaluations, documentation, and compliance. RUS State Environmental Coordinator will review and suggest modifications or accept the environmental documentation.

- IHS will manage all RUS and other partner agency funds provided that the Tribe has agreed to such an arrangement in writing.
- IHS will develop a preliminary engineering report/project summary and send to RUS Engineer. RUS Engineer will review and suggest modifications or accept the preliminary engineering report (PER).
- IHS will provide all engineering design services including review and acceptance of plans and specifications (P&S), and contract documents consistent with approved PER.
- IHS will begin construction contract bid solicitation upon notification from RUS that the closing documents have been executed.
- IHS will use the federal acquisition regulations (FAR) to procure construction services and act as the lead agency on all contracting and construction activities.
- IHS will serve as the lead agency in lieu of RUS involvement for all other engineering services.
- RUS will work with the Tribe to assure that Loan/Grant funds are transferred to IHS prior to contract award.
- IHS will review and approve pay requests for all project costs and reimburse for work performed by the Contractor/s, the Tribe, and others.
- IHS, RUS, and the Tribe will conduct a joint pre-final inspection of the project.
- IHS will submit a project completion package to RUS including a final report and a complete financial summary to close out the project.

B. Tribal Procurement – All Funding Managed by IHS

- A MOA will be developed between IHS, RUS, and the Tribe based on individual project criteria, such as project budget, IHS charges, and environmental classification.
- IHS will serve as lead agency for all environmental evaluations, documentation, and compliance. RUS State Environmental Coordinator will review and suggest modifications or accept the environmental documentation.
- IHS will manage all RUS and other partner agency funds provided that the Tribe has agreed to such an arrangement in writing.
- IHS will develop a PER/IHS Project summary and send to the RUS Engineer. RUS Engineer will review and suggest modifications or accept the PER/IHS Project Summary.
- IHS will provide all engineering design services including review and acceptance of plans and specifications, and contract documents consistent with approved PER/IHS Project Summary.
- IHS shall provide contract documents, including plans and specifications, to the Tribe for construction contract bid solicitation upon notification from RUS that the closing documents have been executed.
- Tribe shall procure for construction using IHS and RUS procurement requirements as described in the MOA. Oversight by IHS will include engineering, technical assistance, site inspections and recommendation of approval of change orders for the Tribe.
- RUS will work with the Tribe to assure that Loan/Grant funds are transferred to IHS after bid review and concurrence and prior to unit cost approval by IHS.

- IHS will review pay requests for all project costs and reimburse tribe for approved construction costs as construction progresses.
- IHS will serve as the lead agency in lieu of RUS involvement for all other engineering services.
- IHS, RUS, and the Tribe will conduct a joint pre-final inspection of the project.
- IHS will submit a project completion package to RUS including a final report and a complete financial summary to close out the project.

C. Tribal Procurement – All Funding Managed by the Tribe

- An MOA will be developed between the Tribe and IHS to include project budget, IHS charges, and environmental responsibilities.
- RUS processes and procedures as outlined in RUS 1780 will be followed. These include RUS review and approval of preliminary engineering reports, engineering services agreements, plans and specifications, monthly site inspections, change orders and so forth.
- RUS funds will go directly to the Tribe when needed.
- IHS serves in a consulting role to the Tribe and may contribute funds and/or in-kind services to the project.
- IHS may serve as the lead agency for project related environmental evaluations, documentation and compliance at the tribes request; otherwise, the engineering consultants planning and designing the proposal shall prepare the appropriate environmental documentation consistent with 7 CFR 1794. Tribe shall procure for construction using RUS procurement requirements.
- If IHS provides engineering services, the Tribe will reimburse for the project technical services (PTS) and any other services provided by IHS.
- For those projects engineered by IHS, the MOA may be written to include IHS engineering services and costs, which will meet the RUS engineering services agreement requirement.

D. Environmental Services

- IHS agrees to serve as lead agency (ref. 40 CFR 1501.5 and 1501.6) for NEPA compliance activities. RUS and IHS shall agree upon the classifications of each proposal. Level-of-review classifications and implementation procedures shall be determined by and be consistent with the highest level of review in each agency's regulation. Agencies agree to joint public involvement procedures under IHS's lead including listing RUS as cooperating agency for all public notices.
- Environmental documents will be reviewed simultaneously with engineering documents. Prior to publication of "Finding of No Significant Impact" public notices, IHS shall provide RUS, for its concurrence, copies of project related environmental review documentation. Upon completion of the environmental review process, IHS shall provide copies of all associated documentation to RUS for its files.
- If the RUS funded activities deviate from the original IHS project scope, RUS will supplement or request IHS to supplement its NEPA document.

V. DURATION AND MODIFICATION OF AGREEMENT

This MOU, or any revision hereto, becomes effective when signed by the two parties. This MOU shall remain in effect unless terminated by either party after 60-days prior written notice to the other party.

APPROVALS:

UNITED STATES DEPARTMENT OF AGRICULTURE,
RURAL UTILITIES SERVICE

Jackie J. Gleason
State Director, Washington

3/13/02
Date

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
INDIAN HEALTH SERVICE

Doni Wilder
Director, Portland Area Indian Health Service

3/13/02
Date

SAMPLE

Letter No. 1

Rural Development Specialist
U.S. Department of Agriculture,
Rural Utilities Service

RE: Request for Loan Closing/Grant Agreement Execution

Dear Ms/Mr._____:

Under the Memorandum of Agreement (MOA) for Project PO-02-XYZ, IHS agreed to assist the _____ Tribe with construction of sanitation facilities serving _____ homes in the community of _____ on the _____ Indian Reservation. USDA-RUS, in turn agreed to make a financial contribution to cover the cost/a portion of the cost of the facilities and related services.

IHS is near completion of the construction contract documents. **IHS/The Tribe** is planning to begin the solicitation of bids for construction in approximately 45 days. The bids will be advertised for a period of 30 days. After bid opening, IHS will evaluate the bids and make a determination regarding **contract award/unit cost approval.**

IHS certifies that all rights-of way and easements have been obtained for the project.

Therefore, in accordance with Paragraph ____ of the MOA, IHS respectfully requests that USDA-RUS and the Tribe proceed with processing of loan closing documents and/or grant agreements for the USDA-RUS portion of funds.

Please notify this office as soon as the Tribe and USDA-RUS have executed the loan closing documents and/or grant agreements

If you have any questions, please contact me at (503) 326-3155.

Sincerely,

Kelly R. Titensor, P.E.
Director, Division of Sanitation Facilities Construction

cc: Sandra Boughton, USDA-RUS, Wenatchee, WA.

SAMPLE

Letter No. 2

Rural Development Specialist
U.S. Department of Agriculture,
Rural Utilities Service

RE: Request for Transfer of Funds

Dear Ms/Mr._____:

Under the Memorandum of Agreement (MOA) for Project PO-02-XYZ, IHS agreed to assist the _____ Tribe with construction of sanitation facilities serving _____ homes in the community of _____ on the _____ Indian Reservation. In turn, USDA-RUS agreed to make a financial contribution to IHS for **the cost/a portion** of the cost of the facilities and related services.

IHS/The Tribe has solicited bids for construction of the sanitation facilities as described in the Project Summary/Preliminary Engineering Report and MOA for Project PO-02-XYZ. IHS has evaluated the bids and determined that a contract may be awarded in the amount of $_____. IHS is prepared to **award this contract/provide a unit cost approval to the Tribe for this work** as soon as the USDA-RUS funds have been received. A copy of the bid abstract is attached for your records.

Therefore, in accordance with Paragraph ____ of the Memorandum of Agreement, IHS respectfully requests that USDA-RUS transfer funds in the amount of $_____ to IHS as soon as possible. **Award of the contract/Issuance of the unit cost approval** is contingent on receipt of these funds by IHS.

USDA-RUS funds will be applied towards construction of the facilities and provision of the services described in the Project Summary/Preliminary Engineering Report for Project PO-02-XYZ.

Please contact this office to arrange for the financial transactions necessary to transfer USDA-RUS funds to IHS.

If you have any questions, please contact me at (503) 326-3155.

Sincerely,

Kelly R. Titensor, P.E.
Director, Division of Sanitation Facilities Construction

Attachments

cc: Sandra Boughton, USDA-RUS, Wenatchee, WA.

A9. Example NAHASDA[25]/HUD MOA

MEMORANDUM OF AGREEMENT
AMONG

THE UNITED STATES OF AMERICA

THE_____TRIBE

AND

THE_____HOUSING AUTHORITY

This Agreement is made among the Indian Health Service, hereinafter referred to as IHS, of the Department of Health and Human Services (HHS), under and pursuant to the provisions of Section 7 (a)(3) of Public Law 86-121 (42 USC 2004 (a), 73 Stat. 267); the_____Tribe hereinafter referred to as the Tribe, acting through its Chairman and the _____Housing Authority, hereinafter referred to as the Authority, acting through its Executive Director.

WHEREAS, the Authority is undertaking construction of_____ housing units with financial assistance from HUD as part of a housing located at_____and known as HUD assisted Project No._____; and

WHEREAS, the Authority, (by Project Proposal dated_____) requests IHS assistance in the provision of off-site water and sewer facilities to support the HUD assisted Indian Housing units for HUD assisted Project No._____;

NOW THEREFORE, in order to carry out the water and sewer facilities project as set forth in the attached Project Summary dated _____, the parties mutually agree that:

1. The IHS shall provide to the Authority all materials, supplies, equipment, labor, tests, consultations, and inspections, necessary for construction of off-site water and sewer facilities for the HUD assisted housing units in the project in accordance with the attached Project Summary.

2. The Authority shall contribute to the IHS an amount totaling $_____for construction of off-site water and sewer facilities under Paragraph 1 of this agreement.

3. In the case of off-site water and sewer facilities which serve both HUD assisted housing units and non-HUD assisted housing units, the Authority's contribution shall be used only for the pro-rata share attributable to the HUD assisted units as provided in the attached Project Summary. Authority funds shall not be used to provide water and sewer facilities attributable to the non-HUD assisted units and the IHS shall arrange for other funds for the non-HUD assisted portion of the sewer and water facilities.

4. If the actual costs of providing the off-site water and sewer facilities for the HUD assisted housing units are less than the amount of the Authority's contribution, then the difference will be refunded to the Authority. If, on the other hand, the revised projections of actual costs of providing the pro-rata share of the off-site water and sewer facilities for the HUD assisted housing units will exceed the Authority's contribution, then the IHS will so notify the Authority and HUD. The Authority will then provide an additional pro-rata contribution to the IHS. Any additional contribution by the Authority shall be subject to the availability of funds. It is understood that the Authority must make an additional contribution to the IHS prior to the IHS performing any work or incurring any costs under this agreement (or amendments thereto) which will involve pro-rata costs in excess of the Authority's contribution.

5. The off-site water and sewer facilities shall be constructed in accordance with existing standards and procedures used by the IHS for construction of such facilities. Construction shall begin as soon as practicable after this Agreement becomes effective (see paragraph 19), in accordance with a schedule to be agreed on by the IHS and the Authority.

6. The Authority shall require the housing construction contractor or Turnkey developer to coordinate the installation of on-site water and sewer facilities with the IHS and to notify the IHS project officer at the appropriate times to facilitate necessary inspections of on-site water and sewer facilities construction.

[25]Native American Housing Assistance and Self-Determination Act of 1996

7. The IHS shall maintain a set of accounting records for recording all transactions relating to funds received from the Authority for this project. The IHS shall provide to the Authority, upon request, detailed accounting data relating to costs incurred for this project.

8. The Tribe and/or Authority, as appropriate, shall obtain and provide all rights-of-way, easements, or other interest in land determined necessary to carry out the obligation of the IHS under this agreement.

9. The Tribe and Authority hereby grant permission for the IHS and its representatives to enter upon or across lands under control of the Tribe or Authority, without charge, for the purpose of carrying out the project outlined in the attached Project Summary as provided for this Agreement, and further agree to waive all claims which may arise by reason of such entry upon those lands, except those that may be recognized under the Federal Tort Claims Act.

10. [Insert NEPA, environmental, historic preservation, cultural properties, and discovery clauses; as appropriate.]

11. The Tribe and Authority shall abide by the recommendations of the IHS regarding testing, construction, inspection and final review of the facilities provided under this Agreement, in order to assure that the facilities will function properly and meet minimum public health standards.

12. In consideration of the contributions made and the maintenance responsibilities undertaken herein by the Tribe upon completion of the project, the IHS will transfer to the Tribe without charge, all rights, title and interest in the water and sewer facilities including all materials, supplies, and equipment provided for and incorporated therein pursuant to this agreement.

13. The Tribe or the responsible operations and maintenance organization will adopt rules and regulations governing the operation and maintenance of the installed community water and sewer facilities to include user rates and a bookkeeping system to enable the Tribe, or other organization, to sustain the effective operation and maintenance of these systems. These rules and regulations shall have the concurrence of the IHS and shall be in force prior to the date of transfer.

14. The Tribe or the responsible operation and maintenance organization will accept transfer of the community water and sewer facilities and assume responsibility for the maintenance, operation and repair of such facilities as its own property, so as to keep them in an effective and operating condition. The IHS shall provided instruction to appropriate tribal and other officials regarding the proper utilization, maintenance, operation and protection of the water and sewer facilities transferred.

15. It is the understanding of the parties to this Agreement that participants whose units will be connected to the community water and sewer facilities will be responsible to the Tribe or other responsible entity for the payment of the monthly service charge, unless funds are identified for operation and maintenance from another source, and that these participants must adhere to the rules and regulations adopted by the Tribe.

16. For facilities provided by IHS with funds contributed by the Authority, the IHS, to the extent economically feasible, will obtain a 1-year warranty for the Authority from the IHS contractors, suppliers, and manufacturers on equipment, work, and supplies provided by them. The IHS shall assist the Tribe or other responsible operation and maintenance organization in obtaining the benefits and protections of all warranties on equipment or work provided under this Agreement. In the event of a problem occurring within the first year of installation with the design or construction of IHS installed facilities on equipment or work not protected by the warranties of the suppliers or manufacturers, the IHS will correct the problem, subject to the availability of funds and staff resources as determined by the IHS.

17. [Disputes clause, as appropriate.]

18. Any party to this agreement may pursue its right and remedies for breech of the terms or responsibilities by any party to this Agreement.

19. This Agreement shall take effect upon transfer of the full amount of the contribution provided for in paragraph 2 to the IHS and execution by the Tribe, the Authority, and the IHS.

HHS	Date
Tribe	Date
TDHE	Date
Responsible Operation and Maintenance Organization (if appropriate)	Date

Attachment: ***Project Summary***

ALTERNATE PARAGRAPH 19, TO BE USED INSTEAD OF PARAGRAPH 19 ABOVE ONLY WHEN THE PROJECT SUMMARY SPECIFIED A PHASED PROJECT

19. The water and sewer project which is the subject of this agreement will be implemented by phase construction in accordance with the attached Project Summary. The total cost of the phases will equal the amount of the contribution provided for in paragraph 2. Each phase shall represent a separate agreement under the MOA, and each agreement shall only become effective upon transfer of the full amount of the Authority's contribution for that phase of the MOA (see list below) and execution by the Tribe, the Authority, and the IHS.

Phase I $____
Phase II $____
Phase III $____
Total $____

APPENDIX B

General Provisions for Tribal Contracts

Schedule A--Bidding Instructions and Bid Schedule
Schedule B--General Conditions
Schedule C--Labor Provisions
Schedule D--Special Provisions
Schedule E--Exhibits
Schedule F--Submittal Requirements
Schedule G--Technical Provisions
Schedule H--Drawings

Requirements for Tribal Procurement under P.L. 86-121

Schedule A	-	Bidding Instructions and Bid Schedule (Specific to Contract)
Schedule B	-	General Conditions
Schedule C	-	Labor Provisions
Schedule D	-	Special Provisions
Schedule E	-	Exhibits (Specific to Contract)
Schedule F	-	Submittal Requirements
Schedule G	-	Technical Provisions (Specific to Contract)
Schedule H	-	Drawings (Specific to Contract)

Note:

Standard form contracts in the construction industry provide a convenient and cost-effective means of contracting, and they help define what the industry expects from contractual relationships. While certain schedules and conditions are required for Federally funded projects, there are other standard forms or boilerplate contracts than what is presented in this Appendix, including:

- American Institute of Architects (AIA);
- Engineers Joint Contract Documents Committee (EJCDC) and
- Associated General Contractors of America (AGC).

These contract families are similar at many ways; however, each organization has a different perspective on the most appropriate way to procure and contract for services.

Schedule A
Bidding Instruction
and Bid Schedule

(Insert Bid Schedule and Instructions to Bidders Here)

Schedule B
General Conditions

GENERAL CONDITIONS

01. Definitions
02. Additional Instructions and Detail Drawings
03. Reports and Records
04. Drawings and Specifications
05. Site Investigation and Conditions Affecting the Work
06. Shop Drawings
07. Materials, Services and Facilities
08. Substitutions
09. Patents
10. Surveys, Permits, Regulations
11. Laws and Regulations Affecting Work
12. Taxes
13. Protection of Work, Property, Persons
14. Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements
15. Operations and Storage Areas
16. Insurance
17. Indemnification
18. Contract Security
19. Accident Prevention and Safety Program
20. Temporary Sanitary Facilities
21. Supervision by Contractor
22. Subcontracting
23. Separate Contracts
24. Time for Completion and Liquidated Damages
25. Progress Schedules and Requirements for Compliance
26. Land and Rights-of-Way
27. Suspension of Work, Termination and Delay
28. Inspection and Testing
29. Correction of Work
30. Changes in the Work
31. Changes in Contract Price
32. Differing Site Conditions
33. Use and Possession Prior to Completion
34. Cleanup and Finish Grading
35. Measurement and Payment
36. Variation in Estimated Quantities
37. Payments to Contractor
38. Assignments
39. Guaranty
40. Acceptance of Final Payment as Release
41. Engineer's Role and Authority
42. Resolution of Disputes
43. Equal Employment Opportunity
44. Clean Air and Water
45. Indian Health Service

1. DEFINITIONS

1.1 Wherever used in the CONTRACT DOCUMENTS, the following terms shall have the meanings indicated which shall be applicable to both the singular and plural thereof:

1.2 ADDENDA - Written or graphic instruments issued prior to the execution of the Agreement which modify or interpret the CONTRACT DOCUMENTS, DRAWINGS and SPECIFICATIONS, by additions, deletions, clarifications or corrections.

1.3 BID - The offer or proposal of the BIDDER submitted on the prescribed form setting forth the prices for the WORK to be performed.

1.4 BIDDER - Any person, firm or corporation submitting a BID for the WORK.

1.5 BONDS - Bid, Performance, and Payment Bonds and other instruments of security, furnished by the CONTRACTOR and his surety in accordance with the CONTRACT DOCUMENTS.

1.6 CHANGE ORDER - A written order to the CONTRACTOR authorizing an addition, deletion or revision in the WORK within the general scope of the CONTRACT DOCUMENTS, or authorizing an adjustment in the CONTRACT PRICE or CONTRACT TIME.

1.7 CONTRACT DOCUMENTS - The contract, including Advertisement For Bids, Information For Bidders, BID, Bid Bond, Agreement, General Provisions, Labor Provisions, Special Provisions, Payment Bond, Performance Bond, NOTICE OF AWARD, NOTICE TO PROCEED, CHANGE ORDER, DRAWINGS, Technical Provisions, Submittal Requirements, and ADDENDA.

1.8 CONTRACT PRICE - The total monies payable to the CONTRACTOR under the terms and conditions of the CONTRACT DOCUMENTS.

1.9 CONTRACT TIME - The number of calendar days stated in the CONTRACT DOCUMENTS for the completion of the WORK.

1.10 CONTRACTING OFFICER - The person with the OWNER organization who is authorized to administer the contract for the OWNER.

Schedule B
General Conditions

1.11 CONTRACTING OFFICER'S REPRESENTATIVE - The representative of the CONTRACTING OFFICER authorized to deal with the CONTRACTOR at the site to administer the technical aspects of the CONTRACT, and to assure compliance with the drawings and specifications.

1.12 CONTRACTOR - The person, firm or corporation with whom the OWNER has executed the Agreement.

1.13 DRAWINGS - The part of the CONTRACT DOCUMENTS which show the characteristics and scope of the WORK to be performed and which have been prepared or approved by the ENGINEER.

1.14 ENGINEER - The person, firm or corporation named as such in the CONTRACT DOCUMENTS.

1.15 FIELD ORDER - A written order effecting a change in the WORK not involving an adjustment in the CONTRACT PRICE or an extension of the CONTRACT TIME, issued by the ENGINEER to the CONTRACTOR during construction.

1.16. INDIAN HEALTH SERVICE (IHS) - Federal agency which is providing funding and/or technical assistance to the Owner on this project.

1.17 NOTICE OF AWARD - The written notice of the acceptance of the BID from the OWNER to the successful BIDDER.

1.18 NOTICE TO PROCEED - Written communication issued by the OWNER to the CONTRACTOR authorizing him to proceed with the WORK and establishing the date of commencement of the WORK.

1.19 OWNER - A public or quasi-public body or authority, tribe, corporation, association, partnership, or individual for whom the WORK is to be performed.

1.20 PROJECT - The undertaking to be performed as provided in the CONTRACT DOCUMENTS.

1.21 RESIDENT PROJECT REPRESENTATIVE - The authorized representative of the OWNER who is assigned to the PROJECT site or any part thereof.

1.22 SHOP DRAWINGS - All drawings, diagrams, illustrations, brochures, schedules and other data which are prepared by the CONTRACTOR, a SUBCONTRACTOR, manufacturer, SUPPLIER or distributor, which illustrate how specific portions of the WORK shall be fabricated or installed.

1.23 SPECIFICATIONS - A part of the CONTRACT DOCUMENTS consisting of written descriptions of a technical nature of materials, equipment, construction systems, standards and workmanship.

1.24 SUBCONTRACTOR - An individual, firm or corporation having a direct contract with the CONTRACTOR or with any other SUBCONTRACTOR for the performance of a part of the WORK at the site.

1.25 SUBSTANTIAL COMPLETION - That date as certified by the ENGINEER when the construction of the PROJECT is sufficiently completed in accordance with the CONTRACT DOCUMENTS, so that the PROJECT or specified part can be utilized for the purposes for which it is intended.

1.26 SPECIAL PROVISIONS - Modifications and additions to General Provisions which may be required by a Federal agency for participation in the PROJECT, or such requirements that may be imposed by applicable state or local laws, or the OWNER's contracting practices.

1.27 SUPPLIER - Any person or organization who supplies materials or equipment for the WORK, including that fabricated to a special design, but who does not perform labor at the site.

1.28 TRIBE - The governing body of the INDIAN TRIBE which has jurisdiction on the INDIAN RESERVATION on or near which the WORK will be performed.

1.29 WORK - All labor necessary to produce the construction required by the CONTRACT DOCUMENTS and all materials and equipment incorporated or to be incorporated in the PROJECT.

Schedule B
General Conditions

1.30 WRITTEN NOTICE - Any notice to any party of the Agreement relative to any part of this Agreement in writing and considered delivered and the service thereof completed, when posted by certified or registered mail to the said party at his last given address, or delivered in person to said party or his authorized representative on the WORK.

2. ADDITIONAL INSTRUCTIONS AND DETAIL DRAWINGS

2.1 The CONTRACTOR may be furnished additional instructions and detail drawings, by the ENGINEER, as necessary to carry out the WORK required by the CONTRACT DOCUMENTS.

2.2 The additional drawings and instruction thus supplied will become a part of the CONTRACT DOCUMENTS. The CONTRACTOR shall carry out the WORK in accordance with the additional detail drawings and instructions.

3. REPORTS AND RECORDS

3.1 The CONTRACTOR shall submit to the OWNER such schedule of quantities and costs, payrolls, reports, estimates, records and other data where applicable as are required by the CONTRACT DOCUMENTS for the WORK to be performed.

3.2 The CONTRACTOR shall keep all records related to the CONTRACT for a minimum of three years after acceptance of the completed work.

4. DRAWINGS AND SPECIFICATIONS

4.1 The intent of the DRAWINGS and SPECIFICATIONS is that the CONTRACTOR shall furnish all labor, materials, tools, equipment, and transportation necessary for the proper execution of the WORK in accordance with the CONTRACT DOCUMENTS and all incidental work necessary to complete the PROJECT in an acceptable manner, ready for use, occupancy or operation by the OWNER.

4.2 In case of conflict between the DRAWINGS and SPECIFICATIONS, the SPECIFICATIONS shall govern. Figure dimensions on DRAWINGS shall govern over scale dimensions, and detailed DRAWINGS shall govern over general DRAWINGS.

4.3 Any discrepancies found between the DRAWINGS and SPECIFICATIONS and site conditions or any inconsistencies or ambiguities in the DRAWINGS or SPECIFICATIONS shall be immediately reported to the ENGINEER, in writing, who shall promptly correct such inconsistencies or ambiguities in writing. WORK done by the CONTRACTOR after his discovery of such discrepancies, inconsistencies or ambiguities shall be done at the CONTRACTOR'S risk.

5. SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK

5.1 The CONTRACTOR will take steps necessary to ascertain the nature and location of the work, and investigate the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The CONTRACTOR also will observe and determine the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the OWNER, as well as from the drawings and specifications made a part of this contract. Any failure of the CONTRACTOR to take the actions described and acknowledged in this paragraph will not relieve the CONTRACTOR from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the OWNER.

5.2 The OWNER assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the OWNER. The OWNER does not assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its representatives before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

6. SHOP DRAWINGS

6.1 The CONTRACTOR shall provide SHOP DRAWINGS as may be necessary for the prosecution of the WORK as required by the CONTRACT DOCUMENTS. The ENGINEER shall promptly review all SHOP DRAWINGS. The ENGINEER'S approval of any SHOP DRAWING shall not release the CONTRACTOR from responsibility for deviations from the CONTRACT DOCUMENTS. The approval of any SHOP DRAWING which substantially deviates from the requirement of the CONTRACT DOCUMENTS shall be evidenced by a CHANGE ORDER.

6.2 When submitted for the ENGINEER'S review, SHOP DRAWINGS shall bear the CONTRACTOR'S certification that he has reviewed, checked and approved the SHOP DRAWINGS and that they are in conformance with the requirements of the CONTRACT DOCUMENTS.

6.3 Portions of the WORK requiring a SHOP DRAWING or sample submission shall not begin until the SHOP DRAWING or submission has been approved by the ENGINEER. A copy of each approved SHOP DRAWING and each approved sample shall be kept in good order by the CONTRACTOR at the site and shall be available to the ENGINEER.

7. MATERIALS, SERVICES AND FACILITIES

7.1 It is understood that, except as otherwise specifically stated in the CONTRACT DOCUMENTS, the CONTRACTOR shall provide and pay for all materials, labor, tools, equipment, water, light, power, transportation, supervision, temporary construction of any nature, and all other services and facilities of any nature whatsoever necessary to execute, complete, and deliver the WORK within the specified time.

7.2 Materials and equipment shall be so stored as to insure the preservation of their quality and fitness for the WORK. Stored materials and equipment to be incorporated in the WORK shall be located so as to facilitate prompt inspection.

7.3 Manufactured articles, materials and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned as directed by the manufacturer.

7.4 Materials, supplies and equipment shall be in accordance with samples submitted by the CONTRACTOR and approved by the ENGINEER.

7.5 Materials, supplies or equipment to be incorporated into the WORK shall not be purchased by the CONTRACTOR or the SUBCONTRACTOR subject to a chattel mortgage or under a conditional sale contract or other agreement by which an interest is retained by the seller.

8. SUBSTITUTIONS

8.1 Whenever a material, article or piece of equipment is identified on the drawings or specifications by reference to brand name or catalogue number, it shall be understood that this is referenced for the purpose of defining the performance or other salient requirements and that other products of equal capacities, quality and function shall be considered. The CONTRACTOR may recommend the substitution of a material, article, or piece of equipment of equal substance and function for those referred to in the CONTRACT DOCUMENTS by reference to brand name or catalogue number, and if, in the opinion of the ENGINEER, such material, article, or piece of equipment is of equal substance and function to that specified, the ENGINEER may approve its substitution and use by the CONTRACTOR. Any cost differential shall be deductible from the CONTRACT PRICE and the CONTRACT DOCUMENTS shall be appropriately modified by CHANGE ORDER. The CONTRACTOR warrants that if substitutes are approved, no major changes in the function or general design of the PROJECT will result. Incidental changes or extra component parts required to accommodate the substitute will be made by the CONTRACTOR without a change in the CONTRACT PRICE or CONTRACT TIME.

9. PATENTS

9.1 The CONTRACTOR shall pay all applicable royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and save the OWNER harmless from loss on account

thereof, except that the OWNER shall be responsible for any such loss when a particular process, design, or the product of a particular manufacturer or manufacturers is specified, however if the CONTRACTOR has reason to believe that the design, process, or product specified is an infringement of a patent, he shall be responsible for such loss unless he promptly gives such information to the ENGINEER.

10. SURVEYS, PERMITS, REGULATIONS

10.1 The OWNER shall furnish all boundary surveys and establish all base lines for locating the principal component parts of the WORK together with a suitable number of bench marks adjacent to the WORK as shown in the CONTRACT DOCUMENTS. From the information provided by the OWNER, unless otherwise specified in the CONTRACT DOCUMENTS, the CONTRACTOR shall develop and make all detail surveys needed for construction such as slope stakes, batter boards, stakes for pile locations and other working points, lines, elevations and cut sheets.

10.2 The CONTRACTOR shall carefully preserve bench marks, reference points and stakes and, in case of willful or careless destruction, he shall be charged with the resulting expense and shall be responsible for any mistakes that may be caused by their unnecessary loss or disturbance.

10.3 Permits and licenses of a temporary nature necessary for the prosecution of the WORK shall be secured and paid for by the CONTRACTOR unless otherwise specified in the CONTRACT DOCUMENTS. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the OWNER, unless otherwise specified. The CONTRACTOR shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the WORK as drawn and specified. If the CONTRACTOR observes that the CONTRACT DOCUMENTS are at variance therewith, he shall promptly notify the ENGINEER in writing, and any necessary changes shall be adjusted as provided in Section 30 - "CHANGES IN THE WORK".

11. LAWS AND REGULATIONS AFFECTING WORK

11.1 The CONTRACTOR shall at all times observe and comply with Federal, State, City, County and Tribal laws, ordinances and regulations which in any manner affect the conduct of the work; and all such orders and decrees as exist at the present and which may be enacted later by legislative bodies or tribunals having legal jurisdiction or authority over the work. No pleas of misunderstanding or ignorance thereof will be considered. The CONTRACTOR shall be wholly responsible for any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order or decree.

12. TAXES

12.1 The CONTRACTOR will pay all sales, consumer, use and other similar taxes required by the law of the place where the WORK is performed.

13. PROTECTION OF WORK, PROPERTY AND PERSONS

13.1 The CONTRACTOR will be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the WORK. He will take all necessary precautions for the safety of and will provide the necessary protection to prevent damage, injury or loss to all employees on the WORK and other persons who may be affected thereby, all the WORK and all materials or equipment to be incorporated therein, whether in storage on or off the site, and other property at the site or adjacent thereto.

14. PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS

14.1 The CONTRACTOR shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed and which do not unreasonably interfere with the work required under this contract. The CONTRACTOR shall remove trees only when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during contract performance, or by the careless operation of equipment, or by workmen, the CONTRACTOR shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the ENGINEER.

14.2 The CONTRACTOR shall protect from damage all existing improvements and utilities (1) at or near the work site and (2) on adjacent property of a third party, the locations of which are made known to or should be known by the CONTRACTOR. The existence and location of utilities are not guaranteed by the OWNER and shall be investigated and verified in the field by the CONTRACTOR before commencing construction activities in any particular area. The CONTRACTOR shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the CONTRACTOR fails or refuses to repair the damage promptly, the OWNER may have the necessary work performed and charge the cost to the CONTRACTOR.

15. OPERATIONS AND STORAGE AREAS

15.1 The CONTRACTOR shall confine all operations (including storage of materials) to areas authorized or approved by the OWNER. The CONTRACTOR shall hold and save the OWNER and its representatives, free and harmless from liability of any nature occasioned by the CONTRACTOR's performance.

15.2 Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by the CONTRACTOR only with the approval of the OWNER and shall be built with labor and materials furnished by the CONTRACTOR without expense to the OWNER. The temporary buildings and utilities shall remain the property of the CONTRACTOR and shall be removed by the CONTRACTOR at its expense upon completion of the work. Only with the written consent of the OWNER may the buildings and utilities be abandoned and not removed.

15.3 The CONTRACTOR shall use only established roadways, or use temporary roadways constructed by the CONTRACTOR when and as authorized by the OWNER. In such case, the CONTRACTOR shall minimize disruption and delays to traffic in the affected areas. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State, or local law or regulation. When it is necessary to cross curbs or sidewalks, the CONTRACTOR shall protect them from damage. The CONTRACTOR shall repair or pay for the repair of any damaged curbs, sidewalks, or roads.

16. INSURANCE

16.1 The CONTRACTOR shall purchase and maintain such insurance as will protect him from claims set forth below which may arise out of or result from the CONTRACTOR'S execution of the WORK, whether such execution be by himself or by any SUBCONTRACTOR or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

16.1.1 Claims under workmen's compensation, disability benefit and other similar employee benefit acts;

16.1.2 Claims for damages because of bodily injury, occupational sickness or disease, or death of his employees;

16.1.3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees;

16.1.4 Claims for damages insured by usual personal injury liability coverage which are sustained (1) by any person as a result of an offense directly or indirectly related to the employment of such person by the CONTRACTOR, or (2) by any other person; and

16.1.5 Claims for damages because of injury to or destruction of tangible property, including loss of use resulting therefrom.

16.2 Certificates of Insurance acceptable to the OWNER shall be filed with the OWNER prior to commencement of the WORK. These Certificates shall contain a provision that coverages afforded under the policies will not be cancelled unless at least fifteen (15) days prior WRITTEN NOTICE has been given to the OWNER.

16.3 The CONTRACTOR shall procure and maintain, at his own expense, during the CONTRACT TIME, liability insurance as hereinafter specified;

16.3.1 CONTRACTOR'S General Public Liability and Property Damage Insurance including vehicle coverage issued to the CONTRACTOR and protecting him from all claims for personal injury, including death, and all claims for destruction of or damage to any property, arising out of or in connection with any operations under the CONTRACT DOCUMENTS, whether such operations be by himself or by any SUBCONTRACTOR under him, or anyone directly or indirectly employed by the CONTRACTOR or by a SUBCONTRACTOR under him. Insurance shall be written with a limit of liability of not less than $500,000 for all damages arising out of bodily injury, including death, at any time resulting therefrom, sustained by any one person in any one accident; and a limit of liability of not less than $1,000,000 aggregate for any such damages sustained by two or more persons in any one accident. Insurance shall be written with a limit of liability of not less than $200,000 for all property damage sustained by any one person in any one accident; and a limit of liability of not less than $500,000 aggregate for any such damage sustained by two or more persons in any one accident.

16.3.2 The CONTRACTOR shall acquire and maintain, if applicable, Fire and Extended Coverage insurance upon the PROJECT to the full insurable value thereof for the benefit of the OWNER, the CONTRACTOR, and SUBCONTRACTORS as their interest may appear. This provision shall in no way release the CONTRACTOR or CONTRACTOR'S surety from obligations under the CONTRACT DOCUMENTS to fully complete the PROJECT.

16.4 The CONTRACTOR shall procure and maintain, at his own expense, during the CONTRACT TIME, in accordance with the provisions of the laws of the state in which the work is performed, Workmen's Compensation Insurance, including occupational disease provisions, for all of his employees at the site of the PROJECT and in case any work is sublet, the CONTRACTOR shall require such SUBCONTRACTOR similarly to provide Workmen's Compensation Insurance, including occupational disease provisions for all of the latter's employees unless such employees are covered by the protection afforded by the CONTRACTOR. In case any class of employees engaged in hazardous work under this contract at the site of the PROJECT is not protected under Workmen's Compensation statute, the CONTRACTOR shall provide, and shall cause each SUBCONTRACTOR to provide, adequate and suitable insurance for the protection of his employees not otherwise protected.

16.5 The CONTRACTOR shall secure, if applicable, "All Risk" type Builder's Risk Insurance for WORK to be performed. Unless specifically authorized by the OWNER, the amount of such insurance shall not be less than the CONTRACT PRICE totaled in the BID. The policy shall cover not less than the losses due to fire, explosion, hail, lightning, vandalism, malicious mischief, wind, collapse, riot, aircraft, and smoke during the CONTRACT TIME, and until the WORK is accepted by the OWNER. The policy shall name as the insured the CONTRACTOR, the ENGINEER, and the OWNER.

17. INDEMNIFICATION

17.1 The CONTRACTOR will indemnify and hold harmless the OWNER and the ENGINEER and their agents and employees from and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the WORK, provided that any such claims, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including the loss of use resulting therefrom; and is caused in whole or in part by any negligent or willful act or omission of the CONTRACTOR, and SUBCONTRACTOR, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable.

17.2 In any and all claims against the OWNER or the ENGINEER, or any of their agents or employees, by any employee of the CONTRACTOR, any SUBCONTRACTOR, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, the indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the CONTRACTOR or any SUBCONTRACTOR under workmen's compensation acts, disability benefit acts or other employee benefits acts.

17.3 The obligation of the CONTRACTOR under this paragraph shall not extend to the liability of the ENGINEER, his agents or employees arising out of the preparation or approval of maps, DRAWINGS, opinions, reports, surveys, CHANGE ORDERS, designs or SPECIFICATIONS.

18. CONTRACT SECURITY

18.1 The CONTRACTOR shall within ten (10) days after the receipt of the NOTICE OF AWARD furnish the OWNER with a Performance Bond and a Payment Bond in penal sums equal to the amount of the CONTRACT PRICE, conditioned upon the performance by the CONTRACTOR of all undertakings, covenants, terms, conditions and agreements of the CONTRACT DOCUMENTS, and upon the prompt payment by the CONTRACTOR to all persons supplying labor and materials in the prosecution of the WORK provided by the CONTRACT DOCUMENTS. Such BONDS shall be executed by the CONTRACTOR and a corporate bonding company licensed to transact such business in the state in which the WORK is to be performed. The expense of these BONDS shall be borne by the CONTRACTOR. If at any time a surety on any such BOND is declared as bankrupt or loses its right to do business in the state in which the WORK is to be performed, the CONTRACTOR shall within ten (10) days after notice from the OWNER to do so, substitute an acceptable BOND (or BONDS) in such form and sum and signed by such other surety or sureties as may be satisfactory to the OWNER. The premiums on such BOND shall be paid by the CONTRACTOR. No further payments shall be deemed due nor shall be made until the new surety or sureties shall have furnished an acceptable BOND to the OWNER.

19. ACCIDENT PREVENTION AND SAFETY PROGRAM

19.1 The CONTRACTOR shall be solely and completely responsible for conditions of the jobsite, including safety of all persons, including employees, and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to U.S. Department of Labor (OSHA), and all other applicable Federal, State, County, and local laws, ordinances, codes, the requirements set forth below, and any regulations that may be detailed in other parts of these documents. Where any of these are in conflict, the more stringent requirement shall be followed. The CONTRACTOR's failure to thoroughly familiarize himself with the aforementioned safety provisions shall not relieve him from compliance with the obligations and penalties set forth herein.

19.2 The OWNER or his Representative will notify the CONTRACTOR of any observed non-compliance with the foregoing provisions and the action to be taken. The CONTRACTOR shall, upon receipt of such notice, immediately take corrective action. If the CONTRACTOR fails or refuses to comply promptly, the OWNER may issue an order stopping all or part of the WORK until satisfactory corrective action has been taken. No part of the time lost due to any such stop orders shall be made the subject of claims for extension of time, or for excess costs or damages by the CONTRACTOR.

19.3 The CONTRACTOR shall develop and maintain for the duration of this Contract, a safety program that will effectively incorporate and implement all required safety provisions. The CONTRACTOR shall appoint an employee who is qualified and authorized to supervise and enforce compliance with the safety program.

19.4 The CONTRACTOR as a part of his safety program, shall maintain at his office or other well-known place at the jobsite, safety equipment applicable to the WORK as prescribed by the aforementioned authorities, all articles necessary for giving first aid to the injured, and shall establish the procedure for the immediate removal to a hospital or a doctor's care of persons who may be injured on the jobsite.

19.5 If death or serious injuries or serious damages are caused, the accident shall be reported immediately by telephone or messenger to both the ENGINEER and OWNER. In addition, the CONTRACTOR must promptly report in writing to appropriate authorities and the OWNER's representative all accidents whatsoever arising out of, or in connection with, the performance of the WORK whether on, or adjacent to, the site, giving full details and statements of witnesses. If a claim is made by anyone against the CONTRACTOR or any subcontractor on account of any accident, the CONTRACTOR shall promptly report the facts in writing to the OWNER giving full details of the claim.

19.6 The CONTRACTOR shall provide, erect, and maintain all necessary barricades, suitable and sufficient lights, danger signals, signs and other traffic control devices, and shall take all necessary precautions for the protection of the WORK and safety of the public. Highways closed to traffic shall be protected by effective barricades, and obstructions shall be illuminated during the hours of darkness. Suitable warning signs shall be provided to control and direct traffic properly. The CONTRACTOR shall erect warning signs in advance of any place on the project where operations

may interfere with the use of the road by traffic, and at all intermediate points where the new work crosses or coincides with an existing road.

19.7 Compliance with the requirements of this provision by subcontractors will be the responsibility of the CONTRACTOR.

20. TEMPORARY SANITARY FACILITIES

20.1 The CONTRACTOR shall provide and maintain necessary sanitary conveniences for the use of those employed on or about the WORK, properly secluded from public observation in such a manner and at such points as shall be approved by the OWNER's representative, and their use shall be strictly enforced.

21. SUPERVISION BY CONTRACTOR

21.1 The CONTRACTOR will supervise and direct the WORK. He will be solely responsible for the means, methods, techniques, sequences and procedures of construction. The CONTRACTOR will employ and maintain on the WORK a qualified supervisor or superintendent who shall have been designated in writing by the CONTRACTOR as the CONTRACTOR'S representative at the site. The supervisor shall have full authority to act on behalf of the CONTRACTOR and all communications given to the supervisor shall be as binding as if given to the CONTRACTOR. The supervisor shall be present on the site at all times as required to perform adequate supervision and coordination of the WORK.

22. SUBCONTRACTING

22.1 The CONTRACTOR may utilize the services of specialty SUBCONTRACTORS on those parts of the WORK which, under normal contracting practices, are performed by specialty SUBCONTRACTORS.

22.2 The CONTRACTOR must perform at least thirty three (33%) of the total amount of the WORK using the CONTRACTOR's own work force and equipment. The CONTRACTOR shall not award WORK to SUBCONTRACTOR(s), in excess of sixty seven (67%) percent of the CONTRACT PRICE, without prior written approval of the OWNER.

22.3 The CONTRACTOR shall be fully responsible to the OWNER for the acts and omissions of his SUBCONTRACTORS, and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

22.4 The CONTRACTOR shall cause appropriate provisions to be inserted in all subcontracts relative to he WORK to bind SUBCONTRACTORS to the CONTRACTOR by the terms of the CONTRACT DOCUMENT insofar as applicable to the WORK of SUBCONTRACTORS and to give the CONTRACTOR the same power as regards terminating any subcontract that the OWNER may exercise over the CONTRACTOR under any provision of the CONTRACT DOCUMENTS.

22.5 Nothing contained in this CONTRACT shall create any contractual relation between any SUBCONTRACTOR and the OWNER.

23. SEPARATE CONTRACTS

23.1 The OWNER reserves the right to let other contracts in connection with this PROJECT. The CONTRACTOR shall afford other CONTRACTORS reasonable opportunity for the introduction and storage of their materials and the execution of their WORK, and shall properly connect and coordinate his WORK with theirs. If the proper execution or results of any part of the CONTRACTOR'S WORK depends upon the WORK of any other CONTRACTOR, the CONTRACTOR shall inspect and promptly report to the ENGINEER any defects in such WORK that render it unsuitable for such proper execution and results.

23.2 The OWNER may perform additional WORK related to the PROJECT by himself, or he may let other contracts containing provisions similar to these. The CONTRACTOR will afford the other CONTRACTORS who are parties to such Contracts (or the OWNER, if he is performing the additional WORK himself), reasonable opportunity for the introduction and storage of materials and equipment and the execution of WORK, and shall properly connect and coordinate his WORK with theirs.

23.3 If the performance of additional WORK by other CONTRACTORS or the OWNER is not noted in the CONTRACT DOCUMENTS prior to the execution of the CONTRACT, written notice thereof shall be given to the CONTRACTOR prior to starting any such additional WORK. If the CONTRACTOR believes that the performance of such additional WORK by the OWNER or others involves him in additional expense or entitles him to an extension of the CONTRACT TIME, he may make a claim therefor as provided in Sections 30 and 31.

24. TIME FOR COMPLETION AND LIQUIDATED DAMAGES

24.1 The TIME FOR COMPLETION of the WORK is an essential condition of the CONTRACT DOCUMENTS. The TIME FOR COMPLETION appears in the Special Provisions. The WORK embraced shall be commenced on a date specified in the NOTICE TO PROCEED.

24.2 The CONTRACTOR will proceed with the WORK at such rate of progress to insure full completion within the TIME FOR COMPLETION. It is expressly understood and agreed, by and between the CONTRACTOR and the OWNER, that TIME FOR COMPLETION of the WORK under the CONTRACT is a reasonable time, taking into consideration the average climatic and economic conditions and other factors prevailing in the locality of the WORK.

24.3 If the CONTRACTOR shall fail to complete the WORK within the TIME FOR COMPLETION, or extension of time granted by the OWNER, then the CONTRACTOR will pay to the OWNER the amount for liquidated damages as specified in the Special Provisions for each calendar day that the work shall be incomplete after the date established by the TIME FOR COMPLETION.

24.4 The CONTRACTOR shall not be charged with liquidated damages or any excess cost when the delay in completion of the WORK is due to the following, and the CONTRACTOR has promptly given WRITTEN NOTICE of such delay to the OWNER or ENGINEER.

24.4.1 To any preference, priority or allocation order duly issued by the OWNER.

24.4.2 To unforeseeable causes beyond the control and without the fault or negligence of the CONTRACTOR, including but not restricted to, acts of God, or of the public enemy, acts of the OWNER, acts of another CONTRACTOR in the performance of a contract with the OWNER, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and abnormal and unforeseeable weather; and

24.4.3 To any delays of SUBCONTRACTORS occasioned by any of the causes specified in paragraphs 24.4.1 and 24.4.2 of this article.

25. PROGRESS SCHEDULES AND REQUIREMENTS FOR COMPLIANCE

25.1 The CONTRACTOR shall within 10 days of receipt of NOTICE TO PROCEED, submit to the OWNER through the ENGINEER for approval a practicable schedule, showing the order in which the CONTRACTOR proposes to carry on the WORK, the dates on which he will start the major items of work (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The schedule shall be prepared on the form entitled "Contract Progress Schedule," a copy of which is included in the contract.

25.2 If, in the opinion of the OWNER, the CONTRACTOR falls behind the progress schedule, the CONTRACTOR shall take such steps as may be necessary to assure performance within the allowable TIME FOR COMPLETION. The CONTRACTOR may propose for approval by the OWNER measures such as increasing number of workers, number of shifts, or overtime operations, days of work, or the amount of construction plant, or all of them. The OWNER may require the CONTRACTOR to submit for approval such supplementary schedule or schedules necessary to demonstrate that the WORK shall be performed within the allowable TIME FOR COMPLETION, all without additional cost to the OWNER.

25.3 Failure of the CONTRACTOR to comply with the requirements of this provision shall be grounds for determination that the CONTRACTOR is not prosecuting the work with such diligence as will insure completion within the specified TIME FOR COMPLETION. Upon such determination the OWNER may terminate the CONTRACTOR's right to proceed with the WORK, or any separable part thereof in accordance with Section 27 entitled "Suspension of Work, Termination and Delay".

26. LAND AND RIGHTS-OF-WAY

26.1 Prior to issuance of NOTICE TO PROCEED, the OWNER shall obtain all land and rights-of-way necessary for carrying out and for the completion of the WORK to be performed pursuant to the CONTRACT DOCUMENTS, unless otherwise mutually agreed.

26.2 The OWNER shall provide to the CONTRACTOR information which delineates and describes the lands owned and rights-of-way acquired.

26.3 The CONTRACTOR shall provide at his own expense and without liability to the OWNER any additional land and access thereto that the CONTRACTOR may desire for temporary construction facilities, or for storage of materials.

27. SUSPENSION OF WORK, TERMINATION AND DELAY

27.1 The OWNER may suspend the WORK or any portion thereof for a period of not more than ninety (90) days or such further time as agreed upon by the CONTRACTOR, by WRITTEN NOTICE to the CONTRACTOR and the ENGINEER which notice shall fix the date on which WORK shall be resumed. The CONTRACTOR will resume that WORK on the date so fixed. The CONTRACTOR will be allowed an increase in the CONTRACT PRICE or an extension of the CONTRACT TIME, or both, directly attributable to any suspension.

27.2 If the CONTRACTOR is adjudged as bankrupt or insolvent, or if he makes a general assignment for the benefit of his creditors or if a trustee or receiver is appointed for the CONTRACTOR or for any of his property, or if he files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or applicable laws, or if he repeatedly fails to supply sufficient skilled workmen or suitable materials or equipment, or if he repeatedly fails to make prompt payments to SUBCONTRACTORS or for labor, materials or equipment or if he disregards laws, ordinances, rules, regulations or orders of any public body having jurisdiction of the WORK or if he disregards the authority of the ENGINEER, or if he otherwise violates any provision of the CONTRACT DOCUMENTS then the OWNER may, without prejudice to any other right or remedy and after giving the CONTRACTOR and his surety a minimum of ten (10) days from delivery of a WRITTEN NOTICE, terminate the services of the CONTRACTOR and take possession of the PROJECT and of all materials, equipment, tools, construction equipment and machinery thereon owned by the CONTRACTOR, and finish the WORK by whatever method he may deem expedient. In such case the CONTRACTOR shall not be entitled to receive any further payment until the WORK is finished. If the unpaid balance of the CONTRACT PRICE exceeds the direct and indirect costs of completing the PROJECT, including compensation for additional professional services, such excess SHALL BE PAID TO THE CONTRACTOR. If such costs exceed such unpaid balance, the CONTRACTOR will pay the difference to the OWNER. Such costs incurred by the OWNER will be determined by the ENGINEER and incorporated in a CHANGE ORDER.

27.3 Where the CONTRACTOR'S services have been so terminated by the OWNER, said termination shall not affect any right of the OWNER against the CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of monies by the OWNER due the CONTRACTOR will not release the CONTRACTOR from compliance with the CONTRACT DOCUMENTS.

27.4 After ten (10) days from delivery of a WRITTEN NOTICE to the CONTRACTOR and the ENGINEER, the OWNER may without cause and without prejudice to any other right or remedy, elect to abandon the PROJECT and terminate the CONTRACT. In such case, the CONTRACTOR shall be paid for all WORK executed and any expense sustained plus reasonable profit. If this contract is terminated by the OWNER without cause, the rights, duties, and obligations of the parties, including compensation to the CONTRACTOR, shall be in accordance with Part 49 of the Federal Acquisition Regulation in effect on the date of this contract.

27.5 If, through no act or fault of the CONTRACTOR, the WORK is suspended for a period of more than ninety (90) days by the OWNER or under an order of court or other public authority, or the ENGINEER fails to act on any request for payment within thirty (30) days after it is submitted, or the OWNER fails to pay the CONTRACTOR substantially the sum approved by the ENGINEER or awarded by arbitrators within thirty (30) days of its approval and presentation, then the CONTRACTOR may, after ten (10) days from delivery of a WRITTEN NOTICE to the OWNER and the ENGINEER, terminate the CONTRACT and recover from the OWNER payment for all WORK executed and all expenses sustained. In addition and in lieu of terminating the CONTRACT, if the ENGINEER has failed to act on a request for payment or if the OWNER has failed to make any payment as aforesaid, the CONTRACTOR may upon ten (10) days WRITTEN

NOTICE to the OWNER and the ENGINEER stop the WORK until he has been paid all amounts then due, in which event and upon resumption of the WORK, CHANGE ORDERS shall be issued for adjusting the CONTRACT PRICE or extending the CONTRACT TIME or both to compensate for the costs and delays attributable to the stoppage of the WORK.

27.6 If the performance of all or any portion of the WORK is suspended, delayed, or interrupted as a result of a failure of the OWNER or ENGINEER to act within the time specified in the CONTRACT DOCUMENTS, or if no time is specified, within a reasonable time, an adjustment in the CONTRACT PRICE or an extension of the CONTRACT TIME, or both, shall be made by CHANGE ORDER to compensate the CONTRACTOR for the costs and delays necessarily caused by the failure of the OWNER or ENGINEER.

28. INSPECTION AND TESTING

28.1 All materials and equipment used in the construction of the PROJECT shall be subject to adequate inspection and testing in accordance with generally accepted standards, as required and defined in the CONTRACT DOCUMENTS.

28.2 The OWNER shall provide all inspection and testing services not required by the CONTRACT DOCUMENTS.

28.3 The CONTRACTOR shall provide at his expense the testing and inspection services required by the CONTRACT DOCUMENTS.

28.4 If the CONTRACT DOCUMENTS, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any WORK to specifically be inspected, tested, or approved by someone other than the CONTRACTOR, the CONTRACTOR will give the ENGINEER timely notice of readiness. The CONTRACTOR will then furnish the ENGINEER the required certificates of inspection, testing or approval.

28.5 Inspections, tests or approvals by the engineer or others shall not relieve the CONTRACTOR from his obligations to perform the WORK in accordance with the requirements of the CONTRACT DOCUMENTS.

28.6 The ENGINEER and his representatives will at all times have access to the WORK. In addition, authorized representatives and agents of any participating Federal or state agency shall be permitted to inspect all work, materials, payrolls, records of personnel, invoices of materials, and other relevant data and records. The CONTRACTOR will provide proper facilities for such access and observation of the WORK and also for any inspection, or testing thereof.

28.7 If any WORK is covered contrary to the written instructions of the ENGINEER it must, if requested by the ENGINEER, be uncovered for his observation and replaced at the CONTRACTOR'S expense.

28.8 If the ENGINEER considers it necessary or advisable that covered WORK be inspected or tested by others, the CONTRACTOR, at the ENGINEER'S request, will uncover, expose or otherwise make available for observation, inspection or testing as the ENGINEER may require, that portion of the WORK in question, furnishing all necessary labor, materials, tools and equipment. If it is found that such WORK is defective, the CONTRACTOR will bear all the expenses of such uncovering, exposure, observation, inspection and testing and of satisfactory reconstruction. If, however, such WORK is not found to be defective, the CONTRACTOR will be allowed an increase in the CONTRACT PRICE or an extension of the CONTRACT TIME, or both, directly attributable to such uncovering, exposure, observation, inspection, testing and reconstruction and an appropriate CHANGE ORDER shall be issued.

29. CORRECTION OF WORK

29.1 The CONTRACTOR shall promptly remove from the premises all WORK rejected by the ENGINEER for failure to comply with the CONTRACT DOCUMENTS, whether incorporated in the construction or not, and the CONTRACTOR shall promptly replace and re-execute the WORK in accordance with the CONTRACT DOCUMENTS and without expense to the OWNER and shall bear the expense of making good all WORK of other CONTRACTORS destroyed or damaged by such removal or replacement.

29.2 All removal and replacement WORK shall be done at the CONTRACTOR'S expense. If the CONTRACTOR does not take action to remove such rejected WORK within ten (10) days after receipt of WRITTEN NOTICE, the OWNER may remove such WORK and store the materials at the expense of the CONTRACTOR.

30. CHANGES IN THE WORK

30.1 The OWNER may at any time, as the need arises, order changes within the scope of the WORK without invalidating the Agreement. If such changes increase or decrease the amount due under the CONTRACT DOCUMENTS, or in the time required for performance of the WORK, an equitable adjustment shall be authorized by CHANGE ORDER.

30.2 The ENGINEER, also, may at any time, by issuing a FIELD ORDER, make changes in the details of the WORK. The CONTRACTOR shall proceed with the performance of any changes in the WORK so ordered by the ENGINEER unless the CONTRACTOR believes that such FIELD ORDER entitles him to a change in CONTRACT PRICE or TIME, or both, in which event he shall give the ENGINEER WRITTEN NOTICE thereof within seven (7) days after the receipt of the ordered change. Thereafter the CONTRACTOR shall document the basis for the change in CONTRACT PRICE or TIME within thirty (30) days. The CONTRACTOR shall not execute such changes pending the receipt of an executed CHANGE ORDER or further instruction from the OWNER.

31. CHANGES IN CONTRACT PRICE

31.1 The CONTRACT PRICE may be changed only by a CHANGE ORDER. The value of any WORK covered by a CHANGE ORDER or of any claim for increase or decrease in the CONTRACT PRICE shall be determined by one or more of the following methods in the order of precedence listed below:

a. Unit prices previously approved.
b. An agreed lump sum.
c. The actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work. In addition there shall be added an amount to be agreed upon but not to exceed fifteen (15) percent of the actual cost of the WORK to cover the cost of general overhead and profit.

32. DIFFERING SITE CONDITIONS

32.1 The CONTRACTOR shall promptly, and before such conditions are disturbed, except in the event of an emergency, notify the OWNER by WRITTEN NOTICE of:

32.1.1 Subsurface or latent physical conditions at the site differing materially from those indicated in the CONTRACT DOCUMENTS; or

32.1.2 Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in WORK of the character provided for in the CONTRACT DOCUMENTS.

32.2 The OWNER shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or in the time required for, performance of the WORK, an equitable adjustment shall be made and the CONTRACT DOCUMENTS shall be modified by a CHANGE ORDER. Any claim of the CONTRACTOR for adjustment hereunder shall not be allowed unless he has given the required WRITTEN NOTICE; provided that the OWNER may, if he determines the facts so justify, consider and adjust any such claims asserted before the date of final payment.

33. USE AND POSSESSION PRIOR TO COMPLETION

33.1 The OWNER shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the OWNER shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the OWNER intends to take possession of or use. However, failure of the OWNER to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The OWNER's possession or use shall not be deemed an acceptance of any work under the contract.

33.2 While the OWNER has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting directly from the OWNER'S possession or use. If prior possession or use by the OWNER delays the progress of the work or causes additional expense to the Contractor, an adjustment shall be made in the contract price, the time of completion or both, and the contract shall be modified in writing accordingly.

34. CLEANUP AND FINISH GRADING

34.1 The CONTRACTOR shall restore all areas disturbed by construction to a condition at least equal to that existing prior to construction. Excess construction materials, equipment, tools, waste excavation, and rubbish shall be removed. Excavated areas shall be finish graded to provide drainage as required by the drawings and specifications, or in the absence of specific requirements, to provide drainage away from the facilities constructed and to restore original drainage patterns in existence prior to construction and to provide drainage away from excavated areas and installed facilities.

35. MEASUREMENT AND PAYMENT

35.1 Completed items of work shall be measured and paid for in accordance with the requirements listed in the Bid Schedule. Payment shall be based on the actual quantities completed and shall represent full compensation under the contract. The price paid for the completed item of work shall include full compensation for furnishing all labor, materials, (other than that furnished by the OWNER), tools, equipment, and performing all work required by the provisions of the contract to furnish and install the item of work, complete in place. In all cases, the finished product shall be a complete, operational system or component. The price for the completed item of work shall also include all applicable state and local sales and other taxes.

36. VARIATION IN ESTIMATED QUANTITIES

36.1 If the quantity of a unit-priced item in this CONTRACT is an estimated quantity and the actual quantity of the unit-priced item varies more than 25 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 125 percent or below 75 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the CONTRACTOR may request, in writing, an extension of time, to be received by the OWNER within 10 days from the beginning of the delay, or within such further period as may be granted by the OWNER before the date of final settlement of the CONTRACT. Upon the receipt of a written request for an extension, the OWNER shall ascertain the facts and make any appropriate adjustment for extending the completion date.

37. PAYMENTS TO CONTRACTOR

37.1 The CONTRACTOR will submit to the ENGINEER a partial payment estimate filled out and signed by the CONTRACTOR covering the WORK performed during the period covered by the partial payment estimate and supported by such data as the ENGINEER may reasonably require. The request for payment may also include an allowance for the cost of such major materials and equipment which are suitably stored either at or near the site. If payment is requested on the basis of materials and equipment not incorporated in the WORK but delivered and suitably stored at or near the site, the partial payment estimate shall also be accompanied by such supporting data, satisfactory to the OWNER, as will establish the OWNER'S title to the material and equipment and protect his interest therein, including applicable insurance. The ENGINEER will, within ten (10) days after receipt of each partial payment estimate, either indicate in writing his approval of payment and present the partial payment estimate to the OWNER, or return the partial payment estimate to the CONTRACTOR indicating in writing his reasons for refusing to approve payment. In the latter case, the CONTRACTOR may make the necessary corrections and resubmit the partial payment estimate. The OWNER will, within twenty (20) days of presentation to him of an approved partial payment estimate, pay the CONTRACTOR a progress payment on the basis of the approved partial payment estimate. The OWNER shall retain ten (10) percent of the amount of each payment until final completion and acceptance of all work covered by the CONTRACT DOCUMENTS. The OWNER at any time, however, after fifty (50) percent of the WORK has been completed, if he finds that satisfactory progress is being made, shall reduce retainage to five (5%) percent on the current and remaining estimates. When the WORK is substantially complete (operational or beneficial occupancy), the retained amount may be further reduced below five (5) percent to only that amount necessary to assure completion. On completion and acceptance of a

part of the WORK on which the price is stated separately in the CONTRACT DOCUMENTS, payment may be made in full, including retained percentages less authorized deductions.

37.2 Upon completion and acceptance of the WORK, the ENGINEER shall issue a certificate attached to the final payment request that the WORK has been accepted by him under the conditions of the CONTRACT DOCUMENTS. The entire balance found to be due the CONTRACTOR including the retained percentages, but except such sums as may be lawfully retained by the OWNER, shall be paid to the CONTRACTOR within thirty (30) days of completion and acceptance of the WORK.

37.3 The CONTRACTOR will indemnify and save the OWNER or the OWNER'S agents harmless from all claims growing out of the lawful demands of SUBCONTRACTORS, laborers, workmen, mechanics, materialmen, and furnishers of machinery and parts thereof, equipment, tools. and all supplies, incurred in the furtherance of the performance of the WORK. The CONTRACTOR shall at the OWNER'S request, furnish satisfactory evidence that all obligations of the nature designated above have been paid, discharged, or waived. If the CONTRACTOR fails to do so the OWNER may, after having notified the CONTRACTOR, either pay unpaid bills or withhold from the CONTRACTOR'S unpaid compensation a sum of money deemed reasonably sufficient to pay any and all such lawful claims until satisfactory evidence is furnished that all liabilities have been fully discharged whereupon payment to the CONTRACTOR shall be resumed, in accordance with the terms of the CONTRACT DOCUMENTS, but in no event shall the provisions of this sentence be construed to impose any obligations upon the OWNER to either the CONTRACTOR, his Surety, or any third party. In paying any unpaid bills of the CONTRACTOR, any payment so made by the OWNER shall be considered as a payment made under the CONTRACT DOCUMENTS by the OWNER to the CONTRACTOR and the OWNER shall not be liable to the CONTRACTOR for any such payments made in good faith.

37.4 If the OWNER fails to make payment thirty (30) days after approval by the ENGINEER, in addition to other remedies available to the CONTRACTOR, there shall be added to each such payment interest at the maximum legal rate commencing on the first day after said payment is due and continuing until the payment is received by the CONTRACTOR.

38. ASSIGNMENTS

38.1 Neither the CONTRACTOR nor the OWNER shall sell, transfer, assign or otherwise dispose of the CONTRACT or any portion thereof, or of his right, title or interest therein, or his obligations thereunder, without written consent of the other party.

39. GUARANTY

39.1 The CONTRACTOR shall guarantee all materials and equipment furnished and WORK performed for a period of one (1) year from the date of SUBSTANTIAL COMPLETION of the system that the completed system is free from all defects due to faulty materials or workmanship and the CONTRACTOR shall promptly make such corrections as may be necessary by reason of such defects including the repairs of any damage to other parts of the systems resulting from such defects. The OWNER will give notice of observed defects with reasonable promptness. In the event that the CONTRACTOR should fail to make such repairs, adjustments, or other WORK that may be made necessary by such defects, the OWNER may do so and charge the CONTRACTOR the cost thereby incurred. The performance BOND shall remain in full force and effect through the guarantee period.

40. ACCEPTANCE OF FINAL PAYMENT AS RELEASE

40.1 The acceptance by the CONTRACTOR of final payment shall be and shall operate as a release to the OWNER of all claims and all liability to the CONTRACTOR other than claims in stated amounts as may be specifically excepted by the CONTRACTOR for all things done or furnished in connection with this WORK and for every act and neglect of the OWNER and others relating to or arising out of this WORK. Any payment, however, final or otherwise, shall not release the CONTRACTOR or his sureties from any obligations under the CONTRACT DOCUMENTS or the performance BOND and Payment BONDS.

41. ENGINEER'S ROLE AND AUTHORITY

41.1 The ENGINEER shall act as the OWNER'S representative during the construction period. He shall decide questions which may arise as to quality and acceptability of materials furnished and WORK

performed. He shall interpret the intent of the CONTRACT DOCUMENTS in a fair and unbiased manner. The ENGINEER will make visits to the site and determine if the WORK is proceeding in accordance with the CONTRACT DOCUMENTS.

41.2 The CONTRACTOR will be held strictly to the intent of the CONTRACT DOCUMENTS in regard to the quality of materials, workmanship and execution of the WORK. Inspections may be made at the factory or fabrication plant of the source of material supply.

41.3 The ENGINEER will not be responsible for the construction means, controls, techniques, sequences, procedures, or construction safety.

41.4 The ENGINEER does not have authority to obligate the OWNER to changes in the terms of the CONTRACT without the approval of the OWNER.

42. RESOLUTION OF DISPUTES

42.1 All claims, disputes and other matters in question arising out of, or relating to, the CONTRACT DOCUMENTS or the breach thereof, except for claims which have been waived by the making and acceptance of final payment as provided by Section 40, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgement may be entered upon it in any court having jurisdiction thereof.
[Note: An arbitration clause is a waiver of sovereign immunity. The Tribe needs to be aware of this if arbitration clauses are placed in the contract.]

42.2 Notice of the demand for arbitration shall be filed in writing with the other party to the CONTRACT DOCUMENTS and with the American Arbitration Association, and a copy shall be filed with the ENGINEER. Demand for arbitration shall in no event be made on any claim, dispute or other matter in question which would be barred by the applicable statute of limitations.

42.3 The CONTRACTOR will carry on the WORK and maintain the progress schedule during any arbitration proceedings, unless otherwise mutually agreed in writing.

43. EQUAL EMPLOYMENT OPPORTUNITY

43.1 During the performance of this contract, the CONTRACTOR agrees as follows:

43.1.1 The CONTRACTOR shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.

43.1.2 The CONTRACTOR shall take affirmative action to ensure the 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, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

43.1.3 The CONTRACTOR agrees to post in conspicuous places available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

43.1.4 The CONTRACTOR shall, in all solicitations or advertisements for employees placed by or on behalf of the CONTRACTOR, state that all qualified applicants shall receive consideration for employment without regard to race, color, religion, sex, or national origin.

43.1.5 The CONTRACTOR shall send, to each labor union or representative of workers with which he/she has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers' representative of the CONTRACTOR's commitment under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.

43.1.5 The CONTRACTOR shall comply with all provision of Executive Order No. 11246, as amended,and the rules, regulations, and relevant orders of the Secretary of Labor.

43.1.6 The CONTRACTOR shall furnish to the OWNER, all information required by Executive Order No. 11246, as amended, and by the rules, regulations, and orders of the Secretary of Labor. Standard Form 100 (EEO - 1), or any successor form, is the prescribed form to be filed within 30 days following the award, unless filed within 12 months preceeding the date of award.

43.1.7 The CONTRACTOR shall permit access to its books, records, and accounts by the OWNER or the Office of Federal Contract Programs (OFCCP) for the purposes of investigation to ascertain compliance with the applicable rules, regulations, and orders.

43.1.8 If the OFCCP determines that the CONTRACTOR is not in compliance with this clause or any rules, regulations, and orders of the Secretary of Labor, this contract may be cancelled, terminated, or suspended in whole or in part and the CONTRACTOR may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the CONTRACTOR as provided in Executive Order No. 11246, as amended, the rules, regulations, or orders of the Secretary of Labor, or as otherwise provided by law.

43.1.9 The CONTRACTOR shall include the terms and conditions of this clause in every SUBCONTRACT or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order No. 12246, as amended, so that such provisions will be binding upon each SUBCONTRACTOR or vendor.

43.1.10 The CONTRACTOR shall take such action with respect to any SUBCONTRACT or purchase order as the OWNER may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, that if the CONTRACTOR becomes involved in, or is threatened with litigation with a SUBCONTRACTOR or vendor as a result of such direction by the OWNER, the CONTRACTOR may request the OWNER and the United States to enter into such litigation to protect the interests of the United States.

43.1.11 Notwithstanding any other clause in this contract, disputes relative to this clause will be governed by the procedures in 41 CFR 60-1.1

44. CLEAN AIR AND WATER

44.1 The CONTRACTOR agrees:

44.1.1 To comply with all the requirements of section 114 of the Clean Air Act (42 U.S.C. 7414) and section 308 of the Clean Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Clean Air Act and the Clean Water Act, and all regulations and guidelines issued to implement those acts before the award of this contract.

44.1.2 That no portion of the WORK required by this prime contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of the facility from the listing.

44.1.3 To use best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed.

44.1.4 To insert the substance of this clause into any nonexempt SUBCONTRACT, including this subparagraph 44.1.4.

45. INDIAN HEALTH SERVICE

45.1 There shall be no contractual relationship either implied or express between the IHS and the CONTRACTOR or any SUBCONTRACTOR at any tier.

45.2 IHS representatives shall be afforded access to the site at all times during the construction period to observe the work and determine if the work conforms to the intent of the design.

45.3 IHS representatives shall not be responsible for the construction means, controls, techniques, sequences, procedures, or construction safety.

45.4 IHS representatives do not have authority to obligate the OWNER to changes in the terms of the CONTRACT nor to act as an agent of the OWNER in any manner. Inspections conducted by IHS representatives shall be for the sole benefit of the IHS and the OWNER and shall not relieve the CONTRACTOR of any contract requirements.

Schedule C
Labor Provisions

LABOR PROVISIONS

l. DAVIS-BACON ACT

(a) All laborers and mechanics employed or working upon the site of the WORK 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 l(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 or paragraph (d) of this clause also, regular contributions made or costs incurred for more than a weekly period (but not less than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such period. Such laborers and mechanics shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for classification of work actually performed without regard to skill, except as provided in the clause entitled "Apprentices" and "Trainees." Laborers or mechanics performing work in more than one classification may be compensated at 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 (b) of this clause) and the Davis-Bacon poster (WH-l32l) 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.

(b) (1) The OWNER 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 OWNER shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met.

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

(ii) The Classification is utilized in the area by the construction industry; and

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

(2) If the CONTRACTOR and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the OWNER 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 OWNER to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 202l0. The Administrator or an approved authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the OWNER or will notify the OWNER within a 30-day period of that additional time is necessary.

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

(4) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (b)(2) or (b)(3) of this clause, 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.

(c) 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.

(d) 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 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.

2. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION

(a) 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 (See Federal Acquisition Regulation 22.300) shall require or permit any such laborer or mechanic in any workweek in which individual 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.

(b) Violation, liability for unpaid wages, liquidated damages: In the event of any violation of the provisions set forth in paragraph (a) of this clause, 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, employed in violation of the provisions set forth in paragraph (a) of this clause, in the sum of $l0 for each calendar day for which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by the provisions set forth in paragraph (a) of this clause.

(c) Withholding for unpaid wages and liquidated damages: The Contracting officer shall upon his or her own action or 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 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 provisions set forth in paragraph (b) of this clause.

(d) Payrolls and basic records:

(1) The CONTRACTOR or subcontractor shall maintain payrolls and basic payroll records during the course of contract work and shall preserve them for a period of 3 years from the completion of the contract for all laborers and mechanics 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. Nothing in this paragraph shall require the duplication of records required to be maintained for construction work by Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Davis-Bacon Act.

(2) The records to be maintained under paragraph (d)(1) of this clause shall be made available by the CONTRACTOR or subcontractor for inspection, copying, or transcription by authorized representatives of the OWNER or the Department of Labor. The CONTRACTOR or subcontractor shall permit such representatives to interview employees during working hours on the job.

(e) Subcontracts: The CONTRACTOR or subcontractor shall insert in any subcontracts the provisions set forth in paragraphs (a) through (d) of this clause and also a clause requiring the subcontractors to include these provisions any lower tier subcontracts. The Prime CONTRACTOR shall be responsible for compliance by any subcontractor or lower tier subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause.

3. APPRENTICES AND TRAINEES

(a) 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 journeyman 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 in this paragraph 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 apprentices's level of progress, expressed as percentage of the journeyman hourly rate specified in the applicable wage determination. Apprentices shall be paid fringes in accordance with the provisions of the apprenticeship program. If the apprenticeship programs 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, fringe benefits 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.

(b) Trainees: Except as provided in 29 CFR 5.l6, 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 Employee and Training Administration withdraws approval of a training program, the CONTRACTOR will not longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(c) 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 ll246, as amended, and 29 CFR Part 30.

4. PAYROLLS AND BASIC RECORDS

(a) 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. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates or wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section l(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deduction made and actual wages paid. Whenever the Secretary of Labor has found under paragraph (d) of the clause entitled "Davis-Bacon Act" 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 l(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 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 costs 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.

(b) (1) The CONTRACTOR shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the OWNER. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under paragraph (a) of this clause. The information may be submitted in any form desired. Optional Form WH-347 Federal stock number 029-005-00014-1 is available for this purpose and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The Prime Contractor is responsible for the submission of copies of payrolls by all subcontractors.

(2) 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:

(i) That the payroll for the payroll period contains the information required to be maintained under paragraph (a) of this clause entitled "Payrolls and Basic Records" and that such information is correct and complete.

(ii) 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 deduction as set forth in Regulations, 29 CFR Part 3 and

(iii) That each laborer or mechanic has been paid not less that 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.

(3) 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 subparagraph (b)(2) of this clause.

(4) The falsification of any of the certifications may subject the CONTRACTOR or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 18 and Section 231 of Title 31 of the United States Code.

(c) The CONTRACTOR or subcontractor shall make the records required under paragraph (a) of this clause available for inspection, copying, or transcription by authorized OWNER or representatives of the OWNER or the Department of Labor. The CONTRACTOR or subcontractor shall permit the OWNER or representatives of the OWNER or the Department of Labor 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 OWNER may, after written notice to the CONTRACTOR, sponsor take such action as may be necessary to cause the suspension of any further payment. 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.

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. WITHHOLDING OF FUNDS

The OWNER shall upon his or her 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 requirement, which is held by the same Prime CONTRACTOR, so much of the accrued payment 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 WORK, all or part of the wages required by the contract, the OWNER may, after written notice to

the CONTRACTOR, 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.

7. SUBCONTRACTS (LABOR STANDARDS)

(a) The CONTRACTOR or subcontractor shall insert in any subcontracts the clauses entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act Overtime Compensation," "Apprentice and Trainees," "Payrolls and Basic Records," "Compliance With Copeland Act Requirements," "Withholding of Funds," "Subcontracts (Labor Standards)," "Contract Termination: Debarment," "Disputes Concerning Labor Standards," "Compliance with Davis-Bacon and Related Act Requirements," and "Certification of Eligibility," and such other clauses as the OWNER may by appropriate instruction 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 cited in this paragraph.

(b) (1) Within 14 days after of the contract, the CONTRACTOR shall deliver to the OWNER a completed Statement and Acknowledgment Form (SF-1413) for each subcontract, including the subcontractor's signed and dated acknowledgment that the clauses set forth in paragraph (a) of this clause have been included in the subcontract.

(2) Within 14 days after the award of any subsequently awarded subcontract the CONTRACTOR shall deliver to the OWNER an updated completed SF 1413 for such additional subcontract.

8. CONTRACT TERMINATION: DEBARMENT

A breach of the contract clauses entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act-Overtime Compensation," "Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Act Requirements," Subcontracts," (Labor Standards) "Compliance with Davis-Bacon and Related Act Requirements," and "Certification of Eligibility" may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

9. DISPUTES CONCERNING LABOR STANDARDS

The United States Department of Labor has set forth in 29 CFR Parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with the procedures and not the Disputes clause of this Contract. Disputes within the meaning of this clause include disputes between the CONTRACTOR (or any of its subcontractors) and the OWNER, the U.S. Department of Labor, or the employees or their representatives.

10. COMPLIANCE WITH THE 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.

11. CERTIFICATION OF ELIGIBILITY

(a) 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 assisted contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(b) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government assisted contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(c) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.80

Schedule C
Labor Provisions

Schedule D
Special Provisions

SPECIAL PROVISIONS

This section is used to clarify or add supplemental material to the General Conditions including modifications to the General Conditions, addressing non-technical and unique issues that could affect the work; local, city, county, or tribal requirements; TERO, taxes, labor pools, subcontractor lists, and contacts for tribal procurement of local inspections; local warrantee, bonding , insurance, or licensing requirements. Other relevant issues include availability of electricity, water, and other utilities; site access, rights-of-way, and peculiar site or access conditions. Special provisions may include:

SP-01	Pre-Bid Conference
SP-02	Commencement, Prosecution, and Completion Work
SP-03	Days of Work and Hours of Work
SP-04	Liquidated Damages
SP-05	Contract Documents
SP-06	Submittal Requirements
SP-07	Preconstruction Conference and Projects Meetings
SP-08	Final Inspection
SP-09	Order of Precedence

1. PRE-BID CONFERENCE

A Pre-Bid Conference will be held on _____ at _____. The conference will begin at _____, local time.

The Pre-Bid conference will provide prospective bidders an opportunity to inquire about and clarify various elements of the scope of work, CONTRACTOR procedures and obligations or any other items which a CONTRACTOR would like to discuss.

All explanations, suggestions, interpretations, clarifications, and changes made at the conference are not considered official and will not be enforceable or binding unless and until set forth in an Amendment to the solicitation.

Failure to visit the site will not relieve the CONTRACTOR from the requirement to furnish all materials and perform all job necessary to complete the WORK in strict compliance with the CONTRACT.

2. COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK

Prior to commencing work on this CONTRACT, the CONTRACTOR shall be required to participate in a pre-construction conference with the OWNER and PROJECT ENGINEER if the OWNER so chooses. The purpose of this conference will be to discuss the authorities, duties, and responsibilities of parties involved and to plan operating procedures mutually satisfactory to those involved. It will also present an opportunity to resolve any questions regarding performance under the CONTRACT which have not been previously resolved.

To enable orderly review of progress during construction and to provide for systematic discussion of problems, the Project Engineer may conduct project meetings throughout the construction period. In general, project meetings may be held monthly in accordance with a mutually acceptable schedule. The purpose of the meetings is to analyze problems that might arise relative to execution of the work. Persons designated by the Contractor to attend and participate in project meetings shall have all the required authority to commit the Contractor to solutions as agreed upon in the project meetings. To the maximum extent practicable, project meetings shall be held at the job site.

The CONTRACTOR shall be required to commence work under this CONTRACT within _____ calendar days after the date of receipt of the Notice to Proceed, to prosecute the work diligently, and to complete all required work not later than _____ calendar days after receipt of the Notice to Proceed.

3. DAYS OF WORK AND HOURS OF WORK

Construction work will not be permitted on Saturdays, Sundays, nor on New Year's Day, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day, nor any other holidays declared by the OWNER. When any of the above holidays falls on Saturday and the preceding Friday is established as a holiday or when any of the above holidays fall on Sunday and the Monday following that day is established as a holiday, no construction will be permitted on those days. However, the ENGINEER, when in his opinion it is justified, may grant the

CONTRACTOR permission to work on any of the above days upon written application by the CONTRACTOR in advance.

Regular work shifts shall be eight (8) hours daily Monday through Friday, except on holidays indicated above. Time of beginning and ending the day's work shall be approved by the OWNER'S representative. Approval shall be requested in writing at least 48 hours in advance. When for good reason short periods of overtime work are required, the OWNER'S representative may give approval without advance written notice.

4. LIQUIDATED DAMAGES

Liquidated Damages will be assessed in the amount of $_____.00 per day for each calendar day of delay beyond the TIME FOR COMPLETION stated in the CONTRACT, or any extension thereof that may be granted pursuant to the terms of the CONTRACT, until the work is determined by the OWNER to be substantially complete.

5. CONTRACT DOCUMENTS

A maximum of 6 sets of CONTRACT drawings and specifications will be furnished without charge to the CONTRACTOR at award of this contract, except applicable publications incorporated by reference which will be furnished on request at the cost of reproduction.

6. SUBMITTAL REQUIREMENTS

The CONTRACTOR shall furnish material submittals, design submittals, shop drawings, operation and maintenance manuals, and as-built drawings in accordance with the requirements detailed in Schedule F, Contract Submittal Requirements.

7. PRE-CONSTRUCTION CONFERENCE AND PROJECT MEETINGS

Prior to commencing work on this contract, the CONTRACTOR shall be required to participate in a pre-construction conference with the OWNER, ENGINEER, and other representatives designated by the OWNER. The purpose of this conference will be to discuss the authorities, duties, and responsibilities of parties involved and to plan operating procedures mutually satisfactory to those involved. It will also present an opportunity to resolve any questions regarding performance under the contract which have not been previously resolved.

8. MAINTENANCE OF UTILITIES AND SITE FACILITIES

The CONTRACTOR is responsible to determine the exact location of any and all utilities not specifically located on the plans and to protect them from damage during construction. Should any utility be damaged or disturbed, the CONTRACTOR shall immediately notify the Project ENGINEER and the OWNER of the damaged utility. Any and all damage that results from work under the contract shall be promptly repaired at the expense of the CONTRACTOR.

During the progress of work, the CONTRACTOR shall protect all existing vegetation, structures, sidewalks, streets, mailboxes, ditches, culverts, signposts, fences, driveways, and similar items. If the CONTRACTOR must remove or disturb these facilities, provision shall be made to maintain a temporary facility serving the same purpose as that which it was intended to replace. Damage caused by the CONTRACTOR'S negligence, over excavation or any of the Contractor's operations to vegetation, structures, sidewalks, streets, mailboxes, ditches, culverts, signposts, fences, driveways and similar items shall be promptly restored at the CONTRACTOR'S expense. Upon completion of the work, the CONTRACTOR shall restore all such facilities to a condition at least equal to that existing prior to construction. The CONTRACTOR shall not obstruct access to the site.

The CONTRACTOR shall perform his work at all times in a manner to ensure minimal obstruction to traffic and minimal inconvenience to the general public.

9. NOTIFICATION, INSPECTION, AND FINAL INSPECTION

The CONTRACTOR shall keep the Project ENGINEER notified and advised of all work to be done or work in progress sufficiently in advance so that proper inspection can be performed.

Request for final inspection shall be submitted in writing by the CONTRACTOR to the OWNER at least 5 days prior to the requested date of final inspection to allow sufficient preparation and scheduling of Owner's representatives.

The CONTRACTOR may be charged with additional cost of re-inspection when the work is not ready at the time specified by the Contractor and re-inspected or re- test is necessary.

10. ORDER OF PRECEDENCE

In the event of an inconsistency between provisions of this contract, the inconsistency shall be resolved by giving precedence in the following order:

1) Bid Schedule (Schedule A) and Terms and Conditions of Contract.
2) Written bid instructions.
3) General Conditions, Schedule B.
4) Special Provisions, Schedule D.
5) Exhibits and other provisions of the contract, where incorporated by reference or otherwise, Schedule E.
6) Submittals, Schedule F.
7) Technical Provisions, Schedule G.
8) Drawings, Schedule H.

Schedule D
Special Provisions

Schedule E
Exhibits

(Insert Exhibits Here)

Schedule F
Contract Submittal
Requirements

CONTRACT SUBMITTAL REQUIREMENTS

[Change the number of copies and number of days listed below to meet the needs of the Area. Consider requesting submittal of data files on CDs or floppy disks of the final documents and drawings in addition to the hard copies with a stipulation that the hard copies are the official submittals.]

1. Material Submittals.

The Contractor shall furnish to the Project Engineer 5 copies of all material submittals listed on the "Submittal Review Form". All material submittals or resubmittals shall be accompanied by and furnished in accordance with this "Submittal Review Form". The location of the specification for each of these items in the Technical Provisions is indicated on this form. If the item description for the material submittal is not the exact brand or model specified by the Owner, then 5 copies of the manufacturer's descriptive literature, catalog cut-sheets, etc., must also be included with the submittal.

The contractor shall clearly indicate on all material submittals and copies, the submittal review form item number, and the exact item selected. In all cases, the Contractor shall enter the exact brand and model on the "Submittal Review Form" for that particular item.

All material submittals shall be submitted within 10 days after receipt of Notice to Proceed. The Contractor should allow 10 days from receipt by the Project Engineer for review and approval or rejection by the Owner. For each material resubmittal required, the Contractor should allow an additional 5 days from date of receipt by the Project Engineer for review and approval or rejection by the Owner.

2. Design Submittals

Five copies of all design submittals and related shop drawings are required. Shop drawings and electrical schematic details shall be of the size 24" x 36" with one copy on reproducible Mylar. Each design submittal or resubmittal and related shop drawings shall be listed on the "Submittal Review Form" by the contractor with an appropriate reference to the attachments submitted. All design submittals shall be stamped by a Professional Engineer registered in the State of _____.

All design submittals are required within 14 days after receipt of Notice to Proceed. The Contractor should allow 10 days from receipt by the Project Engineer for review and approval or rejection by the Owner. For each design resubmittal required, the Contractor should allow an additional 10 days from date of receipt by the Project Engineer for review and approval or rejection by the Owner.

Example--Design Submittal Required

a. TP 46.0, Control System. The submittal shall include all of the following items:
   i. Manufacturer's name and model number of all components of the control system, and product data sheets for all components.
   ii. Electrical schematic (ladder) diagram, on a reproducible, 24" x 36" mylar, of the control system showing all circuits and control components in symbolic form using standard symbols. The diagram shall include a legend which explains all symbols.
   iii. Outline dimension and general physical arrangement drawings of each enclosure and panel board.
b. TP 40.0 Provision of Temporary Water Service. The submittal shall include the following items:
   i. General description of proposed methods including pipe sizing, materials and routing for the water mains and house services.
   ii. Estimate of the amount of time and number of services to be served by temporary water service.
   iii. Explanation of chlorination procedures and materials for temporary water service lines.
c. TP 50.0 Degasifier. The submittal shall include the following items:
   i. Preliminary sizing and performance information including height, diameter, flow rates, expected percentage of CO2 removal, flow schematic, and size and capacity of blower motor and cable.
   ii. Preliminary drawings and technical information indicating construction materials, manufacturer, access to interior, inlet-outlet piping, and blower, vent, demisting, and tray assemblies.
   iii. Plan and schedule for completing final sizing, delivery, and installation process.
d. SP-16 Signing and Traffic Plan. The submittal shall include the following:
   i. Signing plan showing the necessary construction signing flagmen and barricades required for this project.

2. Operation and Maintenance Manuals

The Contractor shall provide 5 copies of an operation and maintenance (O & M) manual for the constructed systems. The manuals shall be typewritten or printed and bound in durable 3-ring binders. A draft copy of the manual is due when 50% of the performance time for the contract has elapsed. The Contractor should allow 10 days from receipt by the Project Engineer for review and approval or rejection by the Owner.

The Final Manual shall incorporate the Owner's review comments and be approved by the COR prior to final payment. The Final Manual shall be submitted five days prior to the Final Inspection.

These Operation and Maintenance Manuals shall include the following information as a minimum.

a. Identification on the front cover stating the general nature of the manual; e.g.:

OPERATION AND MAINTENANCE MANUAL
_____ SYSTEM

A Cooperative Project
_____ Nation
Indian Health Service, PL 86-121

b. Table of Contents. Table of Contents of all sections, sub-sections and components referenced to page numbers.

c. Operation and Maintenance Manual Format. The Operation and Maintenance Manual format shall include a narrative description of the overall system and its major sub-systems (in layman's language). The narrative description of the overall system shall be presented in the same order as the primary sections and subsections listed in (d). Troubleshooting shall include common problems for the control system, relays, motor overload, breakers, starter, etc., with physical reference to schematic and physical wiring number system.

i. Primary Sections. The manual shall be divided into primary sections, each of which describes a major sub-system. The primary sections shall be listed in the order shown in (d). Each primary section shall include a detailed narrative description (in layman's language) of its function in relationship to the overall system.
ii. Sub-Sections. Each primary section shall be divided into sub-sections as listed in (d). Each sub-section shall include a comprehensive and complete equipment and appurtenance listing followed by a comprehensive description of each component listed.

d. Operation and Maintenance Manual Primary Sections and Sub-Sections:
Change sections depending on type of system; i.e., water or sewer.
i. Include material list of all items discussed above, including manufacturer's bulletins and troubleshooting and repair manuals, lists of replacement parts, part numbers, and the name and address of a local vendor where parts may be purchase.
ii. Copy of all submittals listed on submittal review form and shop drawings (including 24" x 36" reproducible drawings of control panel and ladder diagrams), with all data concerning all changes made during construction.
iii. Copy of all related guarantees and warranties issued.

3. <u>As-Built Drawings</u>

The as-built drawings shall be a record of the construction as installed and completed by the Contractor. They shall include all the information shown on the contract set of drawings and a record of all construction deviations, modifications or changes from those drawings which were incorporated in the work; all additional work not appearing on the contract drawings; and all changes which are made after final inspection of the contract work.

The Contractor shall mark up a set of plans to show the as-built conditions. Those as-built marked prints shall be kept current and available on the job site at all times, and be made available to the COR upon request. The changes from the contract plans which are made in the work or additional information which might be uncovered in the course of construction shall be accurately and neatly recorded as they occur by means of details and notes. No construction work shall be concealed until it has been inspected, approved, and recorded. The drawings shall show at least the following:

a. The project number, contract number, community name, and other relevant general information.
b. The location and description of any utilities or other installation known to exist and or encountered within the construction area. The location of these utilities shall include accurate description, dimensions, and at least 2 ties to permanent features for all utilities encountered.
c. The location and description of all facilities installed by the Contractor. The location of facilities shall include accurate dimensions and at least 2 ties to permanent features for all major components, including gate valves, curb stops, meter boxes, and cleanouts. Perpendicular off-set measurements from the roadway center to the centerline of the pipeline installed shall be recorded on the as-builts at 100 foot intervals while the pipeline is being installed.
d. As-builts for homesites shall be submitted in a 3-ring binder on an 8.5" x 11" sheet at a scale of 1" = 20' with a north arrow. Two 3" x 5" photographs from opposite ends of the facilities constructed shall be taken while the excavation is open and included with the 8.5" as-builts in a protective plastic cover. Reference of photos and as-builts shall be by the homesite owner name and house number.

A set of the as-builts shall be delivered to the Project Engineer at the time of the request for final inspection for review and approval. As-built drawings must be approved before final payment will be made.

Schedule F
Contract Submittal
Requirements

Schedule F
Contract Submittal
Requirements

SUBMITTAL REVIEW FORM (Example)

(The Contractor shall furnish material submittals, design submittals, shop drawing, operation and maintenance manuals, and as-built drawings in accordance with the requirements this schedule. Material submittals, shop drawings, design submittals, certification and all other submittals required by the Technical Provisions or drawings shall be listed or added to the Submittal Review form by the Contractor with an appropriate reference to the technical provision or drawing requiring the submittal. Omission of a submittal requirement from the submittal review form by the Owner does not relieve the Contractor from the Technical Provision or drawing requirement.)

Received by Proj. Engr.: ____ ____ Submittal No. _____
Date Initial

Contract Name _____

Contract Number _____

Returned to Contractor: ____ ____ Contractor _____
Date Initial

Project Number _____

MATERIAL SUBMITTALS REQUIRED [change items and specifications for type of system]

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
1	Submersible Effluent Pumps TP 21.0		
2	PVC Sewer Pipe		
3	Mercury Float Switches TP 21.0		
4	Concrete Protective Coating TP 21.0		
5	Gate Valves TP 21.0		
6	Check Valves TP 21.0		
7			
8			
9			
10			
11			
12			
13	Effluent Screen TP 29.0		
14			
15	Recirculation Tank Pump TP 28.0		
16			
17	Sand Filter Media TP 28.0		
18	Liner TP 28.0		
19	Infiltration Chamber TP 25.0		
20	PVC Ball Valves TP 25.0		
21	Precast Manhole TP 20.0		

Schedule F
Contract Submittal
Requirements

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
22	Manhole Frame and Cover TP 20.0		
23	PVC Sewer Pipe TP 20.0		
24	PVC Sewer Service Pipe TP 10.0		
25	PVC Sewer Force Main TP 22.0		
26	Manhole Gaskets TP 20.0		
29			
30			
31			
32			
33	Chain Link Fence TP 4.0		

If the item description for a material submittal is not the exact brand or model specified by the Owner, then 5 copies of the manufacturer's descriptive literature, catalog cut-sheet etc., must be included with the submittal. For design submittals requiring design calculation, shop drawings, and wiring and control diagrams, etc., 5 copies of each must also be included with the Contractor's submittal.

CONTRACTOR: _____ _____
Signature Date

Engineer Approval: _____
Signature Date

Owner Approval: _____ _____
Signature Date

Schedule F
Contract Submittal
Requirements

4. DESIGN SUBMITTALS REQUIRED

a. Electrical Power Equipment, Fixtures, and Pump Control Systems - The submittals shall include all of the following items:

i. Manufacturer's name and model number of all electrical fixtures and components of the control system, and project data sheets for all components.

ii. Electrical schematic (ladder) diagram of the electrical fixtures and control system showing all circuits and control components in symbolic form using standard symbols. The diagram shall include a legend which explains all symbols, and be on 11" x 17" paper.

iii. Outline dimension and general physical arrangement drawings of each enclosure, panel board, and conduit sizes and routing locations for all pumps, alarm lights and horns, floats, and electrical fixtures including outlets and switches.

All plans and calculations shall be stamped by a registered Professional Engineer.

(Example) [change items and specifications for type of system]

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
1	Power Supply Wire		
2	Main disconnect/Circuit Breaker Switch and enclosure.		
3	Recirculation Tank Electrical Fixtures and Pump Control System		
4	Dosing Tank Electrical Fixtures and Pump Control System		

b. Community Septic Tank, Recirculation Tank, Recirculating Sand Filter Walls: The Contractor shall submit 5 complete sets of detailed structural plans, showing as a minimum: dimensions for tank heights, lengths and widths, wall, floor, and roof thicknesses; footing dimensions; piping; placement and size of reinforcement; invert elevations of inlets and outlets relative to tank floor. Shop drawings for various accessories shall also be submitted with the plans. One set of the plans shall be provided on original reproducible Mylar film. In addition, the Contractor shall submit 5 complete sets of design calculations with the plans. All calculations shall be legible and follow an orderly sequence. The calculations shall clearly state the external loading criteria and assumptions; show the resulting moments and stresses; and detail the resulting cross-sectional area. All plans and calculations shall be stamped by a registered Professional Engineer.

(Example) [change items and specifications for type of system]

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
1	Recirculation Tank TP 28.0		
2	Recirculation Sand Filter Walls TP 29.0		
3	Community Septic Tank TP 23.0		

*If the item description for a material submittal is not the exact brand or model specified by the Owner, then 5 copies of the manufacturer's descriptive literature, catalog cut-sheets, etc., must be included with the submittal. For design submittals requiring design calculations, shop drawings, wiring and control diagrams, etc., 5 copies of each must also be included with this submittal.

CONTRACTOR: _____ _____
Signature Date

Engineer Approval: _____
Signature Date

Owner Approval: _____ _____
Signature Date

Schedule F
Contract Submittal
Requirements

Schedule G
Technical Provisions

(Insert Technical Provisions Here)

Schedule H
Drawings

(Insert or reference accompanying Drawings Here)

APPENDIX C

Copies of the Authorization Acts and Supporting Documents

•P.L. 86-121

•P.L. 94-437 Section 302

•GAO Report B-197343, September 30,1980 (HRD-80-124), to The Honorable Sidney R. Yates, Chairman, Subcommittee on Interior Committee on Appropriations, House of Representatives

•31 U.S.C. Sec. 1501 Documentary evidence requirement for Government obligations

Public Law 86-121

86th Congress, S. 56
July 31, 1959

AN ACT

73 Stat. 267.

To amend the Act of August 5, 1954 (68 Stat. 674), and for other purposes.

(The Transfer Act)

Be it enacted by the Senate and House Representatives of the United States of America in Congress assembled, That the Act of August 5, 1954 (68 Stat. 674), is amended by adding at the end thereof the following new section:

Indians, sanitation facilities. 42 USC 2004a

"Sec. 7. (a) In carrying out his functions under this subchapter with respect to the provision of sanitation facilities and services, the Surgeon General is authorized -

Surgeon General. Powers.

(1) to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities, including domestic and community water supplies and facilities, drainage facilities, and sewage- and waste-disposal facilities, together with necessary appurtenances and fixtures, for Indian homes, communities, and lands;

Acquisition of lands.

(2) to acquire lands, or rights or interests therein, including sites, rights-of-way, and easements, and to acquire rights to the use of water, by purchase, lease, gift, exchange, or otherwise, when necessary for the purposes of this section, except that no lands or rights or interests therein may be acquired from an Indian tribe, band, group, community, or individual other than by gift or for nominal consideration, if the facility for which such lands or rights or interests therein are acquired is for the exclusive benefit of such tribe, band, group, community, or individual, respectively;

Construction and maintenance.

(3) to make such arrangements and agreements with appropriate public authorities and nonprofit organizations or agencies and with the Indians to be served by such sanitation facilities (and any other person so served) regarding contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof, as in his judgment are equitable and will best assure the future maintenance of facilities in an effective and operating condition; and

Transfer and reversion of lands

(4) to transfer any facilities provided under this section, together with appurtenant interests in land, with or without a money consideration, and under such terms and conditions as in his judgment are appropriate, having regard to the contributions made and the maintenance responsibilities undertaken, and the special health needs of the Indians concerned, to any State or Territory or subdivision or public authority thereof, or to any Indian tribe, group, band, or community or, in the case of domestic appurtenances and fixtures, to any one or more of the occupants of the Indian home served thereby.

Transfer of U.S. land.

(b)The Secretary of the Interior is authorized to transfer to the Surgeon General for use in carrying out the purposes of this section such interest and rights in federally owned lands under the jurisdiction of the Department of the Interior, and in Indian-owned lands that either are held by the United States in trust for Indians or are subject to a restriction against alienation imposed by the United States, including appurtenances and improvements thereto, as may be requested by the Surgeon General. Any land or interest therein, including appurtenances and improvements to such land, so transferred shall be subject to disposition by the Surgeon General in accordance with paragraph (4) of subsection (a) of this section: *Provided*, That, in any case where a beneficial interest in such land is in any Indian, or Indian tribe, band, or group, the consent of such beneficial owner to any such transfer or disposition shall first be obtained: *Provided further*, That where deemed appropriate by the Secretary of the Interior provisions shall be made for a reversion of title to such land if it ceases to be used for the purpose for which it is transferred or disposed.

(c) Project consultation and participation The Surgeon General shall consult with, and encourage the participation of, the Indians concerned, States and political subdivisions thereof, in carrying out the provisions of this section.

SOURCE (Aug. 5, 1954, ch. 658, Sec. 7, as added July 31, 1959, Pub. L. 86-121, Sec. 1, 73 Stat. 267.)

[Public Law 94-437, Section 302; 25 U.S.C. 1632]

UNITED STATES CODE
TITLE 25 - INDIANS
CHAPTER 18 - INDIAN HEALTH CARE
SUBCHAPTER III - HEALTH FACILITIES

Sec. 1632. Safe water and sanitary waste disposal facilities

(a) Congressional findings

The Congress hereby finds and declares that -

(1) the provision of safe water supply systems and sanitary sewage and solid waste disposal systems is primarily a health consideration and function;

(2) Indian people suffer an inordinately high incidence of disease, injury, and illness directly attributable to the absence or inadequacy of such systems;

(3) the long-term cost to the United States of treating and curing such disease, injury, and illness is substantially greater than the short-term cost of providing such systems and other preventive health measures;

(4) many Indian homes and communities still lack safe water supply systems and sanitary sewage and solid waste disposal systems; and

(5) it is in the interest of the United States, and it is the policy of the United States, that all Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems as soon as possible.

(b) Authority; assistance; transfer of funds

(1) In furtherance of the findings and declarations made in subsection (a) of this section, Congress reaffirms the primary responsibility and authority of the Service to provide the necessary sanitation facilities and services as provided in section 2004a of title 42.

(2) The Secretary, acting through the Service, is authorized to provide under section 2004a of title 42 -

(A) financial and technical assistance to Indian tribes and communities in the establishment, training, and equipping of utility organizations to operate and maintain Indian sanitation facilities;

(B) ongoing technical assistance and training in the management of utility organizations which operate and maintain sanitation facilities; and

(C) operation and maintenance assistance for, and emergency repairs to, tribal sanitation facilities when necessary to avoid a health hazard or to protect the Federal investment in sanitation facilities.

(3) Notwithstanding any other provision of law -

(A) the Secretary of Housing and Urban Affairs is authorized to transfer funds appropriated under the Housing and Community Development Act of 1974 (42 U.S.C. 5301, et seq.) to the Secretary of Health and Human Services, and

(B) the Secretary of Health and Human Services is authorized to accept and use such funds for the purpose of providing sanitation facilities and services for Indians under section 2004a of title 42.

(c) 10-year plan

Beginning in fiscal year 1990, the Secretary, acting through the Service, shall develop and begin implementation of a 10-year plan to provide safe water supply and sanitation sewage and solid waste disposal facilities to existing Indian homes and communities and to new and renovated Indian homes.

(d) Tribal capability

The financial and technical capability of an Indian tribe or community to safely operate and maintain a sanitation facility shall not be a prerequisite to the provision or construction of sanitation facilities by the Secretary.

(e) Amount of assistance

(1) The Secretary is authorized to provide financial assistance to Indian tribes and communities in an amount equal to the Federal share of the costs of operating, managing, and maintaining the facilities provided under the plan described in subsection (c) of this section.

(2) For the purposes of paragraph (1), the term "Federal share" means 80 percent of the costs described in paragraph (1).

(3) With respect to Indian tribes with fewer than 1,000 enrolled members, the non-Federal portion of the costs of operating, managing, and maintaining such facilities may be provided, in part, through cash donations or in kind property, fairly evaluated.

(f) Eligibility of programs administered by Indian tribes

Programs administered by Indian tribes or tribal organizations under the authority of the Indian Self-Determination Act (25 U.S.C. 450f et seq.) shall be eligible for -

(1) any funds appropriated pursuant to this section, and

(2) any funds appropriated for the purpose of providing water supply or sewage disposal services, on an equal basis with programs that are administered directly by the Service.

(g) Annual report; sanitation deficiency levels

(1) The Secretary shall submit to the President, for inclusion in each report required to be transmitted to the Congress under section 1671 of this title, a report which sets forth -

(A) the current Indian sanitation facility priority system of the Service;

(B) the methodology for determining sanitation deficiencies;

(C) the level of sanitation deficiency for each sanitation facilities project of each Indian tribe or community;

(D) the amount of funds necessary to raise all Indian tribes and communities to a level I sanitation deficiency; and

(E) the amount of funds necessary to raise all Indian tribes and communities to zero sanitation deficiency.

(2) In preparing each report required under paragraph (1) (other than the initial report), the Secretary shall consult with Indian tribes and tribal organizations (including those tribes or tribal organizations operating health care programs or facilities under any contract entered into with the Service under the Indian Self-Determination Act (25 U.S.C. 450f et seq.)) to determine the sanitation needs of each tribe.

(3) The methodology used by the Secretary in determining sanitation deficiencies for purposes of paragraph (1) shall be applied uniformly to all Indian tribes and communities.

(4) For purposes of this subsection, the sanitation deficiency levels for an Indian tribe or community are as follows:

(A) level I is an Indian tribe or community with a sanitation system -

(i) which complies with all applicable water supply and pollution control laws, and

(ii) in which the deficiencies relate to routine replacement, repair, or maintenance needs;

(B) level II is an Indian tribe or community with a sanitation system -

(i) which complies with all applicable water supply and pollution control laws, and

(ii) in which the deficiencies relate to capital improvements that are necessary to improve the facilities in order to meet the needs of such tribe or community for domestic sanitation facilities;

(C) level III is an Indian tribe or community with a sanitation system which -

(i) has an inadequate or partial water supply and a sewage disposal facility that does not comply with applicable water supply and pollution control laws, or

(ii) has no solid waste disposal facility;

(D) level IV is an Indian tribe or community with a sanitation system which lacks either a safe water supply system or a sewage disposal system; and

(E) level V is an Indian tribe or community that lacks a safe water supply and a sewage disposal system.

(5) For purposes of this subsection, any Indian tribe or community that lacks the operation and maintenance capability to enable its sanitation system to meet pollution control laws may not be treated as having a level I or II sanitation deficiency.

http://archive.gao.gov/f0502/113421.pdf

NW-V

HRD-80-124

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

HUMAN RESOURCES
DIVISION

B-197343

SEPTEMBER 30, 1980

113421

The Honorable Sidney R. Yates
Chairman, Subcommittee on Interior
Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

Subject: Unexpended Fund Balance in the Indian Health Service Water and Sanitation Facility Construction Program (HRD-80-124)

This report responds to your September 19, 1979, request concerning the unexpended fund balance in the Indian Health Service's (IHS') water and sanitation facility construction program.

As agreed, we examined the program to determine whether:

--IHS budgeting procedures can be changed to reduce the amount of appropriated funds needed for facility construction in a given year.

--IHS allocation and obligation procedures are contributing to the size of the unexpended balance.

--IHS is receiving more funds than it can effectively use for water and sanitation facility construction.

--The Congress should consider different ways of providing funds to IHS for water and sanitation facility construction.

--IHS' use of the memorandum of agreement as an obligating document is legal.

(102051)

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During our review, we visited IHS' headquarters and five of its eight area offices. The five area offices selected--Aberdeen, Anchorage, Billings, Navajo, and Oklahoma--accounted for 70 percent of the unexpended fund balance reported as of September 30, 1979.

FACTORS CONTRIBUTING TO THE AMOUNT OF UNEXPENDED PROGRAM FUNDS

The reported unexpended balance was $95 million at the end of fiscal year 1979, but it averaged about $112 million for fiscal years 1977-79. About one-third of the unexpended balance pertained to projects that were not started or for which construction was interrupted because of unforeseen problems that occurred after funds had been obligated.

Project construction delays

The area offices visited generally obligated funds for a project after IHS and the benefiting tribe or community signed a memorandum of agreement specifying the type, the cost, and the parties' operation and maintenance responsibilities. Our review of files for 251 construction projects (funded in fiscal years 1977-79) in the five areas we visited disclosed a time lapse between when funds were obligated and when construction began on 66 of the projects. Total funds obligated for the 66 projects were $28.2 million. At the time of our visit, construction had not started on 17 of the 66 projects, and we noted delays on other projects of as much as 30 months between obligation and construction.

Data in the project files showed various reasons for delays in starting or continuing project construction, including:

--Problems in obtaining right-of-way or resolving problems concerning historical preservation of land (15 projects).

--Problems encountered with contractors; e.g., bankruptcy, slow subcontractors, and faulty bids (13 projects).

--Tribal tardiness in providing required data (11 projects).

--Curtailment pending completion of other projects linked to planned projects (7 projects).

--Inclement weather (5 projects).

--Problems in obtaining adequate water supply (3 projects).

Posting financial transactions

When funds are obligated for a construction project, the area office Sanitation Facilities Construction Branch prepares a commitment register to record the amount obligated. When funds are expended, branch personnel record the transactions in the commitment register and send the invoices or other documentation to the area office finance personnel for payment and recording in the official financial records. At the time of our visit, the finance offices had 3- to 5-month backlogs in posting the transactions to the financial records. As a result, the reported unexpended balance was overstated by several million dollars.

Area office finance personnel attributed the backlog to a staff shortage. The chief, IHS Financial Management, told us that the agency has been authorized 10 additional clerical positions in the 1981 budget, which should alleviate the problem and result in more timely recording of financial transactions.

BUDGETING, ALLOCATING, AND OBLIGATING PROCEDURES DO NOT CONTRIBUTE TO THE UNEXPENDED BALANCE

The annual budget requests prepared by the area offices are based on the estimated total costs of construction projects to be started in the budget year. This practice is known as full funding. The planned projects support new housing activities. IHS has generally allocated to the areas less funds than were initially requested.

At the five area offices visited, the funds allocated to each area during fiscal years 1977-79 were obligated before the end of each fiscal year, including the supplemental appropriation of $75 million provided in June 1977. However, since much of the $75 million was authorized for upgrading substandard water and sanitary facilities in existing Indian

housing, delays in expending the funds occurred in areas that had many substandard facilities. For example, one of eight service areas (which are subunits of an area office) on the Navajo reservation was allotted almost 50 percent of the total funds made available to the Navajo Reservation. As a result, a large burden was placed on the engineering staff of that service area to make the necessary studies before contracting for the required work.

Regarding the Committee's interest in an alternative to the present funding system, we discussed with IHS officials the possibility of budgeting, allocating, and obligating funds based only on expenditures that are anticipated to be incurred during a fiscal year (phased funding). IHS officials expressed reservations about phased funding because of the uncertainty of funding in later years to complete projects under construction. They added that, because of inflation, delays in contracting for portions of projects would likely increase overall contruction costs as well as area offices' administrative costs. Also, phased funding negates the flexibility provided by the Congress in allowing IHS to use a no-year appropriation for the water and sanitation program.

From a congressional perspective, phased (or incremental) funding can cause problems of budgetary disclosure and control. When funding for only 1 year's cost of a multiyear project is requested, the full cost may not be visible. This incremental funding can lead to a lack of budget control when the Congress must provide funding in the future to carry out past commitments.

We believe that full funding 1/--providing funds for the total cost of a project at the outset--is the most appropriate way of funding multiyear commitments like IHS construction projects. It provides full disclosure of total costs in congressional budget decisionmaking and increases control over future allocations of budget authority.

1/For a more complete discussion of full funding, see our report "Further Implementation of Full Funding in the Federal Government" (PAD-78-80, Sept. 7, 1978).

MEMORANDUM OF AGREEMENT IS A LEGAL OBLIGATING DOCUMENT

IHS and the Indian tribe or Alaska Native community sign a memorandum of agreement to ensure a mutual understanding of each party's responsibilities for project construction and subsequent operation and maintenance of the water and sanitation facilities. The memorandum of agreement is also used by the area finance offices as documentary evidence for obligating funds for project construction.

We found that the memorandum of agreement contained the required documentary evidence needed to support an obligation by a Federal agency, pursuant to 31 U.S.C. 200. In addition, the memorandum of agreement used by IHS contains the basic elements necessary to represent a binding contract between the Federal Government and Indian or Alaska Natives. Therefore, where delays have interfered with the start or completion of project construction, we do not believe that IHS can terminate or modify a signed memorandum of agreement without the consent of the Indian or Alaska Native beneficiaries. Where the start or completion of project construction will be delayed indefinitely, mutual agreement to terminate or modify the memorandum of agreement could enable IHS to deobligate the funds for use on other unfunded priority projects.

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We discussed this report with IHS officials and, where appropriate, have incorporated their comments.

As arranged with your office, we are sending a copy of this report to the Secretary of Health and Human Services and will make copies available to others upon request.

Sincerely yours,

Gregory J. Ahart
Director

NOTE:
31 USC TITLE 31 01/02/01
- MONEY AND FINANCE

Title 31 Former Sections	Title 31 New Sections
200(a)	1501

-CITE-
31 USC Sec. 1501 01/02/01

-EXPCITE-
TITLE 31 - MONEY AND FINANCE
SUBTITLE II - THE BUDGET PROCESS
CHAPTER 15 - APPROPRIATION ACCOUNTING
SUBCHAPTER I - GENERAL

-HEAD-
Sec. 1501. Documentary evidence requirement for Government obligations

-STATUTE-
(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of -
(1) a binding agreement between an agency and another person (including an agency) that is -
(A) in writing, in a way and form, and for a purpose authorized by law; and
(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided;
(2) a loan agreement showing the amount and terms of repayment;
(3) an order required by law to be placed with an agency;
(4) an order issued under a law authorizing purchases without advertising -
(A) when necessary because of a public exigency;
(B) for perishable subsistence supplies; or
(C) within specific monetary limits;
(5) a grant or subsidy payable -
(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;
(B) under an agreement authorized by law; or
(C) under plans approved consistent with and authorized by law;
(6) a liability that may result from pending litigation;
(7) employment or services of persons or expenses of travel under law;
(8) services provided by public utilities; or
(9) other legal liability of the Government against an available appropriation or fund.
(b) A statement of obligations provided to Congress or a committee of Congress by an agency shall include only those amounts that are obligations consistent with subsection (a) of this section.

-SOURCE-
(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 927.)

ALLOWABLE COSTS

The following briefly summarizes OMB Circular A-87, with emphasis on construction related cost items commonly occurring on sanitation facilities projects. Many of the listed allowable costs have specific conditions that must be met. Refer to the full text of the Circular for more detailed rules.

1.

Allowable Costs	Not Allowable
Accounting, bookkeeping, auditing	Contingencies
Advertising for contracts	Entertainment
Bonding	Fines and penalties
Equipment rental	Interest expense
Equipment depreciation	Building rent for Federally funded building
Equipment maintenance and repair	
Labor and fringe benefits	
Legal expenses	
Material and supplies	
Printing	
Transportation	
Telephone	
Postage	
Travel	
Taxes	
Warehousing	

2. Other costs are allowable only if specifically approved in advance by IHS:

   ADP - rental, depreciation or purchase
   Building rent (and O&M expenses)
   Insurance
   Capital equipment
   Management studies
   Expenditures made prior to MOA
   Professional services
   Proposal costs

3. Project administrative support costs are referred to as "indirect costs" in OMB A-87.

from ATTACHMENT B; Circular No. A-87:

Sections 1 through 42 provide principles to be applied in establishing the allowability or unallowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. A cost is allowable for Federal reimbursement only to the extent of benefits received by Federal awards and its conformance with the general policies and principles stated in Attachment A to this Circular A-87. Failure to mention a particular item of cost in these sections is not intended to imply that it is either allowable or unallowable; rather, determination of allowability in each case should be based on the treatment or standards provided for similar or related items of cost.

? = conditional, see A-87

SELECTED ITEMS OF COST	**Allowable**	**Unallowable**
1. Accounting	X	
2. Advertising and public relations costs	?	
3. Advisory councils	?	
4. Alcoholic beverages		X
5. Audit services	X	
6. Automatic electronic data processing	?	
7. Bad debts		X
8. Bonding costs	X	
9. Budgeting	X	
10. Communications	X	
11. Compensation for personnel services	?	
12. Contingencies		X
13. Contributions and donations		X
14. Defense and prosecution of criminal and civil proceedings, and claims		X
15. Depreciation and use allowances	?	
16. Disbursing service	X	
17. Employee morale, health, and welfare costs	?	
18. Entertainment		X
19. Equipment and other capital expenditures	?	
20. Fines and penalties		X
21. Fund raising and investment management costs		X
22. Gains and losses on disposition of depreciable property and other capital assets and substantial relocation of Federal programs.	?	
23. General government expenses		X
24. Idle facilities and idle capacity		X
25. Insurance and indemnification	?	
26. Interest		X
27. Lobbying		X
28. Maintenance, operations, and repairs	?	
29. Materials and supplies	X	
30. Memberships, subscriptions, and professional activities	?	
31. Motor pools	X	
32. Pre-award costs	?	
33. Professional service costs	?	
34. Proposal costs	?	
35. Publication and printing costs	X	
36. Rearrangements and alterations	?	
37. Reconversion costs	X	
38. Rental costs	?	
39. Taxes	?	
40. Training	X	
41. Travel costs	X	
42. Underrecovery of costs under Federal agreements		X

APPENDIX D

•Allowable Costs

•OMB Circular A-87, Cost Principles for State and Local Governments

ALLOWABLE COSTS

The following briefly summarizes OMB Circular A-87, with emphasis on construction related cost items commonly occurring on sanitation facilities projects. Many of the listed allowable costs have specific conditions that must be met. Refer to the full text of the Circular for more detailed rules.

1.

Allowable Costs	Not Allowable
Accounting, bookkeeping, auditing	Contingencies
Advertising for contracts	Entertainment
Bonding	Fines and penalties
Equipment rental	Interest expense
Equipment depreciation	Building rent for Federally funded building
Equipment maintenance and repair	
Labor and fringe benefits	
Legal expenses	
Material and supplies	
Printing	
Transportation	
Telephone	
Postage	
Travel	
Taxes	
Warehousing	

2. Other costs are allowable only if specifically approved in advance by IHS:

   ADP - rental, depreciation or purchase
   Building rent (and O&M expenses)
   Insurance
   Capital equipment
   Management studies
   Expenditures made prior to MOA
   Professional services
   Proposal costs

3. Project administrative support costs are referred to as "indirect costs" in OMB A-87.

from ATTACHMENT B; Circular No. A-87:

Sections 1 through 42 provide principles to be applied in establishing the allowability or unallowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. A cost is allowable for Federal reimbursement only to the extent of benefits received by Federal awards and its conformance with the general policies and principles stated in Attachment A to this Circular A-87. Failure to mention a particular item of cost in these sections is not intended to imply that it is either allowable or unallowable; rather, determination of allowability in each case should be based on the treatment or standards provided for similar or related items of cost.

? = conditional, see A-87

SELECTED ITEMS OF COST	**Allowable**	**Unallowable**
1. Accounting	X	
2. Advertising and public relations costs	?	
3. Advisory councils	?	
4. Alcoholic beverages		X
5. Audit services	X	
6. Automatic electronic data processing	?	
7. Bad debts		X
8. Bonding costs	X	
9. Budgeting	X	
10. Communications	X	
11. Compensation for personnel services	?	
12. Contingencies		X
13. Contributions and donations		X
14. Defense and prosecution of criminal and civil proceedings, and claims		X
15. Depreciation and use allowances	?	
16. Disbursing service	X	
17. Employee morale, health, and welfare costs	?	
18. Entertainment		X
19. Equipment and other capital expenditures	?	
20. Fines and penalties		X
21. Fund raising and investment management costs		X
22. Gains and losses on disposition of depreciable property and other capital assets and substantial relocation of Federal programs.	?	
23. General government expenses		X
24. Idle facilities and idle capacity		X
25. Insurance and indemnification	?	
26. Interest		X
27. Lobbying		X
28. Maintenance, operations, and repairs	?	
29. Materials and supplies	X	
30. Memberships, subscriptions, and professional activities	?	
31. Motor pools	X	
32. Pre-award costs	?	
33. Professional service costs	?	
34. Proposal costs	?	
35. Publication and printing costs	X	
36. Rearrangements and alterations	?	
37. Reconversion costs	X	
38. Rental costs	?	
39. Taxes	?	
40. Training	X	
41. Travel costs	X	
42. Underrecovery of costs under Federal agreements		X

federal register

Wednesday
May 17, 1995

A-87

Part II

Office of Management and Budget

Cost Principles for State, Local and Indian Tribal Governments (Circular A–87); Notice

OFFICE OF MANAGEMENT AND BUDGET

Cost Principles for State, Local and Indian Tribal Governments

AGENCY: Office of Management and Budget.

ACTION: Final Revision to OMB Circular A–87, ''Cost Principles for State, Local and Indian Tribal Governments''.

SUMMARY: An interagency task force was established to review existing cost principles for Federal awards to State and local governments. The task force studied Inspector General reports and recommendations, solicited suggestions for changes to the Circular from State and local governments, and compared for consistency the provisions of other Office of Management and Budget cost principles covering non-profit organizations and universities. Proposed revisions reflecting the results of those efforts were published on October 12, 1988 (53 FR 40352–40367) and August 19, 1993 (58 FR 44212–44234). The extensive comments received on these proposed revisions, discussions with interested groups, and other related developments were considered in developing this final revision.

DATES: Agencies shall issue codified regulations to implement the provisions of this Circular by September 1, 1995.

ADDRESSES: Office of Management and Budget, Office of Federal Financial Management, Financial Standards and Reporting Branch, Room 6025, New Executive Office Building, Washington, DC 20503. For a copy of the revised Circular, contact Office of Administration, Publications Office, Room 2200, New Executive Office Building, Washington, DC 20503, or telephone (202)395–7332.

FOR FURTHER INFORMATION CONTACT: Non-Federal organizations should contact the organization's cognizant Federal funding agency. Federal agencies should contact Gilbert H. Tran, Financial Standards and Reporting Branch, Office of Federal Financial Management, Office of Management and Budget, telephone: (202)395–3993.

SUPPLEMENTARY INFORMATION:

A. Background

The Office of Management and Budget (OMB) received about 200 comments from governmental units, Federal agencies, professional organizations and others in response to the **Federal Register** notice of August 19, 1993 (58 FR 44212). All comments were considered in developing this final revision.

OMB also considered the National Performance Review's recommendations to reduce paperwork and red tape. Changes were made to the Circular to streamline the cost negotiation process and defer to State and local accounting procedures whenever possible. Also, the policy guides in the Circular were amended to provide that Federal agencies should work with States or localities which wish to test alternative mechanisms for paying costs for administering Federal programs.

Section B presents a summary of the major public comments grouped by subject and a response to each comment. Other changes have been made to increase clarity and readability. Section C addresses procurement issues. Section D discusses the Federal Acquisition Streamlining Act of 1994.

B. Public Comments and Responses

Basic Circular

Comment: The policy subsection states that ''no provision for profit or increment above allowable cost is intended.'' This statement is currently contained in the Circular, but it is different from that contained in other OMB cost principles circulars and is literally incorrect. This seems to say no profit or increment above cost is permitted.

Response: This sentence was changed to conform with the other OMB cost principles circulars. There is no policy change intended by this change.

General Principles for Determining Allowable Costs—Attachment A

Comment: The requirement in the basic guidelines that ''a cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to a Federal award as an indirect cost'' appears to be too expansive and should be clarified.

Response: There is no policy change intended from that in the existing Circular. The wording in the consistency provision was changed to make it clear that all costs incurred for the same purpose in like circumstances are either direct costs only or indirect costs only with respect to final cost objectives (e.g., grants). No final cost objective shall have allocated to it as an indirect cost any cost if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective. For example, a grantee normally allocates all travel as an indirect cost. For purposes of a new grant proposal, the grantee intends to allocate the travel costs of personnel whose time is accounted for as direct labor directly to the grant. Since travel costs of personnel whose time is accounted for as direct labor working on other grants are costs which are incurred for the same purpose, these costs may no longer be included within indirect cost pools for purposes of allocation to any other grant.

Comment: The Circular lists the market price of comparable goods or services as one test of reasonableness. This statement may cause problems for State agencies that are required to make purchases from State-wide contracts.

Response: OMB recognizes that market fluctuations may result in a State paying higher prices on State-wide contracts. However, significant differences between State prices and market prices should be analyzed. For example, Federal awards should not be paying higher prices for State awards based on geographical preferences.

Comment: The prohibition against shifting costs allocable to a particular Federal award or other cost objective to other Federal awards needs to be clarified. Governmental units should not be precluded from shifting allowable cost in accordance with program agreements.

Response: This section was expanded to recognize that there are instances when it may be appropriate for governmental units to transfer costs from one cost objective to another cost objective.

Comment: It is not logical to require governmental units to allocate indirect costs to all activities including donated services.

Response: The Circular is designed to provide that Federal awards bear their fair share of costs. If non-Federal activities use donated services that require a substantial amount of support costs, it would be inequitable to charge these costs to Federal awards.

Comment: The section on applicable credits needs to be clarified.

Response: The language in this section has been revised to remove inappropriate examples of applicable credits and references to program income which are covered by the grants management common rule.

Selected Items of Cost—Attachment B

Advertising and Public Relations Costs

Comment: Clarify the allowability of certain public relations type costs, such as job fairs and activities to promote ridership on public transportation.

Response: The allowability of these types of costs depends upon the circumstances surrounding the individual case. In determining whether

Federal awards should participate in these types of costs, the recipient should consider how similar types of costs are charged, and whether there is a direct benefit to Federal awards resulting from these costs.

Audit Services

Comment: The Circular limits the allowability of audit costs to single audits and does not provide reimbursement for audits of a less comprehensive nature.

Response: This section was revised to allow the costs of other audits.

Automatic Electronic Data Processing

Comment: The requirement for governmental units to amortize the costs associated with the development and testing of automated systems would impose an unreasonable financial and administrative burden on the governmental units.

Response: OMB eliminated the requirement for governmental units to amortize the costs of developing and testing automated systems until a uniform Federal policy covering all types of recipients of Federal awards can be developed.

Compensation for Personnel Services

Comment: The potential paperwork burdens associated with accounting for employee leave payments and accruals could be substantial.

Response: This section was simplified by modifying many of the prescriptive accounting rules for leave.

Comment: Interest cost associated with pension contributions should be allowed if the governmental unit's contributions are delayed.

Response: References to interest payments were deleted. However, language was inserted into the Circular to make it clear that Federal reimbursement of pension cost must be adjusted when the governmental unit's payments to the fund are late. The adjustment should compensate for the additional cost because of the timing of the charges to the Federal Government and the governmental unit's contribution to the pension fund.

Comment: Governmental units should not be required to use separate cost allocation procedures for classes of employees that experience different actuarial gains and losses (e.g., police and fire departments).

Response: This requirement was deleted from the Circular.

Comment: The requirement that a governmental unit obtain Federal approval for changing its method for determining pension and post-retirement health benefit costs should be deleted.

Response: This requirement was deleted. Pension costs and post-retirement health benefit costs determined in accordance with Generally Accepted Accounting Principles (GAAP) and the provisions of the Circular will be allowable. For contracts covered under Cost Accounting Standards (CAS), CAS 412 and 413 promulgated by the Cost Accounting Standards Board shall establish the allocability of pension costs.

Comment: The current principles applicable to support of personnel costs have worked well and require no change.

Response: OMB believes additional guidance is necessary. Federal agencies have found that the absence of sufficient guidance on documentation to support salaries charged to Federal awards has caused numerous audit findings and resulted in endless wasted hours of negotiation between Federal agencies and governmental units. Based on the comments received, OMB made a number of changes to the requirements in this section of the Circular to clarify and simplify Federal requirements for documenting salaries charged to Federal awards.

Defense and Prosecution of Criminal and Civil Proceedings, and Claims

Comment: OMB proposed to substantially amend the provisions on the allowability of legal and related expenses. In the 1981 version of the Circular, this provision is found at Attachment B, section 16 (46 FR 9552). In the latest proposal, the proposed revisions were at Attachment B, section 14 (58 FR 44222).

State and local governments contended that the proposed revisions on the allowability of legal and related expenses would be unfair and would deny them due process.

State and local governments also objected to the specific proposed revisions dealing with legal proceedings based on the Major Fraud Act and the Federal Acquisition Regulation (48 CFR 31.205–47) in Attachment B, sections 14.a. through f. State and local governments contended that those provisions are ambiguous, inconsistent and overly broad. In addition, these commenters argued that the provisions were designed for commercial contractors and should not be applied to grants.

Response: After reviewing the comments on the proposed revisions, OMB decided not to amend the current provision on the allowability of legal and related expenses. In the revised Circular, this provision is now found at section 14.b.

In this revision, OMB has added a provision at section 14.a. This provision, which was in the proposal, simply restates the currently-applicable, statutory restrictions in 10 U.S.C. 2324(k).

Depreciation and Use Allowances

Comment: It is unclear if a use charge can be charged while an asset is in service.

Response: The Circular now provides that a reasonable use allowance may be negotiated for fully depreciated assets; therefore, OMB believes a reasonable use allowance could be negotiated for an asset for as long as the asset is in service.

Comment: It is not clear whether accelerated depreciation is allowed.

Response: The preferred method of depreciation is the straight line method. However, other methods may be used when there is evidence that an asset will be used up faster in the earlier portion of its useful life.

Comment: The estimated useful lives of equipment and buildings used to compute use allowances should be shortened.

Response: No changes were made. Governmental units have the option of claiming depreciation which is usually based on the actual life of the asset.

Comment: It is not clear why classes of assets needed to be determined on a State-wide, local-wide, or Tribal-wide basis.

Response: This section was amended to say classes of assets shall be determined on the same bases used for the governmental unit's financial statements.

Equipment and Other Capital Expenditures

Comment: The capitalization level for equipment seems to be arbitrarily low. The criterion of $25,000, which is recognized by the Department of Health and Human Services (HHS), might be more appropriate.

Response: The $5000 criterion is in line with capitalization levels used by government contractors and others. The HHS criterion is limited to equipment used on a few very large programs where equipment purchases are a very small percentage of total program costs. For CAS-covered contracts subject to ''full coverage'', the threshold for equipment is $1500 as established under CAS 404.

Comment: Clarify the term ''article'' as used in the definition of equipment. The Circular defines equipment ''as

being an article of nonexpendable property.''

Response: The definition of ''capital expenditure'' was added to further define the term ''equipment.'' However, if further guidance is needed in this area, governmental units should follow their own accounting practices when defining equipment.

Comment: It is not clear what is meant by ''The total acquisition costs are not allowable as indirect costs during the period acquired.''

Response: This section was clarified. It now says that capital expenditures which are not authorized to be charged directly to an award may be recovered through use allowances or depreciation.

Comment: The impact of depreciation as proposed in the Circular would shift costs to the governmental unit, not make any provision for the time value of money, increase administrative costs to track resulting depreciation schedules, and erode the partner relationship between Federal agencies and governmental units.

Response: The accounting treatment for depreciation as prescribed by the Circular is based on GAAP. Further, the provisions ensure that the Federal Government pays its fair share of costs, including interest on financing.

Fund Raising and Investment Management Costs

Comment: It is not clear whether costs related to raising funds from employees within an organization for charitable activities, such as the United Way, would be allowable since the Circular disallows fund raising costs.

Response: Generally, the prohibition on fund raising activities covered by the Circular is for those activities where the governmental unit raises funds for its own use. Incidental fund raising from an organization's own employees for charitable organizations, such as the United Way, is considered part of normal operating expenses and, therefore, allowable.

Gains and Losses on Disposition of Depreciable Property and Other Capital Assets and Substantial Relocation of Federal Programs

Comment: The provisions which would require governmental units to reimburse the Federal Government when Federal awards were relocated from facilities where the Federal Government participated in the financing is inappropriate.

Response: This section was amended. It now requires governmental units to obtain prior approval from the cognizant agency for substantial relocations of Federal awards from buildings for which the Federal Government participated in the financing.

Insurance and Indemnification

Comment: It is not apparent why provisions for liabilities, which do not become payable for more than one year after a self insurance provision is made, are limited to the discounted value of the liability.

Response: This requirement is designed to cover only those cases where the amount of the liability is firm or reasonably certain. This provision helps to avoid excessive reserve balances for the current fiscal year. It limits current year premiums to the present value of the future (known or reasonably certain) liability. When that future liability becomes due, prior years premiums plus earnings (i.e., interest or investment income) from those premiums will be available to satisfy that debt.

Comment: The Circular states that self-insurance reserves must be based on sound actuarial principles using the most likely assumptions. This seems to be an attempt to limit sound actuarial principles.

Response: This language was not intended to restrict sound actuarial principles. The language was changed to clarify that sound actuarial assumptions should recognize actual past, as well as probable future, events when determining premiums and reserve levels.

Interest

Comment: Interest expense should be allowable not only for building modifications, as provided in the 1981 revision of Circular A–87, but also for acquisitions of equipment made prior to the issuance date of the revised Circular. The proposed provision is objectionable because it would require dual records and impose an unreasonable and unnecessary administrative burden on State and local governments.

Response: The provision was rewritten to allow interest expense paid or incurred on or after the revised Circular's effective date to be charged to Federal awards for existing as well as newly-acquired equipment.

Historically, OMB has not allowed interest on debt issued prior to the effective date of an interest policy revision (pre-revision debt). In 1980, OMB allowed State and local governments interest on debt issued to acquire buildings, but not on pre-revision debt (45 FR 27363). In 1982, in a revision to Circular A–21, ''Cost Principles for Educational Institutions,'' OMB allowed interest on debt issued to acquire buildings and equipment, but not on pre-revision debt (47 FR 33658). In 1994, in a proposed revision to Circular A–122, ''Cost Principles for Non-Profit Organizations,'' OMB proposed to allow interest debt issued to acquire buildings and equipment, but not on pre-revision debt (59 FR 49091).

In view of the fact that pre-revision debt was incurred with full knowledge of the cost policy that was in effect at that time, OMB does not believe that grantees should expect the Federal Government to allow interest on this debt without such a decision being cost-justified from the Federal Government's perspective. OMB believes the Federal Government should only allow interest on pre-revision debt when the cost of maintaining dual records on pre-revision and post-revision assets and related debt (all or a portion of these recordkeeping costs are chargeable to the Federal programs as administrative costs) is less than the interest cost on pre-revision debt.

With respect to debt incurred to purchase buildings, OMB believes that the cost of maintaining dual records is cost-justified in view of the limited number of buildings and debt issues for which separate records would have to be maintained, and the substantial interest cost associated with long term debt used to finance buildings. Thus, as OMB has previously explained, ''[a]applying the new rules to old buildings would appear to provide a windfall recovery, and might drive up overhead costs of federally assisted programs'' (47 FR 33658, also see 45 FR 27363).

Equipment acquired by State and local governments (except computers), while substantial in terms of the number of pieces, is relatively nominal in cost and has a relatively short life span. As a result, the outstanding interest on debt issued to finance this equipment is relatively nominal. Moreover, State and local governments would still bear the major share of the financing costs, even if pre-revision debt were allowable. By contrast, the cost of maintaining dual records for a large number of items and related debt would likely be substantial. Given the different balance between administrative and interest costs, OMB has decided that, in this instance, the administrative costs associated with maintaining separate records to track pre-revision and post-revision debt is not cost-justifiable from the Federal Government's perspective.

The basis for the allowance of pre-revision debt for equipment of State and local governments is consistent with the basis for OMB's treatment of such debt for educational institutions (in 1982) and OMB's proposed treatment of such

debt for non-profit organizations (in 1994). The cost of equipment acquired by educational institutions and non-profit organizations through debt financing can be significant (e.g., over $650,000 for x-ray crystallography equipment, $348,000 for a vantage flow cytometer for high speed cell analysis, and $265,000 for an electron microscope). Equipment of this type and related debt has a longer life, and in turn, significantly higher interest cost. Moreover, as with buildings, there are only a limited number of pieces of such equipment, which reduces the administrative costs of dual records. Given the amount of interest involved in the financing of these assets compared with the relatively nominal administrative burden associated with maintaining dual records, OMB believes the cost of maintaining dual records is justifiable.

Comment: The requirement for a governmental unit to document, as part of its decisionmaking process, that capital leasing is the most economical option does not belong in Circular A–87.

Response: The requirement for lease analysis as part of the governmental unit's decisionmaking process and its proper documentation is addressed in the Grants Management Common Rule under Section ____.36(b)(4). This requirement is not addressed in Circular A–87.

Comment: Governmental units would not recover their full costs because of provisions in the Circular which provide that a credit is due the Federal Government when Federal payments for interest, depreciation, use charges and other contributions for building use exceed the interest and principal payments made by the government (positive cash flow).

Response: OMB deleted the provisions in the Circular which would require credits under the conditions described above. However, governmental units will be required to negotiate the amount of allowable interest whenever cash payments (interest, use allowances, depreciation and contributions) exceed governmental unit cash payments and other governmental unit contributions. OMB will study this matter further to ensure fair and equitable policies are established for the States and the Federal Government.

Memberships, Subscriptions, and Professional Activities

Comment: Membership costs in some civic and community organizations should be allowable when the purpose is to promote services provided by the Federal award.

Response: The language has been revised to allow memberships in civic and community organizations as a direct cost with the prior approval of the Federal awarding agency.

Professional Service Costs

Comment: Simplify the section on professional service costs by eliminating the factors to consider in determining the allowability of professional service costs.

Response: Eight subsections listing the factors were deleted.

Proposal Costs

Comment: It is not clear why proposal costs should normally be treated as indirect costs and allocated to all activities. Such costs should be treated as direct costs if they can be identified with a specific award.

Response: OMB added a provision to allow governmental units to charge proposal costs directly to a Federal award with the prior approval of the Federal awarding agency.

Taxes

Comment: If OMB adopts the proposed revision affecting sales tax reimbursement, the revision should become effective at some later date to allow time to change State and local laws.

Response: OMB agrees that there should be a phase-in period. The Circular allows governmental units three years to phase-in the change.

Comment: If the sales tax proposal were adopted, it would become a burden to separately account for State sales taxes paid on Federal grant purchases.

Response: The Circular allows reasonable approximations to be used where the identification of the actual amount of unallowed taxes would require an inordinate amount of effort.

Comment: State sales taxes should be allowable when a governmental unit is in a position that makes exclusion administratively impossible, i.e., when employees in travel status must pay sales taxes upon receipt of goods and services.

Response: States should attempt a reasonable approximation.

Comment: Some State and local governments and Indian Tribal governments would lose substantial amounts of revenue if sales taxes were not chargeable to purchases made in connection with federally-funded programs.

Response: The intention of the tax provision is to address State or local government taxes, or changes in tax policy, that disproportionately affect a federally-funded program. Under the Circular, such taxes are unallowable. (As explained in the next comment-and-response, where a Federal statute prescribes a different treatment for taxes, that statute controls.)

For example, a tax would disproportionately affect a Federal program if the tax were defined or applied so that it was imposed only in connection with that program, or only in connection with Federal programs generally. Another example would be if a sales tax were imposed on a good or service that in practice is used solely or disproportionately in connection with Federal programs. These examples are for illustration, and are not meant to be exclusive. Whether a particular tax, or change in tax policy, would disproportionately affect a Federal program will have to be determined based on a review of the tax and the Federal programs in question.

When a governmental unit pays a tax to itself, that self-assessed tax is not a true cost to the governmental unit. Especially where a self-assessed tax disproportionately affects a Federal program, it is not appropriate for the governmental unit to be able to characterize that tax as a ''cost'' of its participation in the Federal program. If such disproportionate, self-assessed taxes were treated as allowable, even though they disproportionately affect Federal programs, governmental units could define or apply taxes in such a way that their net impact would largely be to increase the Federal Government's contribution, rather than to raise revenues from the taxpayer. To the extent that making such taxes unallowable would result in a loss of Federal assistance awards, the Circular allows three years for governmental units to phase-out any existing taxes that disproportionately affect Federal programs. (For the larger formula grant programs, the disallowance of such taxes would not result in any loss of Federal assistance awards; the funds which are now used to pay self-assessed taxes could be used to further the objectives of the Federal assistance.)

Comment: The proposed revision on sales taxes is directly contrary to the legislative intent of Public Law 102–234, ''Medicaid Voluntary Contributions and Provider Specific Tax Amendments of 1991.'' The proposal should be revised to preclude its application to broad-based health care related taxes paid by public entities.

Response: The Circular would not take precedence over a statute. If any statute specifically prescribes policies

and specific requirements that differ from the Circular, the statute will govern.

Comment: State sales taxes collected by another level of government should be exempt from the provisions of the Circular.

Response: As noted above, the Circular's disallowance is directed at self-assessed taxes. Thus, if a local government receives an award directly from the Federal Government, and pays a State sales tax on purchases made in connection with that award, the tax is an allowable cost. (However, as previously noted, the Circular does not restrict the authority of Federal agencies to identify taxes where Federal participation is inappropriate.)

However, if the local government does not receive the award directly from the Federal Government, but instead receives the award indirectly by virtue of a State pass-through, then the sales tax that the local government pays the State is in reality a self-assessed tax, which would be unallowable if the tax disproportionately affects a Federal program.

Comment: It is not clear whether the prohibition on payment of sales taxes applies to out-of-state sales tax.

Response: Since they are not self-assessed, taxes assessed by other States, or political subdivisions of other States, are not unallowable under the Circular. (However, as previously noted, the Circular does not restrict the authority of Federal agencies to identify taxes where Federal participation is inappropriate.)

Travel Costs

Comment: Airfare costs in excess of the lowest available commercial discount fare are unallowable. With today's confusing array of super savers and fare wars, the burden involved in proving the lowest airfare would be considerable.

Response: The travel provisions were changed to say travel costs in excess of the customary standard (coach or equivalent) airfare are unallowable.

State/Local-Wide Central Service Cost Allocation Plans—Attachment C

Comment: Working capital reserves in many cases should not be limited to 60 days cash expenses. Time consuming collections, uneven usage levels, and unanticipated demand for services are some of the reasons for authorizing a larger reserve.

Response: OMB believes the 60 day reserve should provide the flexibility required by most funds to operate from one billing cycle to the next. However, the Circular was amended to provide for a larger reserve in exceptional cases when approved by the cognizant Federal agency.

Comment: The Circular should not restrict governmental units from engaging an accounting firm to prepare an indirect cost proposal and then engaging the same firm to make subsequent audits.

Response: This provision was deleted from the Circular. This issue will be addressed as part of OMB policy changes to other OMB grants management circulars.

Comment: What are the criteria OMB uses for making cognizant assignments and for defining ''major governments''?

Response: OMB is in the process of reviewing the cognizant assignments for governmental units. Only governmental units receiving substantial amounts of direct Federal assistance will be assigned a Federal cognizant agency and be required to submit plans to those cognizant agencies. Because the mix of Federal awards has changed so much since the last list was issued, OMB needs to develop a new dollar criterion for defining ''major.''

Comment: States and other prime grantees should not be required to monitor subrecipient cost allocation plans and/or negotiate sub-recipient indirect costs.

Response: The grants management common rule requires governmental units to monitor subawards to assure compliance with applicable Federal requirements. These requirements include compliance with the cost principles. In those cases where the subrecipient does not receive any Federal awards directly from the Federal Government, Federal agencies would not have any direct responsibility for negotiating indirect costs.

Comment: Attachment C, Section E states that ''The documentation requirements in this section may be modified, expanded, or reduced by the cognizant agency on a case-by-case basis.'' This specific sentence might allow a Federal cognizant agency to unreasonably and unilaterally expand the documentation requirements.

Response: Federal agencies should have the flexibility to obtain additional data, when necessary. However, OMB agrees that this type of request should be the exception rather than the rule.

Comment: Documentation for internal service funds seems excessive since these areas are audited. This documentation is more appropriately included in a State or local government's financial statements and work papers for the fiscal year rather than in the entity's cost allocation plan.

Response: OMB amended this section to require only the largest funds to submit data. If the required data are included in the governmental unit's financial statements, submission of the financial statements to the Federal cognizant agency will meet the requirements of the Circular.

Comment: OMB proposed to add provisions requiring the certification of cost allocation plans and of indirect cost rates (see preamble (58 FR 44218); Attachment C, Section E.4 (58 FR 44229); Attachment D, Section D.3 (58 FR 44230–31); and Attachment E, Section D.3 (58 FR 44233)). States objected to the inclusion of the phrase ''under penalty of perjury'' in the proposed certification. They contended that the phrase is unnecessary.

Response: OMB has decided to amend the Circular to add the proposed certifications, but OMB has accepted the commenters' suggestion that the phrase ''under penalty of perjury'' not be included in the certifications. OMB believes that, when the Federal Government is dealing with State and local governments, it is unnecessary to require that the certifying government official sign a certification stating that it is made ''under penalty of perjury.'' State and local officials should not conclude, however, that the omission of the phrase ''under penalty of perjury'' means that no potential legal liability is associated with a certification's submission. In this regard, note the provision in Federal law imposing criminal penalties for ''false, fictitious or fraudulent statements or representations'' (18 U.S.C. 1001). The Department of Justice is responsible for enforcing this provision (and other laws regarding false statements and claims). OMB expresses no opinion concerning the potential legal liabilities that are associated with making the certifications in the revised Circular.

Comment: Restricting the authority to reopen Central Service Plans to the Federal cognizant agency is inequitable.

Response: This section was changed to state that agreements may be subject to reopening only if the agreement is subsequently found to violate a statute or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate.

Comment: GAAP for State and local governments do not require internal service activities to be accounted for and reported in proprietary accounts.

Response: The requirement for internal service activities to be accounted for in proprietary accounts was deleted.

Comment: Remove the requirement that a carry forward adjustment is not

permitted for a central service activity that was not included in the approved plan.

Response: The carry forward technique was intended to permit adjustments for differences between actual and estimated costs of services included in a cost allocation plan. It was not intended to shift the entire cost of an activity excluded from the year of the plan to a future year. There may be circumstances where a change to the plan should be considered (e.g., the service did not exist when the plan was established and was initiated during the year covered by the plan). This type of amendment should modify the plan itself and would not be handled through a carry forward adjustment.

Comment: Adjustments of billed services do not provide a workable solution for the larger central services of the States. The dollar limitation of $50,000 for making adjustments through allocated central services is too low.

Response: This section was rewritten to provide governmental units more options and flexibility in making adjustments to Federal awards.

Public Assistance Cost Allocation Plans—Attachment D

Comment: The public assistance cost allocation plans are narrative descriptions of cost allocation procedures rather than allocations of actual costs. The provisions dealing with refunds or adjustments related to unallowable costs and the certification of cost allowability do not appear appropriate.

Response: The certification and the provisions dealing with refunds and adjustments were deleted.

State and Local Indirect Cost Rate Proposals—Attachment E

Comment: The Circular is silent on the time period for use of predetermined rates.

Response: The Circular was amended to encourage the use of indirect cost rates for a period of two to four years.

Comment: Governmental units should notify the Federal Government of any accounting changes that might make it necessary to renegotiate the predetermined rate.

Response: A provision was added to the certification which requires the governmental unit to notify the Federal Government of any accounting changes that would effect the application of the predetermined rate.

C. Procurement Issues

Several procurement issues arose during the Federal Government's internal review process. This section clarifies the procurement issues.

Effective Date for Governmental Units With Predetermined Rates Beyond September 1, 1995

For a governmental unit that already has established indirect cost rates beyond September 1, 1995, the effective date of the revised Circular shall be at the start of the next accounting period beginning on or after September 1, 1995, for which the governmental unit has not yet established a predetermined indirect cost rate.

Depreciation Method(s) for CAS-Covered Contracts

CAS-covered contracts subject to ''full coverage'' under CASB shall follow the standards promulgated by CASB in the computation of depreciation.

Allowability of Interest Expenses for CAS-Covered Contracts

For contracts subject to CAS 414 (48 CFR 9903.414, cost of money as an element of the cost of capital), and CAS 417 (48 CFR 9903.417, cost of money as an element of the cost of capital assets under construction), the imputed cost of money determined allocable in accordance with CAS 414 and 417 may be claimed as an allowable cost. When cost of money is claimed, interest shall not be an allowable direct or indirect cost under such contracts.

D. Federal Acquisition Streamline Act

The Federal Acquisition Streamlining Act (FASA) of 1994, enacted on October 13, 1994, amended Section 306(e) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256, Public Law 103–355, Section 2151, 108 Stat. 3309–12), to specify certain items of costs as not allowable under Federal covered contracts. OMB is undertaking a review of these FASA provisions, for the purpose of determining whether the unallowable cost provisions of Circular A–87, and of OMB's other cost principles circulars, should be amended in light of the FASA provisions on unallowable costs. If OMB ultimately concludes that amendments may be appropriate, OMB will issue a proposal seeking public comment on the proposed revisions.

John B. Arthur,

Associate Director for Administration.

Executive Office of The President

Office of Management and Budget

Washington, DC 20503

May 4, 1995.

Circular No. A–87 Revised

To the Heads of Executive Departments and Establishments

From: Alice M. Rivlin, Director

Subject: Cost Principles for State, Local, and Indian Tribal Governments

1. *Purpose.* This Circular establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and federally-recognized Indian tribal governments (governmental units).

2. *Authority.* This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; the Chief Financial Officers Act of 1990; Reorganization Plan No. 2 of 1970; and Executive Order No. 11541 (''Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President'').

3. *Background.* An interagency task force was established in 1987 to review existing cost principles for Federal awards to State, local, and Indian tribal governments. The task force studied Inspector General reports and recommendations, solicited suggestions for changes to the Circular from governmental units, and compared for consistency the provisions of other OMB cost principles circulars covering non-profit organizations and universities. A proposed revised Circular reflecting the results of those efforts was issued on October 12, 1988, and August 19, 1993. Extensive comments on the proposed revisions, discussions with interest groups, and related developments were considered in developing this revision.

4. *Rescissions.* This Circular rescinds and supersedes Circular A–87, issued January 15, 1981.

5. *Policy.* This Circular establishes principles and standards to provide a uniform approach for determining costs and to promote effective program delivery, efficiency, and better relationships between governmental units and the Federal Government. The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award. Provision for profit or other increment above cost is outside the scope of this Circular.

6. *Definitions.* Definitions of key terms used in this Circular are contained in Attachment A, Section B.

7. *Required Action.* Agencies responsible for administering programs that involve cost reimbursement contracts, grants, and other agreements with governmental units shall

issue codified regulations to implement the provisions of this Circular and its Attachments by September 1, 1995.

8. *OMB Responsibilities.* The Office of Management and Budget (OMB) will review agency regulations and implementation of this Circular, and will provide policy interpretations and assistance to insure effective and efficient implementation. Any exceptions will be subject to approval by OMB. Exceptions will only be made in particular cases where adequate justification is presented.

9. *Information Contact.* Further information concerning this Circular may be obtained by contacting the Office of Federal Financial Management, Financial Standards and Reporting Branch, Office of Management and Budget, Washington, DC 20503, telephone 202–395–3993.

10. *Policy Review Date.* OMB Circular A–87 will have a policy review three years from the date of issuance.

11. *Effective Date.* This Circular is effective as follows:

—For costs charged indirectly or otherwise covered by the cost allocation plans described in Attachments C, D and E, this revision shall be applied to cost allocation plans and indirect cost proposals submitted or prepared for a governmental unit's fiscal year that begins on or after September 1, 1995.

—For other costs, this revision shall be applied to all awards or amendments, including continuation or renewal awards, made on or after September 1, 1995.

OMB Circular No. A–87—Cost Principles for State, Local and Indian Tribal Governments

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A. Purpose and Scope

1. *Objectives.* This Attachment establishes principles for determining the allowable costs incurred by State, local, and federally-recognized Indian tribal governments (governmental units) under grants, cost reimbursement contracts, and other agreements with the Federal Government (collectively referred to in this Circular as ''Federal awards''). The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal or governmental unit participation in the financing of a particular program or project. The principles are designed to provide that Federal awards bear their fair share of cost recognized under these principles except where restricted or prohibited by law. Provision for profit or other increment above cost is outside the scope of this Circular.

2. *Policy guides.*

a. The application of these principles is based on the fundamental premises that:

(1) Governmental units are responsible for the efficient and effective administration of Federal awards through the application of sound management practices.

(2) Governmental units assume responsibility for administering Federal funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the Federal award.

(3) Each governmental unit, in recognition of its own unique combination of staff, facilities, and experience, will have the primary responsibility for employing whatever form of organization and management techniques may be necessary to assure proper and efficient administration of Federal awards.

b. Federal agencies should work with States or localities which wish to test alternative mechanisms for paying costs for administering Federal programs. The Office of Management and Budget (OMB) encourages Federal agencies to test fee-for-service alternatives as a replacement for current cost-reimbursement payment methods in response to the National Performance Review's (NPR) recommendation. The NPR recommended the fee-for-service approach to reduce the burden associated with maintaining systems for charging administrative costs to Federal programs and preparing and approving cost allocation plans. This approach should also increase incentives for administrative efficiencies and improve outcomes.

3. *Application.*

a. These principles will be applied by all Federal agencies in determining costs incurred by governmental units under Federal awards (including subawards) except those with (1) Publicly-financed educational institutions subject to OMB Circular A–21, ''Cost Principles for Educational Institutions,'' and (2) programs administered by publicly-owned hospitals and other providers of medical care that are subject to requirements promulgated by the sponsoring Federal agencies. However, this Circular does apply to all central service and department/agency costs that are allocated or billed to those educational institutions, hospitals, and other providers of medical care or services by other State and local government departments and agencies.

b. All subawards are subject to those Federal cost principles applicable to the particular organization concerned. Thus, if a subaward is to a governmental unit (other than a college, university or hospital), this Circular shall apply; if a subaward is to a commercial organization, the cost principles applicable to commercial organizations shall apply; if a subaward is to a college or university, Circular A–21 shall apply; if a subaward is to a hospital, the cost principles used by the Federal awarding agency for awards to hospitals shall apply, subject to the provisions of subsection A.3.a. of this Attachment; if a subaward is to some other non-profit organization, Circular A–122, ''Cost Principles for Non-Profit Organizations,'' shall apply.

c. These principles shall be used as a guide in the pricing of fixed price arrangements where costs are used in determining the appropriate price.

d. Where a Federal contract awarded to a governmental unit incorporates a Cost Accounting Standards (CAS) clause, the requirements of that clause shall apply. In such cases, the governmental unit and the cognizant Federal agency shall establish an appropriate advance agreement on how the governmental unit will comply with applicable CAS requirements when estimating, accumulating and reporting costs under CAS-covered contracts. The agreement shall indicate that OMB Circular A–87 requirements will be applied to other Federal awards. In all cases, only one set of records needs to be maintained by the governmental unit.

B. Definitions

1. ''Approval or authorization of the awarding or cognizant Federal agency'' means documentation evidencing consent prior to incurring a specific cost. If such costs are specifically identified in a Federal award document, approval of the document constitutes approval of the costs. If the costs are covered by a State/local-wide cost allocation plan or an indirect cost proposal, approval of the plan constitutes the approval.

2. ''Award'' means grants, cost reimbursement contracts and other agreements between a State, local and Indian tribal government and the Federal Government.

3. ''Awarding agency'' means (a) with respect to a grant, cooperative agreement, or cost reimbursement contract, the Federal agency, and (b) with respect to a subaward, the party that awarded the subaward.

4. ''Central service cost allocation plan'' means the documentation identifying, accumulating, and allocating or developing billing rates based on the allowable costs of services provided by a governmental unit on a centralized basis to its departments and agencies. The costs of these services may be allocated or billed to users.

5. ''Claim'' means a written demand or written assertion by the governmental unit or grantor seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of award terms, or other relief arising under or relating to the award. A voucher, invoice or other routine request for payment that is not a dispute when submitted is not a claim. Appeals, such as those filed by a governmental unit in response to questioned audit costs, are not considered claims until a final management decision is made by the Federal awarding agency.

6. ''Cognizant agency'' means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this Circular on behalf of all Federal agencies. OMB publishes a listing of cognizant agencies.

7. ''Common Rule'' means the ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments; Final Rule'' originally issued at 53 FR 8034–8103 (March 11, 1988). Other common rules will be referred to by their specific titles.

8. ''Contract'' means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to): awards and notices of awards; job orders or task orders issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and, bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301 et seq.

9. ''Cost'' means an amount as determined on a cash, accrual, or other basis acceptable to the Federal awarding or cognizant agency. It does not include transfers to a general or similar fund.

10. ''Cost allocation plan'' means central service cost allocation plan, public assistance cost allocation plan, and indirect cost rate proposal. Each of these terms are further defined in this section.

11. ''Cost objective'' means a function, organizational subdivision, contract, grant, or other activity for which cost data are needed and for which costs are incurred.

12. ''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 through the Bureau of Indian Affairs.

13. ''Governmental unit'' means the entire State, local, or federally-recognized Indian tribal government, including any component thereof. Components of governmental units may function independently of the governmental unit in accordance with the term of the award.

14. ''Grantee department or agency'' means the component of a State, local, or federally-recognized Indian tribal government which is responsible for the performance or administration of all or some part of a Federal award.

15. ''Indirect cost rate proposal'' means the documentation prepared by a governmental unit or component thereof to substantiate its request for the establishment of an indirect cost rate as described in Attachment E of this Circular.

16. ''Local government'' means a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (whether or not incorporated as a non-profit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

17. ''Public assistance cost allocation plan'' means a narrative description of the procedures that will be used in identifying, measuring and allocating all administrative costs to all of the programs administered or supervised by State public assistance agencies as described in Attachment D of this Circular.

18. ''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.

C. Basic Guidelines

1. *Factors affecting allowability of costs.* To be allowable under Federal awards, costs must meet the following general criteria:

a. Be necessary and reasonable for proper and efficient performance and administration of Federal awards.

b. Be allocable to Federal awards under the provisions of this Circular.

c. Be authorized or not prohibited under State or local laws or regulations.

d. Conform to any limitations or exclusions set forth in these principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amounts of cost items.

e. Be consistent with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit.

f. Be accorded consistent treatment. A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like

circumstances has been allocated to the Federal award as an indirect cost.

g. Except as otherwise provided for in this Circular, be determined in accordance with generally accepted accounting principles.

h. Not be included as a cost or used to meet cost sharing or matching requirements of any other Federal award in either the current or a prior period, except as specifically provided by Federal law or regulation.

i. Be the net of all applicable credits.

j. Be adequately documented.

2. *Reasonable costs.* A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally-funded. In determining reasonableness of a given cost, consideration shall be given to:

a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.

b. The restraints or requirements imposed by such factors as: sound business practices; arms length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award.

c. Market prices for comparable goods or services.

d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.

e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

3. *Allocable costs.*

a. A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received.

b. All activities which benefit from the governmental unit's indirect cost, including unallowable activities and services donated to the governmental unit by third parties, will receive an appropriate allocation of indirect costs.

c. Any cost allocable to a particular Federal award or cost objective under the principles provided for in this Circular may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by law or terms of the Federal awards, or for other reasons. However, this prohibition would not preclude governmental units from shifting costs that are allowable under two or more awards in accordance with existing program agreements.

d. Where an accumulation of indirect costs will ultimately result in charges to a Federal award, a cost allocation plan will be required as described in Attachments C, D, and E.

4. *Applicable credits.*

a. Applicable credits refer to those receipts or reduction of expenditure-type transactions that offset or reduce expense items allocable to Federal awards as direct or indirect costs. Examples of such transactions are: purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds or rebates, and adjustments of overpayments or erroneous charges. To the extent that such credits accruing to or received by the governmental unit relate to allowable costs, they shall be credited to the Federal award either as a cost reduction or cash refund, as appropriate.

b. In some instances, the amounts received from the Federal Government to finance activities or service operations of the governmental unit should be treated as applicable credits. Specifically, the concept of netting such credit items (including any amounts used to meet cost sharing or matching requirements) should be recognized in determining the rates or amounts to be charged to Federal awards. (See Attachment B, item 15, ''Depreciation and use allowances,'' for areas of potential application in the matter of Federal financing of activities.)

D. Composition of Cost

1. *Total cost.* The total cost of Federal awards is comprised of the allowable direct cost of the program, plus its allocable portion of allowable indirect costs, less applicable credits.

2. *Classification of costs.* There is no universal rule for classifying certain costs as either direct or indirect under every accounting system. A cost may be direct with respect to some specific service or function, but indirect with respect to the Federal award or other final cost objective. Therefore, it is essential that each item of cost be treated consistently in like circumstances either as a direct or an indirect cost. Guidelines for determining direct and indirect costs charged to Federal awards are provided in the sections that follow.

E. Direct Costs

1. *General.* Direct costs are those that can be identified specifically with a particular final cost objective.

2. *Application.* Typical direct costs chargeable to Federal awards are:

a. Compensation of employees for the time devoted and identified specifically to the performance of those awards.

b. Cost of materials acquired, consumed, or expended specifically for the purpose of those awards.

c. Equipment and other approved capital expenditures.

d. Travel expenses incurred specifically to carry out the award.

3. *Minor items.* Any direct cost of a minor amount may be treated as an indirect cost for reasons of practicality where such accounting treatment for that item of cost is consistently applied to all cost objectives.

F. Indirect Costs

1. *General.* Indirect costs are those: (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. The term ''indirect costs,'' as used herein, applies to costs of this type originating in the grantee department, as well as those incurred by other departments in supplying goods, services, and facilities. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect costs within a governmental unit department or in other agencies providing services to a governmental unit department. Indirect cost pools should be distributed to benefitted cost objectives on bases that will produce an equitable result in consideration of relative benefits derived.

2. *Cost allocation plans and indirect cost proposals.* Requirements for development and submission of cost allocation plans and indirect cost rate proposals are contained in Attachments C, D, and E.

3. *Limitation on indirect or administrative costs.*

a. In addition to restrictions contained in this Circular, there may be laws that further limit the amount of administrative or indirect cost allowed.

b. Amounts not recoverable as indirect costs or administrative costs under one Federal award may not be shifted to another Federal award, unless specifically authorized by Federal legislation or regulation.

G. Interagency Services

The cost of services provided by one agency to another within the governmental unit may include allowable direct costs of the service plus a pro rate share of indirect costs. A standard indirect cost allowance equal to ten percent of the direct salary and wage cost of providing the service (excluding overtime, shift premiums, and fringe benefits) may be used in lieu of determining the actual indirect costs of the service. These services do not include centralized services included in central service cost allocation plans as described in Attachment C.

H. Required Certifications

Each cost allocation plan or indirect cost rate proposal required by Attachments C and E must comply with the following:

1. No proposal to establish a cost allocation plan or an indirect cost rate, whether submitted to a Federal cognizant agency or maintained on file by the governmental unit, shall be acceptable unless such costs have been certified by the governmental unit using the Certificate of Cost Allocation Plan or Certificate of Indirect Costs as set forth in Attachments C and E. The certificate must be signed on behalf of the governmental unit by an individual at a level no lower than chief financial officer of the governmental unit that submits the proposal or component covered by the proposal.

2. No cost allocation plan or indirect cost rate shall be approved by the Federal Government unless the plan or rate proposal has been certified. Where it is necessary to establish a cost allocation plan or an indirect cost rate and the governmental unit has not submitted a certified proposal for establishing such a plan or rate in accordance with the requirements, the Federal Government may either disallow all indirect costs or unilaterally establish such a plan or rate. Such a plan or rate may be based upon audited historical data or such other data that have been furnished to the cognizant Federal agency and for which it can be demonstrated that all unallowable costs have been excluded. When a cost allocation plan or indirect cost rate is unilaterally established by the Federal Government because of failure of the governmental unit to submit a certified proposal, the plan or rate established will be set to ensure that potentially unallowable costs will not be reimbursed.

Attachment B—Selected Items of Cost

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41. Travel costs
42. Underrecovery of costs under Federal agreements

Sections 1 through 42 provide principles to be applied in establishing the allowability or unallowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. A cost is allowable for Federal reimbursement only to the extent of benefits received by Federal awards and its conformance with the general policies and principles stated in Attachment A to this Circular. Failure to mention a particular item of cost in these sections is not intended to imply that it is either allowable or unallowable; rather, determination of allowability in each case should be based on the treatment or standards provided for similar or related items of cost.

1. *Accounting.* The cost of establishing and maintaining accounting and other information systems is allowable.

2. *Advertising and public relations costs.*

a. The term ''advertising costs'' means the costs of advertising media and corollary administrative costs. Advertising media include magazines, newspapers, radio and television programs, direct mail, exhibits, and the like.

b. The term ''public relations'' includes community relations and means those activities dedicated to maintaining the image of the governmental unit or maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public.

c. Advertising costs are allowable only when incurred for the recruitment of personnel, the procurement of goods and services, the disposal of surplus materials, and any other specific purposes necessary to meet the requirements of the Federal award. Advertising costs associated with the disposal of surplus materials are not allowable where all disposal costs are reimbursed based on a standard rate as specified in the grants management common rule.

d. Public relations costs are allowable when:

(1) Specifically required by the Federal award and then only as a direct cost;

(2) Incurred to communicate with the public and press pertaining to specific activities or accomplishments that result from performance of the Federal award and then only as a direct cost; or

(3) Necessary to conduct general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed on matters of public concern, such as notices of Federal contract/grant awards, financial matters, etc.

e. Unallowable advertising and public relations costs include the following:

(1) All advertising and public relations costs other than as specified in subsections c. and d.;

(2) Except as otherwise permitted by these cost principles, costs of conventions, meetings, or other events

related to other activities of the governmental unit including:

(a) Costs of displays, demonstrations, and exhibits;

(b) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and

(c) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings;

(3) Costs of promotional items and memorabilia, including models, gifts, and souvenirs; and

(4) Costs of advertising and public relations designed solely to promote the governmental unit.

3. *Advisory councils.* Costs incurred by advisory councils or committees are allowable as a direct cost where authorized by the Federal awarding agency or as an indirect cost where allocable to Federal awards.

4. *Alcoholic beverages.* Costs of alcoholic beverages are unallowable.

5. *Audit services.* The costs of audits are allowable provided that the audits were performed in accordance with the Single Audit Act, as implemented by Circular A–128, ''Audits of State and Local Governments.'' Generally, the percentage of costs charged to Federal awards for a single audit shall not exceed the percentage derived by dividing Federal funds expended by total funds expended by the recipient or subrecipient (including program matching funds) during the fiscal year. The percentage may be exceeded only if appropriate documentation demonstrates higher actual costs.

Other audit costs are allowable if specifically approved by the awarding or cognizant agency as a direct cost to an award or included as an indirect cost in a cost allocation plan or rate.

6. *Automatic electronic data processing.* The cost of data processing services is allowable (but see section 19, Equipment and other capital expenditures).

7. *Bad debts.* Any losses arising from uncollectible accounts and other claims, and related costs, are unallowable unless provided for in Federal program award regulations.

8. *Bonding costs.* Costs of bonding employees and officials are allowable to the extent that such bonding is in accordance with sound business practice.

9. *Budgeting.* Costs incurred for the development, preparation, presentation, and execution of budgets are allowable.

10. *Communications.* Costs of telephone, mail, messenger, and similar communication services are allowable.

11. *Compensation for personnel services.*

a. *General.* Compensation for personnel services includes all remuneration, paid currently or accrued, for services rendered during the period of performance under Federal awards, including but not necessarily limited to wages, salaries, and fringe benefits. The costs of such compensation are allowable to the extent that they satisfy the specific requirements of this Circular, and that the total compensation for individual employees:

(1) Is reasonable for the services rendered and conforms to the established policy of the governmental unit consistently applied to both Federal and non-Federal activities;

(2) Follows an appointment made in accordance with a governmental unit's laws and rules and meets merit system or other requirements required by Federal law, where applicable; and

(3) Is determined and supported as provided in subsection h.

b. *Reasonableness.* Compensation for employees engaged in work on Federal awards will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the governmental unit. In cases where the kinds of employees required for Federal awards are not found in the other activities of the governmental unit, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the employing government competes for the kind of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness.

c. *Unallowable costs.* Costs which are unallowable under other sections of these principles shall not be allowable under this section solely on the basis that they constitute personnel compensation.

d. *Fringe benefits.*

(1) Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave, employee insurance, pensions, and unemployment benefit plans. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable to the extent that the benefits are reasonable and are required by law, governmental unit-employee agreement, or an established policy of the governmental unit.

(2) The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, holidays, court leave, military leave, and other similar benefits, are allowable if: (a) they are provided under established written leave policies; (b) the costs are equitably allocated to all related activities, including Federal awards; and, (c) the accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the governmental unit.

(3) When a governmental unit uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable in the year of payment provided they are allocated as a general administrative expense to all activities of the governmental unit or component.

(4) The accrual basis may be only used for those types of leave for which a liability as defined by Generally Accepted Accounting Principles (GAAP) exists when the leave is earned. When a governmental unit uses the accrual basis of accounting, in accordance with GAAP, allowable leave costs are the lesser of the amount accrued or funded.

(5) The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in section 25, Insurance and indemnification); pension plan costs (see subsection e.); and other similar benefits are allowable, provided such benefits are granted under established written policies. Such benefits, whether treated as indirect costs or as direct costs, shall be allocated to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities.

e. *Pension plan costs.* Pension plan costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the governmental unit.

(1) For pension plans financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) Pension costs calculated using an actuarial cost-based method recognized by GAAP are allowable for a given fiscal year if they are funded for that year

within six months after the end of that year. Costs funded after the six month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The cognizant agency may agree to an extension of the six month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursement and the governmental unit's contribution to the pension fund. Adjustments may be made by cash refund or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the pension fund.

(3) Amounts funded by the governmental unit in excess of the actuarially determined amount for a fiscal year may be used as the governmental unit's contribution in future periods.

(4) When a governmental unit converts to an acceptable actuarial cost method, as defined by GAAP, and funds pension costs in accordance with this method, the unfunded liability at the time of conversion shall be allowable if amortized over a period of years in accordance with GAAP.

(5) The Federal Government shall receive an equitable share of any previously allowed pension costs (including earnings thereon) which revert or inure to the governmental unit in the form of a refund, withdrawal, or other credit.

f. Post-retirement health benefits. Post-retirement health benefits (PRHB) refers to costs of health insurance or health services not included in a pension plan covered by subsection e. for retirees and their spouses, dependents, and survivors. PRHB costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written polices of the governmental unit.

(1) For PRHB financed on a pay as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) PRHB costs calculated using an actuarial cost method recognized by GAAP are allowable if they are funded for that year within six months after the end of that year. Costs funded after the six month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The cognizant agency may agree to an extension of the six month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursements and the governmental unit's contributions to the PRHB fund. Adjustments may be made by cash refund, reduction in current year's PRHB costs, or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the PRHB fund.

(3) Amounts funded in excess of the actuarially determined amount for a fiscal year may be used as the government's contribution in a future period.

(4) When a governmental unit converts to an acceptable actuarial cost method and funds PRHB costs in accordance with this method, the initial unfunded liability attributable to prior years shall be allowable if amortized over a period of years in accordance with GAAP, or, if no such GAAP period exists, over a period negotiated with the cognizant agency.

(5) To be allowable in the current year, the PRHB costs must be paid either to:

(a) An insurer or other benefit provider as current year costs or premiums, or

(b) An insurer or trustee to maintain a trust fund or reserve for the sole purpose of providing post-retirement benefits to retirees and other beneficiaries.

(6) The Federal Government shall receive an equitable share of any amounts of previously allowed post-retirement benefit costs (including earnings thereon) which revert or inure to the governmental unit in the form of a refund, withdrawal, or other credit.

g. *Severance pay.*

(1) Payments in addition to regular salaries and wages made to workers whose employment is being terminated are allowable to the extent that, in each case, they are required by (a) law, (b) employer-employee agreement, or (c) established written policy.

(2) Severance payments (but not accruals) associated with normal turnover are allowable. Such payments shall be allocated to all activities of the governmental unit as an indirect cost.

(3) Abnormal or mass severance pay will be considered on a case-by-case basis and is allowable only if approved by the cognizant Federal agency.

h. *Support of salaries and wages.* These standards regarding time distribution are in addition to the standards for payroll documentation.

(1) Charges to Federal awards for salaries and wages, whether treated as direct or indirect costs, will be based on payrolls documented in accordance with generally accepted practice of the governmental unit and approved by a responsible official(s) of the governmental unit.

(2) No further documentation is required for the salaries and wages of employees who work in a single indirect cost activity.

(3) Where employees are expected to work solely on a single Federal award or cost objective, charges for their salaries and wages will be supported by periodic certifications that the employees worked solely on that program for the period covered by the certification. These certifications will be prepared at least semi-annually and will be signed by the employee or supervisory official having first hand knowledge of the work performed by the employee.

(4) Where employees work on multiple activities or cost objectives, a distribution of their salaries or wages will be supported by personnel activity reports or equivalent documentation which meets the standards in subsection (5) unless a statistical sampling system (see subsection (6)) or other substitute system has been approved by the cognizant Federal agency. Such documentary support will be required where employees work on:

(a) More than one Federal award,

(b) A Federal award and a non-Federal award,

(c) An indirect cost activity and a direct cost activity,

(d) Two or more indirect activities which are allocated using different allocation bases, or

(e) An unallowable activity and a direct or indirect cost activity.

(5) Personnel activity reports or equivalent documentation must meet the following standards:

(a) They must reflect an after-the-fact distribution of the actual activity of each employee,

(b) They must account for the total activity for which each employee is compensated,

(c) They must be prepared at least monthly and must coincide with one or more pay periods, and

(d) They must be signed by the employee.

(e) Budget estimates or other distribution percentages determined before the services are performed do not qualify as support for charges to Federal awards but may be used for interim accounting purposes, provided that:

(i) The governmental unit's system for establishing the estimates produces reasonable approximations of the activity actually performed;

(ii) At least quarterly, comparisons of actual costs to budgeted distributions based on the monthly activity reports are made. Costs charged to Federal

awards to reflect adjustments made as a result of the activity actually performed may be recorded annually if the quarterly comparisons show the differences between budgeted and actual costs are less than ten percent; and

(iii) The budget estimates or other distribution percentages are revised at least quarterly, if necessary, to reflect changed circumstances.

(6) Substitute systems for allocating salaries and wages to Federal awards may be used in place of activity reports. These systems are subject to approval if required by the cognizant agency. Such systems may include, but are not limited to, random moment sampling, case counts, or other quantifiable measures of employee effort.

(a) Substitute systems which use sampling methods (primarily for Aid to Families with Dependent Children (AFDC), Medicaid, and other public assistance programs) must meet acceptable statistical sampling standards including:

(i) The sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided in subsection (c);

(ii) The entire time period involved must be covered by the sample; and

(iii) The results must be statistically valid and applied to the period being sampled.

(b) Allocating charges for the sampled employees' supervisors, clerical and support staffs, based on the results of the sampled employees, will be acceptable.

(c) Less than full compliance with the statistical sampling standards noted in subsection (a) may be accepted by the cognizant agency if it concludes that the amounts to be allocated to Federal awards will be minimal, or if it concludes that the system proposed by the governmental unit will result in lower costs to Federal awards than a system which complies with the standards.

(7) Salaries and wages of employees used in meeting cost sharing or matching requirements of Federal awards must be supported in the same manner as those claimed as allowable costs under Federal awards.

i. *Donated services.*

(1) Donated or volunteer services may be furnished to a governmental unit by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services is not reimbursable either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the provisions of the Common Rule.

(2) The value of donated services utilized in the performance of a direct cost activity shall, when material in amount, be considered in the determination of the governmental unit's indirect costs or rate(s) and, accordingly, shall be allocated a proportionate share of applicable indirect costs.

(3) To the extent feasible, donated services will be supported by the same methods used by the governmental unit to support the allocability of regular personnel services.

12. *Contingencies.* Contributions to a contingency reserve or any similar provision made for events the occurrence of which cannot be foretold with certainty as to time, or intensity, or with an assurance of their happening, are unallowable. The term ''contingency reserve'' excludes self-insurance reserves (see subsection 25.c.), pension plan reserves (see subsection 11.e.), and post-retirement health and other benefit reserves (see subsection 11.f.) computed using acceptable actuarial cost methods.

13. *Contributions and donations.* Contributions and donations, including cash, property, and services, by governmental units to others, regardless of the recipient, are unallowable.

14. *Defense and prosecution of criminal and civil proceedings, and claims.*

a. The following costs are unallowable for contracts covered by 10 U.S.C. 2324(k), ''Allowable costs under defense contracts.''

(1) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of false certification brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(2) Costs incurred by a contractor in connection with any criminal, civil or administrative proceedings commenced by the United States or a State to the extent provided in 10 U.S.C. 2324(k).

b. Legal expenses required in the administration of Federal programs are allowable. Legal expenses for prosecution of claims against the Federal Government are unallowable.

15. *Depreciation and use allowances.*

a. Depreciation and use allowances are means of allocating the cost of fixed assets to periods benefitting from asset use. Compensation for the use of fixed assets on hand may be made through depreciation or use allowances. A combination of the two methods may not be used in connection with a single class of fixed assets (e.g., buildings, office equipment, computer equipment, etc.) except as provided in subsection g. Except for enterprise funds and internal service funds that are included as part of a State/local cost allocation plan, classes of assets shall be determined on the same basis used for the government-wide financial statements.

b. The computation of depreciation or use allowances shall be based on the acquisition cost of the assets involved. Where actual cost records have not been maintained, a reasonable estimate of the original acquisition cost may be used. The value of an asset donated to the governmental unit by an unrelated third party shall be its fair market value at the time of donation. Governmental or quasi-governmental organizations located within the same State shall not be considered unrelated third parties for this purpose.

c. The computation of depreciation or use allowances will exclude:

(1) The cost of land;

(2) Any portion of the cost of buildings and equipment borne by or donated by the Federal Government irrespective of where title was originally vested or where it presently resides; and

(3) Any portion of the cost of buildings and equipment contributed by or for the governmental unit, or a related donor organization, in satisfaction of a matching requirement.

d. Where the use allowance method is followed, the use allowance for buildings and improvements (including land improvements, such as paved parking areas, fences, and sidewalks) will be computed at an annual rate not exceeding two percent of acquisition costs. The use allowance for equipment will be computed at an annual rate not exceeding 6⅔ percent of acquisition cost. When the use allowance method is used for buildings, the entire building must be treated as a single asset; the building's components (e.g., plumbing system, heating and air condition, etc.) cannot be segregated from the building's shell. The two percent limitation, however, need not be applied to equipment which is merely attached or fastened to the building but not permanently fixed to it and which is used as furnishings or decorations or for specialized purposes (e.g., dentist chairs and dental treatment units, counters, laboratory benches bolted to the floor, dishwashers, modular furniture, carpeting, etc.). Such equipment will be considered as not being permanently fixed to the building if it can be removed without the destruction of, or need for costly or extensive alterations or repairs, to the building or the equipment. Equipment that meets these

criteria will be subject to the 6⅔ percent equipment use allowance limitation.

e. Where the depreciation method is followed, the period of useful service (useful life) established in each case for usable capital assets must take into consideration such factors as type of construction, nature of the equipment used, historical usage patterns, technological developments, and the renewal and replacement policies of the governmental unit followed for the individual items or classes of assets involved. In the absence of clear evidence indicating that the expected consumption of the asset will be significantly greater in the early portions than in the later portions of its useful life, the straight line method of depreciation shall be used. Depreciation methods once used shall not be changed unless approved by the Federal cognizant or awarding agency. When the depreciation method is introduced for application to an asset previously subject to a use allowance, the annual depreciation charge thereon may not exceed the amount that would have resulted had the depreciation method been in effect from the date of acquisition of the asset. The combination of use allowances and depreciation applicable to the asset shall not exceed the total acquisition cost of the asset or fair market value at time of donation.

f. When the depreciation method is used for buildings, a building's shell may be segregated from the major component of the building (e.g., plumbing system, heating, and air conditioning system, etc.) and each major component depreciated over its estimated useful life, or the entire building (i.e., the shell and all components) may be treated as a single asset and depreciated over a single useful life.

g. A reasonable use allowance may be negotiated for any assets that are considered to be fully depreciated, after taking into consideration the amount of depreciation previously charged to the government, the estimated useful life remaining at the time of negotiation, the effect of any increased maintenance charges, decreased efficiency due to age, and any other factors pertinent to the utilization of the asset for the purpose contemplated.

h. Charges for use allowances or depreciation must be supported by adequate property records. Physical inventories must be taken at least once every two years (a statistical sampling approach is acceptable) to ensure that assets exist, and are in use. Governmental units will manage equipment in accordance with State laws and procedures. When the depreciation method is followed, depreciation records indicating the amount of depreciation taken each period must also be maintained.

16. *Disbursing service.* The cost of disbursing funds by the Treasurer or other designated officer is allowable.

17. *Employee morale, health, and welfare costs.* The costs of health or first-aid clinics and/or infirmaries, recreational facilities, employee counseling services, employee information publications, and any related expenses incurred in accordance with a governmental unit's policy are allowable. Income generated from any of these activities will be offset against expenses.

18. *Entertainment.* Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities) are unallowable.

19. Equipment and other capital expenditures.

a. As used in this section the following terms have the meanings as set forth below:

(1) ''Capital expenditure'' means the cost of the asset including the cost to put it in place. Capital expenditure for equipment means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in, or excluded from, capital expenditure cost in accordance with the governmental unit's regular accounting practices.

(2) ''Equipment'' means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals the lesser of (a) the capitalization level established by the governmental unit for financial statement purposes, or (b) $5000.

(3) ''Other capital assets'' mean buildings, land, and improvements to buildings or land that materially increase their value or useful life.

b. Capital expenditures which are not charged directly to a Federal award may be recovered through use allowances or depreciation on buildings, capital improvements, and equipment (see section 15). See also section 38 for allowability of rental costs for buildings and equipment.

c. Capital expenditures for equipment, including replacement equipment, other capital assets, and improvements which materially increase the value or useful life of equipment or other capital assets are allowable as a direct cost when approved by the awarding agency. Federal awarding agencies are authorized at their option to waive or delegate this approval requirement.

d. Items of equipment with an acquisition cost of less than $5000 are considered to be supplies and are allowable as direct costs of Federal awards without specific awarding agency approval.

e. The unamortized portion of any equipment written off as a result of a change in capitalization levels may be recovered by (1) continuing to claim the otherwise allowable use allowances or depreciation charges on the equipment or by (2) amortizing the amount to be written off over a period of years negotiated with the cognizant agency.

f. When replacing equipment purchased in whole or in part with Federal funds, the governmental unit 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.

20. *Fines and penalties.* Fines, penalties, damages, and other settlements resulting from violations (or alleged violations) of, or failure of the governmental unit to comply with, Federal, State, local, or Indian tribal laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the Federal award or written instructions by the awarding agency authorizing in advance such payments.

21. *Fund raising and investment management costs.*

a. Costs of organized fund raising, including financial campaigns, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions are unallowable, regardless of the purpose for which the funds will be used.

b. Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable. However, such costs associated with investments covering pension, self-insurance, or other funds which include Federal participation allowed by this Circular are allowable.

c. Fund raising and investment activities shall be allocated an appropriate share of indirect costs under the conditions described in subsection C.3.b. of Attachment A.

22. *Gains and losses on disposition of depreciable property and other capital assets and substantial relocation of Federal programs.*

a. (1) Gains and losses on the sale, retirement, or other disposition of depreciable property shall be included in the year in which they occur as credits or charges to the asset cost grouping(s) in which the property was included. The amount of the gain or loss to be included as a credit or charge to the appropriate asset cost grouping(s) shall be the difference between the amount realized on the property and the undepreciated basis of the property.

(2) Gains and losses on the disposition of depreciable property shall not be recognized as a separate credit or charge under the following conditions:

(a) The gain or loss is processed through a depreciation account and is reflected in the depreciation allowable under sections 15 and 19.

(b) The property is given in exchange as part of the purchase price of a similar item and the gain or loss is taken into account in determining the depreciation cost basis of the new item.

(c) A loss results from the failure to maintain permissible insurance, except as otherwise provided in subsection 25.d.

(d) Compensation for the use of the property was provided through use allowances in lieu of depreciation.

b. Substantial relocation of Federal awards from a facility where the Federal Government participated in the financing to another facility prior to the expiration of the useful life of the financed facility requires Federal agency approval. The extent of the relocation, the amount of the Federal participation in the financing, and the depreciation charged to date may require negotiation of space charges for Federal awards.

c. Gains or losses of any nature arising from the sale or exchange of property other than the property covered in subsection a., e.g., land or included in the fair market value used in any adjustment resulting from a relocation of Federal awards covered in subsection b. shall be excluded in computing Federal award costs.

23. *General government expenses.*

a. The general costs of government are unallowable (except as provided in section 41). These include:

(1) Salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision or the chief executives of federally-recognized Indian tribal governments;

(2) Salaries and other expenses of State legislatures, tribal councils, or similar local governmental bodies, such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction;

(3) Cost of the judiciary branch of a government;

(4) Cost of prosecutorial activities unless treated as a direct cost to a specific program when authorized by program regulations (however, this does not preclude the allowability of other legal activities of the Attorney General); and

(5) Other general types of government services normally provided to the general public, such as fire and police, unless provided for as a direct cost in program regulations.

b. For federally-recognized Indian tribal governments and Councils Of Governments (COGs), the portion of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his staff is allowable.

24. *Idle facilities and idle capacity.*

a. As used in this section the following terms have the meanings set forth below:

(1) ''Facilities'' means land and buildings or any portion thereof, equipment individually or collectively, or any other tangible capital asset, wherever located, and whether owned or leased by the governmental unit.

(2) ''Idle facilities'' means completely unused facilities that are excess to the governmental unit's current needs.

(3) ''Idle capacity'' means the unused capacity of partially used facilities. It is the difference between (a) that which a facility could achieve under 100 percent operating time on a one-shift basis less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays and (b) the extent to which the facility was actually used to meet demands during the accounting period. A multi-shift basis should be used if it can be shown that this amount of usage would normally be expected for the type of facility involved.

(4) ''Cost of idle facilities or idle capacity'' means costs such as maintenance, repair, housing, rent, and other related costs, e.g., insurance, interest, and depreciation or use allowances.

b. The costs of idle facilities are unallowable except to the extent that:

(1) They are necessary to meet fluctuations in workload; or

(2) Although not necessary to meet fluctuations in workload, they were necessary when acquired and are now idle because of changes in program requirements, efforts to achieve more economical operations, reorganization, termination, or other causes which could not have been reasonably foreseen. Under the exception stated in this subsection, costs of idle facilities are allowable for a reasonable period of time, ordinarily not to exceed one year, depending on the initiative taken to use, lease, or dispose of such facilities.

c. The costs of idle capacity are normal costs of doing business and are a factor in the normal fluctuations of usage or indirect cost rates from period to period. Such costs are allowable, provided that the capacity is reasonably anticipated to be necessary or was originally reasonable and is not subject to reduction or elimination by use on other Federal awards, subletting, renting, or sale, in accordance with sound business, economic, or security practices. Widespread idle capacity throughout an entire facility or among a group of assets having substantially the same function may be considered idle facilities.

25. *Insurance and indemnification.*

a. Costs of insurance required or approved and maintained, pursuant to the Federal award, are allowable.

b. Costs of other insurance in connection with the general conduct of activities are allowable subject to the following limitations:

(1) Types and extent and cost of coverage are in accordance with the governmental unit's policy and sound business practice.

(2) Costs of insurance or of contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that the awarding agency has specifically required or approved such costs.

c. Actual losses which could have been covered by permissible insurance (through a self-insurance program or otherwise) are unallowable, unless expressly provided for in the Federal award or as described below. However, the Federal Government will participate in actual losses of a self insurance fund that are in excess of reserves. Costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools, which occur in the ordinary course of operations, are allowable.

d. Contributions to a reserve for certain self-insurance programs including workers compensation, unemployment compensation, and severance pay are allowable subject to the following provisions:

(1) The type of coverage and the extent of coverage and the rates and premiums would have been allowed had insurance (including reinsurance) been purchased to cover the risks.

However, provision for known or reasonably estimated self-insured liabilities, which do not become payable for more than one year after the provision is made, shall not exceed the discounted present value of the liability. The rate used for discounting the liability must be determined by giving consideration to such factors as the governmental unit's settlement rate for those liabilities and its investment rate of return.

(2) Earnings or investment income on reserves must be credited to those reserves.

(3) Contributions to reserves must be based on sound actuarial principles using historical experience and reasonable assumptions. Reserve levels must be analyzed and updated at least biennially for each major risk being insured and take into account any reinsurance, coinsurance, etc. Reserve levels related to employee-related coverages will normally be limited to the value of claims (a) submitted and adjudicated but not paid, (b) submitted but not adjudicated, and (c) incurred but not submitted. Reserve levels in excess of the amounts based on the above must be identified and justified in the cost allocation plan or indirect cost rate proposal.

(4) Accounting records, actuarial studies, and cost allocations (or billings) must recognize any significant differences due to types of insured risk and losses generated by the various insured activities or agencies of the governmental unit. If individual departments or agencies of the governmental unit experience significantly different levels of claims for a particular risk, those differences are to be recognized by the use of separate allocations or other techniques resulting in an equitable allocation.

(5) Whenever funds are transferred from a self-insurance reserve to other accounts (e.g., general fund), refunds shall be made to the Federal Government for its share of funds transferred, including earned or imputed interest from the date of transfer.

e. Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (e.g., subsection 11.f. for post retirement health benefits), are allowable in the year of payment provided (1) the governmental unit follows a consistent costing policy and (2) they are allocated as a general administrative expense to all activities of the governmental unit.

f. Insurance refunds shall be credited against insurance costs in the year the refund is received.

g. Indemnification includes securing the governmental unit against liabilities to third persons and other losses not compensated by insurance or otherwise. The Federal Government is obligated to indemnify the governmental unit only to the extent expressly provided for in the Federal award, except as provided in subsection d.

h. Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship are unallowable.

26. *Interest.*

a. Costs incurred for interest on borrowed capital or the use of a governmental unit's own funds, however represented, are unallowable except as specifically provided in subsection b. or authorized by Federal legislation.

b. Financing costs (including interest) paid or incurred on or after the effective date of this Circular associated with the otherwise allowable costs of building acquisition, construction, or fabrication, reconstruction or remodeling completed on or after October 1, 1980 is allowable, subject to the conditions in (1)–(4). Financing costs (including interest) paid or incurred on or after the effective date of this Circular associated with otherwise allowable costs of equipment is allowable, subject to the conditions in (1)–(4).

(1) The financing is provided (from other than tax or user fee sources) by a bona fide third party external to the governmental unit;

(2) The assets are used in support of Federal awards;

(3) Earnings on debt service reserve funds or interest earned on borrowed funds pending payment of the construction or acquisition costs are used to offset the current period's cost or the capitalized interest, as appropriate. Earnings subject to being reported to the Federal Internal Revenue Service under arbitrage requirements are excludable.

(4) Governmental units will negotiate the amount of allowable interest whenever cash payments (interest, depreciation, use allowances, and contributions) exceed the governmental unit's cash payments and other contributions attributable to that portion of real property used for Federal awards.

27. *Lobbying.* The cost of certain influencing activities associated with obtaining grants, contracts, cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants, contracts, cooperative agreements, and loans shall be governed by the common rule, ''New Restrictions on Lobbying'' published at 55 FR 6736 (February 26, 1990), including definitions, and the Office of Management and Budget ''Government-wide Guidance for New Restrictions on Lobbying'' and notices published at 54 FR 52306 (December 20, 1989), 55 FR 24540 (June 15, 1990), and 57 FR 1772 (January 15, 1992), respectively.

28. *Maintenance, operations, and repairs.* Unless prohibited by law, the cost of utilities, insurance, security, janitorial services, elevator service, upkeep of grounds, necessary maintenance, normal repairs and alterations, and the like are allowable to the extent that they: (1) keep property (including Federal property, unless otherwise provided for) in an efficient operating condition, (2) do not add to the permanent value of property or appreciably prolong its intended life, and (3) are not otherwise included in rental or other charges for space. Costs which add to the permanent value of property or appreciably prolong its intended life shall be treated as capital expenditures (see sections 15 and 19).

29. *Materials and supplies.* The cost of materials and supplies is allowable. Purchases should be charged at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received. Withdrawals from general stores or stockrooms should be charged at cost under any recognized method of pricing, consistently applied. Incoming transportation charges are a proper part of materials and supply costs.

30. *Memberships, subscriptions, and professional activities.*

a. Costs of the governmental unit's memberships in business, technical, and professional organizations are allowable.

b. Costs of the governmental unit's subscriptions to business, professional, and technical periodicals are allowable.

c. Costs of meetings and conferences where the primary purpose is the dissemination of technical information, including meals, transportation, rental of meeting facilities, and other incidental costs are allowable.

d. Costs of membership in civic and community, social organizations are allowable as a direct cost with the approval of the Federal awarding agency.

e. Costs of membership in organizations substantially engaged in lobbying are unallowable.

31. *Motor pools.* The costs of a service organization which provides automobiles to user governmental units at a mileage or fixed rate and/or

provides vehicle maintenance, inspection, and repair services are allowable.

32. *Pre-award costs.* Pre-award costs are those incurred prior to the effective date of the award directly pursuant to the negotiation and in anticipation of the award where such costs are necessary to comply with the proposed delivery schedule or period of performance. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the award and only with the written approval of the awarding agency.

33. *Professional service costs.*

a. Cost of professional and consultant services rendered by persons or organizations that are members of a particular profession or possess a special skill, whether or not officers or employees of the governmental unit, are allowable, subject to section 14 when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government.

b. Retainer fees supported by evidence of bona fide services available or rendered are allowable.

34. *Proposal costs.* Costs of preparing proposals for potential Federal awards are allowable. Proposal costs should normally be treated as indirect costs and should be allocated to all activities of the governmental unit utilizing the cost allocation plan and indirect cost rate proposal. However, proposal costs may be charged directly to Federal awards with the prior approval of the Federal awarding agency.

35. *Publication and printing costs.* Publication costs, including the costs of printing (including the processes of composition, plate-making, press work, and binding, and the end products produced by such processes), distribution, promotion, mailing, and general handling are allowable.

36. *Rearrangements and alterations.* Costs incurred for ordinary and normal rearrangement and alteration of facilities are allowable. Special arrangements and alterations costs incurred specifically for a Federal award are allowable with the prior approval of the Federal awarding agency.

37. *Reconversion costs.* Costs incurred in the restoration or rehabilitation of the governmental unit's facilities to approximately the same condition existing immediately prior to commencement of Federal awards, less costs related to normal wear and tear, are allowable.

38. *Rental costs.*

a. Subject to the limitations described in subsections b. through d. of this section, rental costs are allowable to the extent that the rates are reasonable in light of such factors as: rental costs of comparable property, if any; market conditions in the area; alternatives available; and, the type, life expectancy, condition, and value of the property leased.

b. Rental costs under sale and leaseback arrangements are allowable only up to the amount that would be allowed had the governmental unit continued to own the property.

c. Rental costs under less-than-arms-length leases are allowable only up to the amount that would be allowed had title to the property vested in the governmental unit. For this purpose, less-than-arms-length leases include, but are not limited to, those where:

(1) One party to the lease is able to control or substantially influence the actions of the other;

(2) Both parties are parts of the same governmental unit; or

(3) The governmental unit creates an authority or similar entity to acquire and lease the facilities to the governmental unit and other parties.

d. Rental costs under leases which are required to be treated as capital leases under GAAP are allowable only up to the amount that would be allowed had the governmental unit purchased the property on the date the lease agreement was executed. This amount would include expenses such as depreciation or use allowance, maintenance, and insurance. The provisions of Financial Accounting Standards Board Statement 13 shall be used to determine whether a lease is a capital lease. Interest costs related to capital leases are allowable to the extent they meet the criteria in section 26.

39. *Taxes.*

a. Taxes that a governmental unit is legally required to pay are allowable, except for self-assessed taxes that disproportionately affect Federal programs or changes in tax policies that disproportionately affect Federal programs. This provision becomes effective for taxes paid during the governmental unit's first fiscal year that begins on or after January 1, 1998, and applies thereafter.

b. Gasoline taxes, motor vehicle fees, and other taxes that are in effect user fees for benefits provided to the Federal Government are allowable.

c. This provision does not restrict the authority of Federal agencies to identify taxes where Federal participation is inappropriate. Where the identification of the amount of unallowable taxes would require an inordinate amount of effort, the cognizant agency may accept a reasonable approximation thereof.

40. *Training.* The cost of training provided for employee development is allowable.

41. *Travel costs.*

a. *General.* Travel costs are allowable for expenses for transportation, lodging, subsistence, and related items incurred by employees traveling on official business. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip, and results in charges consistent with those normally allowed in like circumstances in non-federally-sponsored activities. Notwithstanding the provisions of section 23, travel costs of officials covered by that section, when specifically related to Federal awards, are allowable with the prior approval of a grantor agency.

b. *Lodging and subsistence.* Costs incurred by employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent such costs do not exceed charges normally allowed by the governmental unit in its regular operations as a result of the governmental unit's policy. In the absence of a written governmental unit policy regarding travel costs, the rates and amounts established under subchapter I of Chapter 57 of Title 5, United States Code ''Travel and Subsistence Expenses; Mileage Allowances,'' or by the Administrator of General Services, or the President (or his designee) pursuant to any provisions of such subchapter shall be used as guidance for travel under Federal awards (41 U.S.C. 420, ''Travel Expenses of Government Contractors'').

c. *Commercial air travel.* Airfare costs in excess of the customary standard (coach or equivalent) airfare, are unallowable except when such accommodations would: require circuitous routing, require travel during unreasonable hours, excessively prolong travel, greatly increase the duration of the flight, result in increased cost that would offset transportation savings, or offer accommodations not reasonably adequate for the medical needs of the traveler. Where a governmental unit can reasonably demonstrate to the awarding agency either the nonavailability of customary standard airfare or Federal Government contract airfare for individual trips or, on an overall basis, that it is the governmental unit's practice to make routine use of such airfare, specific determinations of nonavailability will generally not be questioned by the Federal Government,

unless a pattern of avoidance is detected. However, in order for airfare costs in excess of the customary standard commercial airfare to be allowable, e.g., use of first-class airfare, the governmental unit must justify and document on a case-by-case basis the applicable condition(s) set forth above.

d. *Air travel by other than commercial carrier.* Cost of travel by governmental unit-owned, -leased, or -chartered aircraft, as used in this section, includes the cost of lease, charter, operation (including personnel costs), maintenance, depreciation, interest, insurance, and other related costs. Costs of travel via governmental unit-owned, -leased, or -chartered aircraft are unallowable to the extent they exceed the cost of allowable commercial air travel, as provided for in subsection c.

42. *Underrecovery of costs under Federal agreements.* Any excess costs over the Federal contribution under one award agreement are unallowable under other award agreements.

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A. General

1. Most governmental units provide certain services, such as motor pools, computer centers, purchasing, accounting, etc., to operating agencies on a centralized basis. Since federally-supported awards are performed within the individual operating agencies, there needs to be a process whereby these central service costs can be identified and assigned to benefitted activities on a reasonable and consistent basis. The central service cost allocation plan provides that process. All costs and other data used to distribute the costs included in the plan should be supported by formal accounting and other records that will support the propriety of the costs assigned to Federal awards.

2. Guidelines and illustrations of central service cost allocation plans are provided in a brochure published by the Department of Health and Human Services entitled ''A Guide for State and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government.'' A copy of this brochure may be obtained from the Superintendent of Documents, U.S. Government Printing Office.

B. Definitions

1. ''Billed central services'' means central services that are billed to benefitted agencies and/or programs on an individual fee-for-service or similar basis. Typical examples of billed central services include computer services, transportation services, insurance, and fringe benefits.

2. ''Allocated central services'' means central services that benefit operating agencies but are not billed to the agencies on a fee-for-service or similar basis. These costs are allocated to benefitted agencies on some reasonable basis. Examples of such services might include general accounting, personnel administration, purchasing, etc.

3. ''Agency or operating agency'' means an organizational unit or sub-division within a governmental unit that is responsible for the performance or administration of awards or activities of the governmental unit.

C. Scope of the Central Service Cost Allocation Plans

The central service cost allocation plan will include all central service costs that will be claimed (either as a billed or an allocated cost) under Federal awards and will be documented as described in section E. Costs of central services omitted from the plan will not be reimbursed.

D. Submission Requirements

1. Each State will submit a plan to the Department of Health and Human Services for each year in which it claims central service costs under Federal awards. The plan should include (a) a projection of the next year's allocated central service cost (based either on actual costs for the most recently completed year or the budget projection for the coming year), and (b) a reconciliation of actual allocated central service costs to the estimated costs used for either the most recently completed year or the year immediately preceding the most recently completed year.

2. Each local government that has been designated as a ''major local government'' by the Office of Management and Budget (OMB) is also required to submit a plan to its cognizant agency annually. OMB periodically lists major local governments in the **Federal Register**.

3. All other local governments claiming central service costs must develop a plan in accordance with the requirements described in this Circular and maintain the plan and related supporting documentation for audit. These local governments are not required to submit their plans for Federal approval unless they are specifically requested to do so by the cognizant agency. Where a local government only receives funds as a sub-recipient, the primary recipient will be responsible for negotiating indirect cost rates and/or monitoring the sub-recipient's plan.

4. All central service cost allocation plans will be prepared and, when required, submitted within six months prior to the beginning of each of the governmental unit's fiscal years in which it proposes to claim central service costs. Extensions may be granted by the cognizant agency on a case-by-case basis.

E. Documentation Requirements for Submitted Plans

The documentation requirements described in this section may be modified, expanded, or reduced by the cognizant agency on a case-by-case basis. For example, the requirements may be reduced for those central services which have little or no impact on Federal awards. Conversely, if a review of a plan indicates that certain additional information is needed, and will likely be needed in future years, it may be routinely requested in future plan submissions. Items marked with an asterisk (*) should be submitted only once; subsequent plans should merely indicate any changes since the last plan.

1. *General.* All proposed plans must be accompanied by the following: an organization chart sufficiently detailed to show operations including the central service activities of the State/local government whether or not they are shown as benefiting from central service functions; a copy of the Comprehensive Annual Financial Report (or a copy of the Executive Budget if budgeted costs are being proposed) to support the allowable costs of each central service activity included in the plan; and, a

certification (see subsection 4.) that the plan was prepared in accordance with this Circular, contains only allowable costs, and was prepared in a manner that treated similar costs consistently among the various Federal awards and between Federal and non-Federal awards/activities.

2. *Allocated central services.* For each allocated central service, the plan must also include the following: a brief description of the service*, an identification of the unit rendering the service and the operating agencies receiving the service, the items of expense included in the cost of the service, the method used to distribute the cost of the service to benefitted agencies, and a summary schedule showing the allocation of each service to the specific benefitted agencies. If any self-insurance funds or fringe benefits costs are treated as allocated (rather than billed) central services, documentation discussed in subsections 3.b. and c. shall also be included.

3. *Billed services.*

a. *General.* The information described below shall be provided for all billed central services, including internal service funds, self-insurance funds, and fringe benefit funds.

b. *Internal service funds.*

(1) For each internal service fund or similar activity with an operating budget of $5 million or more, the plan shall include: a brief description of each service; a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source, e.g., regular billings, interest earned, etc.; a listing of all non-operating transfers (as defined by Generally Accepted Accounting Principles (GAAP)) into and out of the fund; a description of the procedures (methodology) used to charge the costs of each service to users, including how billing rates are determined; a schedule of current rates; and, a schedule comparing total revenues (including imputed revenues) generated by the service to the allowable costs of the service, as determined under this Circular, with an explanation of how variances will be handled.

(2) Revenues shall consist of all revenues generated by the service, including unbilled and uncollected revenues. If some users were not billed for the services (or were not billed at the full rate for that class of users), a schedule showing the full imputed revenues associated with these users shall be provided. Expenses shall be broken out by object cost categories (e.g., salaries, supplies, etc.).

c. *Self-insurance funds.* For each self-insurance fund, the plan shall include: the fund balance sheet; a statement of revenue and expenses including a summary of billings and claims paid by agency; a listing of all non-operating transfers into and out of the fund; the type(s) of risk(s) covered by the fund (e.g., automobile liability, workers' compensation, etc.); an explanation of how the level of fund contributions are determined, including a copy of the current actuarial report (with the actuarial assumptions used) if the contributions are determined on an actuarial basis; and, a description of the procedures used to charge or allocate fund contributions to benefitted activities. Reserve levels in excess of claims (1) submitted and adjudicated but not paid, (2) submitted but not adjudicated, and (3) incurred but not submitted must be identified and explained.

d. *Fringe benefits.* For fringe benefit costs, the plan shall include: a listing of fringe benefits provided to covered employees, and the overall annual cost of each type of benefit; current fringe benefit policies*; and procedures used to charge or allocate the costs of the benefits to benefitted activities. In addition, for pension and post-retirement health insurance plans, the following information shall be provided: the governmental unit's funding policies, e.g., legislative bills, trust agreements, or State-mandated contribution rules, if different from actuarially determined rates; the pension plan's costs accrued for the year; the amount funded, and date(s) of funding; a copy of the current actuarial report (including the actuarial assumptions); the plan trustee's report; and, a schedule from the activity showing the value of the interest cost associated with late funding.

4. *Required certification.* Each central service cost allocation plan will be accompanied by a certification in the following form:

Certificate of Cost Allocation Plan

This is to certify that I have reviewed the cost allocation plan submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish cost allocations or billings for [identify period covered by plan] are allowable in accordance with the requirements of OMB Circular A–87, ''Cost Principles for State and Local Governments,'' and the Federal award(s) to which they apply. Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the awards to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently.

I declare that the foregoing is true and correct.

Governmental Unit _____

Signature _____

Name of Official _____

Title _____

Date of Execution _____

F. Negotiation and Approval of Central Service Plans

1. All proposed central service cost allocation plans that are required to be submitted will be reviewed, negotiated, and approved by the Federal cognizant agency on a timely basis. The cognizant agency will review the proposal within six months of receipt of the proposal and either negotiate/approve the proposal or advise the governmental unit of the additional documentation needed to support/evaluate the proposed plan or the changes required to make the proposal acceptable. Once an agreement with the governmental unit has been reached, the agreement will be accepted and used by all Federal agencies, unless prohibited or limited by statute. Where a Federal funding agency has reason to believe that special operating factors affecting its awards necessitate special consideration, the funding agency will, prior to the time the plans are negotiated, notify the cognizant agency.

2. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. The results of the negotiation shall be made available to all Federal agencies for their use.

3. Negotiated cost allocation plans based on a proposal later found to have included costs that: (a) are unallowable (i) as specified by law or regulation, (ii) as identified in Attachment B of this Circular, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards, shall be adjusted, or a refund shall be made at the option of the Federal cognizant agency. These adjustments or refunds are designed to correct the plans and do not constitute a reopening of the negotiation.

G. Other Policies

1. *Billed central service activities.* Each billed central service activity must separately account for all revenues (including imputed revenues) generated by the service, expenses incurred to furnish the service, and profit/loss.

2. *Working capital reserves.* Internal service funds are dependent upon a reasonable level of working capital reserve to operate from one billing cycle to the next. Charges by an internal service activity to provide for the establishment and maintenance of a reasonable level of working capital reserve, in addition to the full recovery of costs, are allowable. A working capital reserve as part of retained earnings of up to 60 days cash expenses for normal operating purposes is considered reasonable. A working capital reserve exceeding 60 days may be approved by the cognizant Federal agency in exceptional cases.

3. *Carry-forward adjustments of allocated central service costs.* Allocated central service costs are usually negotiated and approved for a future fiscal year on a ''fixed with carry-forward'' basis. Under this procedure, the fixed amounts for the future year covered by agreement are not subject to adjustment for that year. However, when the actual costs of the year involved become known, the differences between the fixed amounts previously approved and the actual costs will be carried forward and used as an adjustment to the fixed amounts established for a later year. This ''carry-forward'' procedure applies to all central services whose costs were fixed in the approved plan. However, a carry-forward adjustment is not permitted, for a central service activity that was not included in the approved plan, or for unallowable costs that must be reimbursed immediately.

4. *Adjustments of billed central services.* Billing rates used to charge Federal awards shall be based on the estimated costs of providing the services, including an estimate of the allocable central service costs. A comparison of the revenue generated by each billed service (including total revenues whether or not billed or collected) to the actual allowable costs of the service will be made at least annually, and an adjustment will be made for the difference between the revenue and the allowable costs. These adjustments will be made through one of the following adjustment methods: (a) a cash refund to the Federal Government for the Federal share of the adjustment, (b) credits to the amounts charged to the individual programs, (c) adjustments to future billing rates, or (d) adjustments to allocated central service costs. Adjustments to allocated central services will not be permitted where the total amount of the adjustment for a particular service (Federal share and non-Federal) share exceeds $500,000.

5. *Records retention.* All central service cost allocation plans and related documentation used as a basis for claiming costs under Federal awards must be retained for audit in accordance with the records retention requirements contained in the Common Rule.

6. *Appeals.* If a dispute arises in the negotiation of a plan between the cognizant agency and the governmental unit, the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.

7. *OMB assistance.* To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

Attachment D—Public Assistance Cost Allocation Plans

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F. Unallowable Costs

A. General

Federally-financed programs administered by State public assistance agencies are funded predominately by the Department of Health and Human Services (HHS). In support of its stewardship requirements, HHS has published requirements for the development, documentation, submission, negotiation, and approval of public assistance cost allocation plans in Subpart E of 45 CFR Part 95. All administrative costs (direct and indirect) are normally charged to Federal awards by implementing the public assistance cost allocation plan. This Attachment extends these requirements to all Federal agencies whose programs are administered by a State public assistance agency. Major federally-financed programs typically administered by State public assistance agencies include: Aid to Families with Dependent Children, Medicaid, Food Stamps, Child Support Enforcement, Adoption Assistance and Foster Care, and Social Services Block Grant.

B. Definitions

1. ''State public assistance agency'' means a State agency administering or supervising the administration of one or more public assistance programs operated by the State as identified in Subpart E of 45 CFR Part 95. For the purpose of this Attachment, these programs include all programs administered by the State public assistance agency.

2. ''State public assistance agency costs'' means all costs incurred by, or allocable to, the State public assistance agency, except expenditures for financial assistance, medical vendor payments, food stamps, and payments for services and goods provided directly to program recipients.

C. Policy

State public assistance agencies will develop, document and implement, and the Federal Government will review, negotiate, and approve, public assistance cost allocation plans in accordance with Subpart E of 45 CFR Part 95. The plan will include all programs administered by the State public assistance agency. Where a letter of approval or disapproval is transmitted to a State public assistance agency in accordance with Subpart E, the letter will apply to all Federal agencies and programs. The remaining sections of this Attachment (except for the requirement for certification) summarize the provisions of Subpart E of 45 CFR Part 95.

D. Submission, Documentation, and Approval of Public Assistance Cost Allocation Plans

1. State public assistance agencies are required to promptly submit amendments to the cost allocation plan to HHS for review and approval.

2. Under the coordination process outlined in subsection E, affected Federal agencies will review all new plans and plan amendments and provide comments, as appropriate, to HHS. The effective date of the plan or plan amendment will be the first day of the quarter following the submission of the plan or amendment, unless another date is specifically approved by HHS. HHS, as the cognizant agency acting on behalf of all affected Federal agencies, will, as necessary, conduct negotiations with the State public assistance agency and will inform the State agency of the action taken on the plan or plan amendment.

E. Review of Implementation of Approved Plans

1. Since public assistance cost allocation plans are of a narrative

nature, the review during the plan approval process consists of evaluating the appropriateness of the proposed groupings of costs (cost centers) and the related allocation bases. As such, the Federal Government needs some assurance that the cost allocation plan has been implemented as approved. This is accomplished by reviews by the funding agencies, single audits, or audits conducted by the cognizant audit agency.

2. Where inappropriate charges affecting more than one funding agency are identified, the cognizant HHS cost negotiation office will be advised and will take the lead in resolving the issue(s) as provided for in Subpart E of 45 CFR Part 95.

3. If a dispute arises in the negotiation of a plan or from a disallowance involving two or more funding agencies, the dispute shall be resolved in accordance with the appeals procedures set out in 45 CFR Part 75. Disputes involving only one funding agency will be resolved in accordance with the funding agency's appeal process.

4. To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, the Office of Management and Budget will lend assistance, as required, to resolve such problems in a timely manner.

F. Unallowable Costs

Claims developed under approved cost allocation plans will be based on allowable costs as identified in this Circular. Where unallowable costs have been claimed and reimbursed, they will be refunded to the program that reimbursed the unallowable cost using one of the following methods: (a) a cash refund, (b) offset to a subsequent claim, or (c) credits to the amounts charged to individual awards.

Attachment E—State and Local Indirect Cost Rate Proposals

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A. General

1. Indirect costs are those that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned directly to Federal awards and other activities as appropriate, indirect costs are those remaining to be allocated to benefitted cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. Indirect costs include (a) the indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and (b) the costs of central governmental services distributed through the central service cost allocation plan (as described in Attachment C) and not otherwise treated as direct costs.

3. Indirect costs are normally charged to Federal awards by the use of an indirect cost rate. A separate indirect cost rate(s) is usually necessary for each department or agency of the governmental unit claiming indirect costs under Federal awards. Guidelines and illustrations of indirect cost proposals are provided in a brochure published by the Department of Health and Human Services entitled ''A Guide for State and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government.'' A copy of this brochure may be obtained from the Superintendent of Documents, U.S. Government Printing Office.

4. Because of the diverse characteristics and accounting practices of governmental units, the types of costs which may be classified as indirect costs cannot be specified in all situations. However, typical examples of indirect costs may include certain State/local-wide central service costs, general administration of the grantee department or agency, accounting and personnel services performed within the grantee department or agency, depreciation or use allowances on buildings and equipment, the costs of operating and maintaining facilities, etc.

5. This Attachment does not apply to State public assistance agencies. These agencies should refer instead to Attachment D.

B. Definitions

1. ''Indirect cost rate proposal'' means the documentation prepared by a governmental unit or subdivision thereof to substantiate its request for the establishment of an indirect cost rate.

2. ''Indirect cost rate'' is a device for determining in a reasonable manner the proportion of indirect costs each program should bear. It is the ratio (expressed as a percentage) of the indirect costs to a direct cost base.

3. ''Indirect cost pool'' is the accumulated costs that jointly benefit two or more programs or other cost objectives.

4. ''Base'' means the accumulated direct costs (normally either total direct salaries and wages or total direct costs exclusive of any extraordinary or distorting expenditures) used to distribute indirect costs to individual Federal awards. The direct cost base selected should result in each award bearing a fair share of the indirect costs in reasonable relation to the benefits received from the costs.

5. ''Predetermined rate'' means an indirect cost rate, applicable to a specified current or future period, usually the governmental unit's fiscal year. This rate is based on an estimate of the costs to be incurred during the period. Except under very unusual circumstances, a predetermined rate is not subject to adjustment. (Because of legal constraints, predetermined rates are not permitted for Federal contracts; they may, however, be used for grants or cooperative agreements.) Predetermined rates may not be used by governmental units that have not submitted and negotiated the rate with the cognizant agency. In view of the potential advantages offered by this procedure, negotiation of predetermined rates for indirect costs for a period of two to four years should be the norm in those situations where the cost experience and other pertinent facts available are deemed sufficient to enable the parties involved to reach an informed judgment as to the probable

level of indirect costs during the ensuing accounting periods.

6. ''Fixed rate'' means an indirect cost rate which has the same characteristics as a predetermined rate, except that the difference between the estimated costs and the actual, allowable costs of the period covered by the rate is carried forward as an adjustment to the rate computation of a subsequent period.

7. ''Provisional rate'' means a temporary indirect cost rate applicable to a specified period which is used for funding, interim reimbursement, and reporting indirect costs on Federal awards pending the establishment of a ''final'' rate for that period.

8. ''Final rate'' means an indirect cost rate applicable to a specified past period which is based on the actual allowable costs of the period. A final audited rate is not subject to adjustment.

9. ''Base period'' for the allocation of indirect costs is the period in which such costs are incurred and accumulated for allocation to activities performed in that period. The base period normally should coincide with the governmental unit's fiscal year, but in any event, shall be so selected as to avoid inequities in the allocation of costs.

C. Allocation of Indirect Costs and Determination of Indirect Cost Rates

1. *General.*

a. Where a governmental unit's department or agency has only one major function, or where all its major functions benefit from the indirect costs to approximately the same degree, the allocation of indirect costs and the computation of an indirect cost rate may be accomplished through simplified allocation procedures as described in subsection 2.

b. Where a governmental unit's department or agency has several major functions which benefit from its indirect costs in varying degrees, the allocation of indirect costs may require the accumulation of such costs into separate cost groupings which then are allocated individually to benefitted functions by means of a base which best measures the relative degree of benefit. The indirect costs allocated to each function are then distributed to individual awards and other activities included in that function by means of an indirect cost rate(s).

c. Specific methods for allocating indirect costs and computing indirect cost rates along with the conditions under which each method should be used are described in subsections 2, 3 and 4.

2. *Simplified method.*

a. Where a grantee agency's major functions benefit from its indirect costs to approximately the same degree, the allocation of indirect costs may be accomplished by (1) classifying the grantee agency's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to individual Federal awards. The rate should be expressed as the percentage which the total amount of allowable indirect costs bears to the base selected. This method should also be used where a governmental unit's department or agency has only one major function encompassing a number of individual projects or activities, and may be used where the level of Federal awards to that department or agency is relatively small.

b. Both the direct costs and the indirect costs shall exclude capital expenditures and unallowable costs. However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

c. The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

3. *Multiple allocation base method.*

a. Where a grantee agency's indirect costs benefit its major functions in varying degrees, such costs shall be accumulated into separate cost groupings. Each grouping shall then be allocated individually to benefitted functions by means of a base which best measures the relative benefits.

b. The cost groupings should be established so as to permit the allocation of each grouping on the basis of benefits provided to the major functions. Each grouping should constitute a pool of expenses that are of like character in terms of the functions they benefit and in terms of the allocation base which best measures the relative benefits provided to each function. The number of separate groupings should be held within practical limits, taking into consideration the materiality of the amounts involved and the degree of precision needed.

c. Actual conditions must be taken into account in selecting the base to be used in allocating the expenses in each grouping to benefitted functions. When an allocation can be made by assignment of a cost grouping directly to the function benefitted, the allocation shall be made in that manner. When the expenses in a grouping are more general in nature, the allocation should be made through the use of a selected base which produces results that are equitable to both the Federal Government and the governmental unit. In general, any cost element or related factor associated with the governmental unit's activities is potentially adaptable for use as an allocation base provided that: (1) it can readily be expressed in terms of dollars or other quantitative measures (total direct costs, direct salaries and wages, staff hours applied, square feet used, hours of usage, number of documents processed, population served, and the like), and (2) it is common to the benefitted functions during the base period.

d. Except where a special indirect cost rate(s) is required in accordance with subsection 4, the separate groupings of indirect costs allocated to each major function shall be aggregated and treated as a common pool for that function. The costs in the common pool shall then be distributed to individual Federal awards included in that function by use of a single indirect cost rate.

e. The distribution base used in computing the indirect cost rate for each function may be (1) total direct costs (excluding capital expenditures and other distorting items such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution. An indirect cost rate should be developed for each separate indirect cost pool developed. The rate in each case should be stated as the percentage relationship between the particular indirect cost pool and the distribution base identified with that pool.

4. *Special indirect cost rates.*

a. In some instances, a single indirect cost rate for all activities of a grantee department or agency or for each major function of the agency may not be appropriate. It may not take into account those different factors which may substantially affect the indirect costs applicable to a particular program or group of programs. The factors may include the physical location of the work, the level of administrative support required, the nature of the facilities or other resources employed, the organizational arrangements used, or any combination thereof. When a particular award is carried out in an environment which appears to generate a significantly different level of indirect costs, provisions should be made for a separate indirect cost pool applicable to that award. The separate indirect cost

pool should be developed during the course of the regular allocation process, and the separate indirect cost rate resulting therefrom should be used, provided that: (1) the rate differs significantly from the rate which would have been developed under subsections 2. and 3., and (2) the award to which the rate would apply is material in amount.

b. Although this Circular adopts the concept of the full allocation of indirect costs, there are some Federal statutes which restrict the reimbursement of certain indirect costs. Where such restrictions exist, it may be necessary to develop a special rate for the affected award. Where a ''restricted rate'' is required, the procedure for developing a non-restricted rate will be used except for the additional step of the elimination from the indirect cost pool those costs for which the law prohibits reimbursement.

D. Submission and Documentation of Proposals

1. *Submission of indirect cost rate proposals.*

a. All departments or agencies of the governmental unit desiring to claim indirect costs under Federal awards must prepare an indirect cost rate proposal and related documentation to support those costs. The proposal and related documentation must be retained for audit in accordance with the records retention requirements contained in the Common Rule.

b. A governmental unit for which a cognizant agency assignment has been specifically designated must submit its indirect cost rate proposal to its cognizant agency. The Office of Management and Budget (OMB) will periodically publish lists of governmental units identifying the appropriate Federal cognizant agencies. The cognizant agency for all governmental units or agencies not identified by OMB will be determined based on the Federal agency providing the largest amount of Federal funds. In these cases, a governmental unit must develop an indirect cost proposal in accordance with the requirements of this Circular and maintain the proposal and related supporting documentation for audit. These governmental units are not required to submit their proposals unless they are specifically requested to do so by the cognizant agency. Where a local government only receives funds as a sub-recipient, the primary recipient will be responsible for negotiating and/or monitoring the sub-recipient's plan.

c. Each Indian tribal government desiring reimbursement of indirect costs must submit its indirect cost proposal to the Department of the Interior (its cognizant Federal agency).

d. Indirect cost proposals must be developed (and, when required, submitted) within six months after the close of the governmental unit's fiscal year, unless an exception is approved by the cognizant Federal agency. If the proposed central service cost allocation plan for the same period has not been approved by that time, the indirect cost proposal may be prepared including an amount for central services that is based on the latest federally-approved central service cost allocation plan. The difference between these central service amounts and the amounts ultimately approved will be compensated for by an adjustment in a subsequent period.

2. *Documentation of proposals.* The following shall be included with each indirect cost proposal:

a. The rates proposed, including subsidiary work sheets and other relevant data, cross referenced and reconciled to the financial data noted in subsection b. Allocated central service costs will be supported by the summary table included in the approved central service cost allocation plan. This summary table is not required to be submitted with the indirect cost proposal if the central service cost allocation plan for the same fiscal year has been approved by the cognizant agency and is available to the funding agency.

b. A copy of the financial data (financial statements, comprehensive annual financial report, executive budgets, accounting reports, etc.) upon which the rate is based. Adjustments resulting from the use of unaudited data will be recognized, where appropriate, by the Federal cognizant agency in a subsequent proposal.

c. The approximate amount of direct base costs incurred under Federal awards. These costs should be broken out between salaries and wages and other direct costs.

d. A chart showing the organizational structure of the agency during the period for which the proposal applies, along with a functional statement(s) noting the duties and/or responsibilities of all units that comprise the agency. (Once this is submitted, only revisions need be submitted with subsequent proposals.)

3. *Required certification.* Each indirect cost rate proposal shall be accompanied by a certification in the following form:

Certificate of Indirect Costs

This is to certify that I have reviewed the indirect cost rate proposal submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish billing or final indirect costs rates for [identify period covered by rate] are allowable in accordance with the requirements of the Federal award(s) to which they apply and OMB Circular A–87, ''Cost Principles for State and Local Governments.'' Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently and the Federal Government will be notified of any accounting changes that would affect the predetermined rate.

I declare that the foregoing is true and correct.

Governmental Unit _____

Signature _____

Name of Official _____

Title _____

Date of Execution: _____

E. Negotiation and Approval of Rates

1. Indirect cost rates will be reviewed, negotiated, and approved by the cognizant Federal agency on a timely basis. Once a rate has been agreed upon, it will be accepted and used by all Federal agencies unless prohibited or limited by statute. Where a Federal funding agency has reason to believe that special operating factors affecting its awards necessitate special indirect cost rates, the funding agency will, prior to the time the rates are negotiated, notify the cognizant Federal agency.

2. The use of predetermined rates, if allowed, is encouraged where the cognizant agency has reasonable assurance based on past experience and reliable projection of the grantee agency's costs, that the rate is not likely to exceed a rate based on actual costs. Long-term agreements utilizing predetermined rates extending over two or more years are encouraged, where appropriate.

3. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute, or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. The agreed upon rates shall be made available to all Federal agencies for their use.

4. Refunds shall be made if proposals are later found to have included costs that (a) are unallowable (i) as specified

by law or regulation, (ii) as identified in Attachment B of this Circular, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards. These adjustments or refunds will be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

F. Other Policies

1. *Fringe benefit rates.* If overall fringe benefit rates are not approved for the governmental unit as part of the central service cost allocation plan, these rates will be reviewed, negotiated and approved for individual grantee agencies during the indirect cost negotiation process. In these cases, a proposed fringe benefit rate computation should accompany the indirect cost proposal. If fringe benefit rates are not used at the grantee agency level (i.e., the agency specifically identifies fringe benefit costs to individual employees), the governmental unit should so advise the cognizant agency.

2. *Billed services provided by the grantee agency.* In some cases, governmental units provide and bill for services similar to those covered by central service cost allocation plans (e.g., computer centers). Where this occurs, the governmental unit should be guided by the requirements in Attachment C relating to the development of billing rates and documentation requirements, and should advise the cognizant agency of any billed services. Reviews of these types of services (including reviews of costing/billing methodology, profits or losses, etc.) will be made on a case-by-case basis as warranted by the circumstances involved.

3. *Indirect cost allocations not using rates.* In certain situations, a governmental unit, because of the nature of its awards, may be required to develop a cost allocation plan that distributes indirect (and, in some cases, direct) costs to the specific funding sources. In these cases, a narrative cost allocation methodology should be developed, documented, maintained for audit, or submitted, as appropriate, to the cognizant agency for review, negotiation, and approval.

4. *Appeals.* If a dispute arises in a negotiation of an indirect cost rate (or other rate) between the cognizant agency and the governmental unit, the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.

5. *Collection of unallowable costs and erroneous payments.* Costs specifically identified as unallowable and charged to Federal awards either directly or indirectly will be refunded (including interest chargeable in accordance with applicable Federal agency regulations).

6. *OMB assistance.* To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

[FR Doc. 95–11658 Filed 5–16–95; 8:45 am]
BILLING CODE 3110–01–P

federal register

Friday
August 29, 1997

A-87

Part III

Office of Management and Budget

Governmentwide Grants Management Requirements; Notice; Interim Final Rules and Proposed Rule

OFFICE OF MANAGEMENT AND BUDGET

Governmentwide Grants Management Requirements

AGENCY: Office of Management and Budget.

ACTION: Final Revision of OMB Circulars A–21, A–87, A–102, A–110 and A–122 and Interim Final Revision of OMB Circular A–110.

SUMMARY: The Office of Management and Budget (OMB) is issuing final revisions to five OMB circulars and, in addition, OMB is issuing interim final amendments to one of these circulars to reflect the Single Audit Act Amendments of 1996. The five Circulars are A–21 (''Cost Principles for Educational Institutions''), A–87 (''Cost Principles for State and Local Governments''), A–102 (''Grants and Cooperative Agreements with State and Local Governments''), A–110 (''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations''), and A–122 (''Cost Principles for Non-Profit Organizations''). The purpose of these revisions is to provide a conditional exemption from OMB's grants management requirements and a conditional class deviation from the agencies' Grants Management Common Rule for certain Federal grant programs with statutorily-authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment. Additionally, OMB is issuing interim final conforming amendments to Circular A–110 to reflect the enactment of the Single Audit Act Amendments of 1996, the recent rescission of OMB Circular A–128 (''Audits of State and Local Governments''), and the consolidation of its provisions in a revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

DATES: The final revisions and interim final amendments are effective September 29, 1997. All comments on the interim final amendments should be in writing and must be received by October 28, 1997. Late comments will be considered to the extent practicable.

ADDRESSES: Comments should be mailed to Grants Management Audit Docket, Office of Federal Financial Management, Office of Management and Budget, Room 6025 New Executive Office Building, Washington, DC 20503. Electronic mail (E-mail) comments may be submitted via the Internet to kahlow__b@a1.eop.gov. Please include the full body of E-mail comments in the text of the message and not as an attachment. Please include the name, title, organization, postal address, and E-mail address in the text of the message.

FOR FURTHER INFORMATION CONTACT: Barbara F. Kahlow, Office of Financial Federal Financial Management, Office of Management and Budget, (202) 395–3053. The revised OMB Circulars A–21, A–87, A–102, A–110, and A–122 are available electronically on the OMB Home Page at http://www.whitehouse.gov/WH/EOP/omb. These revised Circulars are also available in paper format by contacting the OMB Publications Office at (202) 395–7332.

SUPPLEMENTARY INFORMATION: On May 14, 1997, the Office of Management and Budget (OMB) proposed a revision (62 FR 26577) of OMB Circulars A–21, ''Cost Principles for Educational Institutions,'' A–87, ''Cost Principles for State and Local Governments,'' A–102, ''Grants and Cooperative Agreements with State and Local Governments,'' A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' and A–122, ''Cost Principles for Non-Profit Organizations.'' The proposal would provide a conditional exemption from OMB's grants management requirements and a conditional class deviation from the agencies' Grants Management Common Rule (GMCR) for certain Federal grant programs with statutorily-authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment.

This exemption could be granted to related Federal non-entitlement grant programs which are administered by State and local governments and which have the following characteristics: the related programs (1) serve a common program purpose, (2) have specific statutorily-authorized consolidated planning and consolidated administrative funding, and (3) are administered by State agencies which are funded mostly by non-Federal sources. In order to promote efficiency in the State and local program administration of such related programs, Federal agencies could exempt these covered State-administered, non-entitlement grant programs from Federal grants management requirements in OMB Circulars A–21, A–87, A–110, and A–122, and the GMCR. The exemptions would be from all but the allocability-of-costs provisions of Circulars A–21 (Section C, subpart 4), A–87 (Attachment A, subsection C.3), and A–122 (Attachment A, subsection A.4), and from all of the administrative requirements provisions of Circular A–110 and the GMCR.

A Federal agency would have the discretion to exempt a Federal grant program from the Federal grants management requirements. A Federal agency shall consult with OMB during its consideration of whether to grant such an exemption.

If a Federal agency exempts a Federal grant program from these requirements, a State would only qualify if it adopts its own written fiscal and administrative requirements for expending and accounting for all funds, which are consistent with the provisions of OMB Circular A–87, and extends such requirements to all subrecipients. These fiscal and administrative requirements must be sufficiently specific to ensure that: funds are used in compliance with all applicable Federal statutory and regulatory provisions, costs are reasonable and necessary for operating these programs, and funds are not to be used for general expenses required to carry out other responsibilities of a State or its subrecipients. If a State does not adopt such fiscal and administrative requirements, then it would continue to be subject to the Federal grants management requirements.

Response to Comments

OMB received eight comment letters: three from Federal agencies, one from a local government, two from universities, one from a non-profit organization, and one from an interest group. Four of the letters did not address the substance of the proposed revisions. The letter from the local government asked if the proposal had any relationship to the recent revision of OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations,'' on June 24, 1997 (62 FR 35278); in response to this question, these revisions are not related to that revision of Circular A–133. The letter from the non-profit organization raised concerns about certain other provisions in OMB Circular A–122 which are unrelated to the proposal; OMB will consider these concerns in connection with its review of Circular A–122. A letter from one of the Federal agencies requested an unrelated change to the GMCR and OMB Circular A–110; the issue raised will be considered during OMB's future review of those provisions. A letter from another Federal agency raised concerns

about OMB's denial of certain other, unrelated waiver requests from that agency which would have been applicable only to that agency's grant programs.

The other four letters addressed the substance of the proposed revisions. The interest group commenter supported the proposed revisions and recommended that the flexibility afforded to State-administered programs be extended to local-administered programs. This recommendation for flexibility for local-administered programs will be considered during OMB's future review of the five circulars.

The two university commenters objected to the proposal because of its possible effect on those subrecipients, including subcontractors, that are universities. Specifically, the university commenters preferred to be subject only to OMB Circulars A–21 and A–110 (and not also to State grants management requirements) because ''We have found that state government does not always do a good job communicating to us what the guidelines are for a given program.'' The university commenters stated that they are familiar with Circulars A–21 and A–110 and ''have systems in place to deal with them.'' Finally, the Federal agency commenter found the proposal unclear and felt that ''the funding agency needs to have not only accountability, but also the consistent accountability afforded by currently imposed Federal cost principles and uniform administrative requirements.'' The commenter raised a concern about the possible inefficiency of having more than one State grants management system, with one for exempted grant programs (and other State programs), and one for the rest of the Federal grant programs.

OMB would also be concerned if the proposed changes increased burden on State grantees or their subrecipients, as the three commenters apparently believed. However, State grants management requirements instead of Federal grants management requirements currently apply to several previously-exempted Federal programs as well as to State-funded programs which have no Federal funding. In 1981 and 1982, OMB waived the application of Circulars A–21, A–87, A–102, A–110, and A–122 for certain, selective State-administered programs. As a consequence, OMB believes that the addition of programs with shared, statutorily-authorized consolidated planning and consolidated administrative funding with these already-exempted programs would not result in additional burden on subrecipients and would not result in increased inefficiency. Since OMB does not believe that any negative effects on grantees or subrecipients will ensue from the proposed revisions, OMB is finalizing them.

Accordingly, to provide such a conditional exemption, OMB is adopting the proposed revisions and amending: Section A.3 of Circular A–21; Attachment A Section A.3 of Circular A–87; Section 2 of Circular A–102; Subpart C of Circular A–110 (as a new Section ____.29 instead of as Section ____.45 as proposed); and, Attachment A Section A of Circular A–122. The amendments are set forth below.

Interim Final Conforming Amendments

In addition to adopting the proposed revisions to the five circulars, OMB is also making conforming amendments to Circular A–110 to reflect the enactment of the Single Audit Act Amendments of 1996 (Public Law 104–156, 110 Stat. 1396) and OMB's rescission of Circular A–128 (''Audits of State and Local Governments'') and its issuance of the June 24, 1997, revision of OMB Circular A–133 (62 FR 35278, June 30, 1997). The provisions of the 1996 Act and of the revised Circular A–133 apply to audits of fiscal years beginning after June 30, 1996. The revised Circular A–133 co-locates audit requirements for States, local governments, and non-profit organizations. As a consequence, OMB rescinded OMB Circular A–128.

Currently, Circular A–110 refers to the Single Audit Act of 1984 (which was superseded by the 1996 Act), to Circular A–128 (which was rescinded), and to the former version of OMB Circular A–133 (which covered only non-profit organizations, and did not cover State and local governments). These interim final conforming amendments update these references. Additional conforming changes were made to conform with the 1996 Act and revised Circular A–133 (e.g., to reflect that, under the 1996 Act, all non-profit hospitals are now subject to the Act).

OMB has determined, under 5 U.S.C. 553(b)(B), that good cause exists to issue these conforming amendments on an interim final basis. The conforming amendments update the references to the applicable statute and circulars, by replacing the superseded references with current ones. Moreover, under the Single Audit Act Amendments of 1996, the provisions of the 1996 Act (which are reflected in the revised OMB Circular A–133) provide standards that are effective for audits of fiscal years beginning after June 30, 1996. Accordingly, OMB has determined that issuing a proposal for comment on these conforming amendments would be ''impractical, unnecessary, and contrary to the public interest.''

Availability of Revised Circulars

OMB has prepared updated versions of the five circulars, as amended herein. The revised OMB Circulars A–21, A–87, A–102, A–110, and A–122, as amended herein, are available electronically on the OMB Home Page at http://www.whitehouse.gov/WH/EOP/omb. These revised Circulars, as amended herein, are also available in paper format by contacting the OMB Publications Office at (202) 395–7332.

Joseph J. Minarik,

Acting Director.

1. OMB hereby amends Circulars A–21, A–87, A–102, A–110, and A–122 by adding the three paragraphs that follow, regarding ''Conditional exemptions,'' at the specified places in each Circular: (1) as a new paragraph d under A.3 Purpose and Scope, Application of Circular A–21; (2) as a new paragraph e under Attachment A, A.3 Purpose and Scope, Application of Circular A–87; (3) as a new paragraph j under Section 2, Post-award Policies of Circular A–102; (4) as a new Section ____.29 under Subpart C, Post-award Requirements of Circular A–110; and, (5) as a new paragraph 7 under Attachment A, A. Basic Considerations of Circular A–122:

Conditional exemptions. (1) OMB authorizes conditional exemption from OMB administrative requirements and cost principles circulars for certain Federal programs with statutorily-authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment. A Federal agency shall consult with OMB during its consideration of whether to grant such an exemption.

(2) To promote efficiency in State and local program administration, when Federal non-entitlement programs with common purposes have specific statutorily-authorized consolidated planning and consolidated administrative funding and where most of the State agency's resources come from non-Federal sources, Federal agencies may exempt these covered State-administered, non-entitlement grant programs from certain OMB grants management requirements. The exemptions would be from all but the allocability of costs provisions of OMB Circulars A–87 (Attachment A, subsection C.3), ''Cost Principles for State, Local, and Indian Tribal Governments,'' A–21 (Section C, subpart 4), ''Cost Principles for Educational

Institutions,'' and A–122 (Attachment A, subsection A.4), ''Cost Principles for Non-Profit Organizations,'' and from all of the administrative requirements provisions of OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' and the agencies' grants management common rule.

(3) When a Federal agency provides this flexibility, as a prerequisite to a State's exercising this option, a State must adopt its own written fiscal and administrative requirements for expending and accounting for all funds, which are consistent with the provisions of OMB Circular A–87, and extend such policies to all subrecipients. These fiscal and administrative requirements must be sufficiently specific to ensure that: funds are used in compliance with all applicable Federal statutory and regulatory provisions, costs are reasonable and necessary for operating these programs, and funds are not be used for general expenses required to carry out other responsibilities of a State or its subrecipients.

2. OMB hereby amends paragraphs (a), (b) and (c) of Section ____.26 of OMB Circular A–110 to read as follows:

____.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A–133 shall be subject to the audit requirements of the Federal awarding agencies.

[FR Doc. 97–22828 Filed 8–28–97; 8:45 am]

BILLING CODE 3110–01–P

APPENDIX E

Delegation of Authority for Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121

IHS General Administrative Manual Chapter 8-78, Guidelines for Selection of Instrument for Use with Non-IHS Entities

IHS General Administrative Manual Chapter 8-79, Use of Collaborative Agreements

Reorganization Order of January 4, 1988, elevating the IHS to a PHS Agency

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

Program #8

MAR 3 1995

TO: Director of Headquarters Operations

FROM: Director

SUBJECT: Delegation of Authority for Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121

Authority Delegated

Pursuant to the authority delegated to the Director, Indian Health Service (IHS), by the Reorganization Order of January 4, 1988, (52 FR 47053), which elevated the IHS to a PHS Agency, and in accordance with Public Law (P.L.) 86-121, the Indian Sanitation Facilities Act, of July 31, 1959, I hereby delegate to the Director of Headquarters Operations for exercise IHS-wide, the following authorities under P.L. 86-121:

1. To accept and approve projects for the construction of sanitation facilities under P.L. 86-121.

2. To make arrangements and agreements with appropriate public authorities and non-profit organizations or agencies and with the Indians to be served and any other person so served by sanitation facilities provided under the Act regarding contributions and the acceptance of such contributions toward the construction, improvement, extension, and provision of sanitation facilities and responsibilities for maintenance thereof.

3. To obtain in the name of the tribe, band, or group to benefit from the facilities, rights-of-way, easements, water rights, and related interests in land, other than title, from the Bureau of Indian Affairs, Department of the Interior, and from others as required for project execution by purchase, lease, gift, exchange or otherwise as authorized by Section 7 (a) (2) of P.L. 86-121.

4. To transfer sanitation facilities provided under P.L. 86-121 together with appurtenant water rights, easements, rights-of-way, and related interests in land, other than title, to any state or subdivision or public authority thereof, or to any Indian tribe, group, band, or community, or in the case of domestic appurtenances and fixtures, to any one or more of the occupants of the Indian homes served thereby.

Authority to Redelegate

The above authorities may be redelegated to the Area Directors, Associate Director, Office of Environmental Health and Engineering, and Associate Director Office of Health Program Research and Development with further redelegation prohibited.

Restrictions and Limitations

Authority No. 1: In exercising the authority delegated in No. 1 above, you shall not approve or undertake projects having an aggregate total estimated cost in excess of funds allowed to the Area for the project category involved. Projects shall conform to the policies set forth in the Indian Health Manual, Part 3, Chapter 11, Environmental Health, and the "Criteria for Sanitation Facilities Construction." Authority is also granted to approve the transfer of sanitation facilities construction project funds from one project account to another for the purpose of applying savings from certain projects to meet the unforeseen fund deficiencies of other projects. Provided that funds allowed for projects to assist housing programs shall not be transferred to regular or special project accounts.

Authorities No. 2, 3, and 4: These authorities shall be used only in a manner consistent with the policies set forth in the Indian Health Manual and other applicable Departmental and Federal Regulations.

References

P.L. 86-121 (73 State. 267) 7/31/59
IHS Circular 62-15, Method of Conduct, Indian Sanitation Facilities Construction Activities, 3/1/62.

Supersession

This delegation supersedes the November 11, 1988, delegation from the Director, IHS, to the Director of Headquarters Operations contained in the Indian Health Manual, Part 1, Chapter 5, Exhibit 1-5.II, Subject: Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121.

Effective Date

This delegation is effective upon date of signature.

Michael H. Trujillo, M.D., M.P.H.
Assistant Surgeon General

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

MAR 3 1995

Program #8

TO: Area Directors

FROM: Acting Director of Headquarters Operations

SUBJECT: Delegation of Authority for Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121

Authority Delegated

Pursuant to the authority delegated to the Director of Headquarters Operations on March 3, 1995 by the Director, Indian Health Service (IHS), and in accordance with Public Law (P.L.) 86-121, July 31, 1959, I hereby delegate to the Area Directors for exercise within their respective area of functional responsibility the following authorities under P.L. 86-121:

1. To accept and approve projects for the construction of sanitation facilities under P.L. 86-121. For oversight purposes, Headquarters may request copies of agreements for projects in excess of $1,000,000.

2. To make arrangements and agreements with appropriate public authorities and non-profit organizations or agencies and with the Indians to be served and any other person so served by sanitation facilities provided under the Act regarding contributions and the acceptance of such contributions toward the construction, improvement, extension, and provision of sanitation facilities and responsibilities for maintenance thereof.

3. To obtain in the name of the tribe, band, or group to benefit from the facilities, rights-of-way, easements, water rights, and related interests in land, other than title, from the Bureau of Indian Affairs, Department of the Interior, and from others as required for project execution by purchase, lease, gift, exchange or otherwise as authorized by Section 7 (a) (2) of P.L. 86-121.

4. To transfer sanitation facilities provided under P.L. 86-121 together with appurtenant water rights, easements, rights-of-way, and related interests in land, other than title, to any State or subdivision or public authority thereof, or to any Indian tribe, group, band, or community, or in the case of domestic appurtenances and fixtures, to any one or more of the occupants of the Indian homes served thereby.

Authority to Redelegate

The above authorities may not be redelegated.

Restrictions and Limitations

Authority No. 1: In exercising the authority delegated in No. 1 above, you shall not approve or undertake projects having an aggregate total estimated cost in excess of funds allowed to the Area for the project category involved. Projects shall conform to the policies set forth in the Indian Health Manual, Part 3, Chapter 11, Environmental Health, and the "Criteria for Sanitation Facilities Construction." Authority is also granted to the officials designated above to approve the transfer of sanitation facilities construction project funds from one project account to another for the purpose of applying savings from certain projects to meet the unforeseen fund deficiencies of other projects. Provided that funds allowed for projects to assist housing programs shall not be transferred to regular or special project accounts.

Authorities No. 2, 3, and 4: These authorities shall be used only in a manner consistent with the policies set forth in the Indian Health Manual and other applicable Departmental and Federal Regulations.

References

P.L. 86-121 (73 State. 267) 7/31/59
IHS Circular 62-15, Method of Conduct, Indian Sanitation Facilities Construction Activities, 8/1/62.

Supersession

This delegation supersedes the November 11, 1988, delegation to the Area Directors by the Director of Headquarters Operations contained in the Indian Health Manual, Part 1, Chapter 5, Exhibit 1-5.II, Subject: Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121.

Effective Date

This delegation is effective upon date of signature.

Luana L. Reyes

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

MAR 3 1995

Program #8

TO: Associate Director
Office of Environmental Health and Engineering

FROM: Acting Director of Headquarters Operations

SUBJECT: Delegation of Authority for Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121

Authority Delegated

Pursuant to the authority delegated to the Director of Headquarters Operations on March 3, 1995 by the Director, Indian Health Service (IHS), and in accordance with Public Law (P.L.) 86-121, July 31, 1959, I hereby delegate to the Associate Director, Office of Environmental Health and Engineering (OEH&E), the following authorities for the IHS sanitation facilities under P.L. 86-121 insofar as they pertain to OEH&E's functional responsibility:

1. To accept and approve projects for the construction of sanitation facilities under P.L. 86-121. For oversight purposes, the Director of Headquarters Operations may request copies of agreements for projects in excess of $1,000,000.

2. To make arrangements and agreements with appropriate public authorities and non-profit organizations or agencies and with the Indians to be served and any other person so served by sanitation facilities provided under the Act regarding contributions and the acceptance of such contributions toward the construction, improvement, extension, and provision of sanitation facilities and responsibilities for maintenance thereof.

3. To obtain in the name of the tribe, band, or group to benefit from the facilities, rights-of-way, easements, water rights, and related interests in land, other than title, from the Bureau of Indian Affairs, Department of the Interior, and from others as required for project execution by purchase, lease, gift, exchange or otherwise as authorized by Section 7 (a) (2) of P.L. 86-121.

4. To transfer sanitation facilities provided under P.L. 86-121 together with appurtenant water rights, easements, rights-of-way, and related interests in land, other than title, to any State or subdivision or public authority thereof, or to any Indian tribe, group, band, or community, or in the case of domestic appurtenances and fixtures, to any one or more of the occupants of the Indian homes served thereby.

Authority to Redelegate

The above authorities may not be redelegated.

Restrictions and Limitations

Authority No. 1: In exercising the authority delegated in No. 1 above, you shall not approve or undertake projects having an aggregate total estimated cost in excess of funds allowed to the Area for the project category involved. Projects shall conform to the policies set forth in the Indian Health Manual, Part 3, Chapter 11, Environmental Health, and the "Criteria for Sanitation Facilities Construction." Authority is also granted to the officials designated above to approve the transfer of sanitation facilities construction project funds from one project account to another for the purpose of applying savings from certain projects to meet the unforeseen fund deficiencies of other projects. Provided that funds allowed for projects to assist housing programs shall not be transferred to regular or special project accounts.

Authorities No. 2, 3, and 4: These authorities shall be used only in a manner consistent with the policies set forth in the Indian Health Manual and other applicable Departmental and Federal Regulations.

References

P.L. 86-121 (73 State. 267) 7/31/59
IHS Circular 62-15, Method of Conduct, Indian Sanitation Facilities Construction Activities, 8/1/62.

Supersession

This delegation supersedes the November 11, 1988, delegation to the Associate Director, OEH&E, by the Director of Headquarters Operations contained in the Indian Health Manual, Part 1, Chapter 5, Exhibit 1-5.II, Subject: Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121.

Effective Date

This delegation is effective upon date of signature.

Luana L. Reyes

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

MAR 3 1995

Program #8

TO: Associate Director
Office of Health Program Research and Development

FROM: Acting Director of Headquarters Operations

SUBJECT: Delegation of Authority for Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121

Authority Delegated

Pursuant to the authority delegated to the Director of Headquarters Operations on March 3, 1995 by the Director, Indian Health Service (IHS), and in accordance with Public Law (P.L.) 86-121, July 31, 1959, I hereby delegate to the Associate Director, Office of Health Program Research and Development (OHPR&D), IHS, Tucson, Arizona, the following authorities for the IHS sanitation facilities under P.L. 86-121 insofar as they pertain to OHPR&D's functional responsibility:

1. To accept and approve projects for the construction of sanitation facilities under P.L. 86-121. For oversight purposes, Headquarters may request copies of agreements for projects in excess of $1,000,000.

2. To make arrangements and agreements with appropriate public authorities and non-profit organizations or agencies and with the Indians to be served and any other person so served by sanitation facilities provided under the Act regarding contributions and the acceptance of such contributions toward the construction, improvement, extension, and provision of sanitation facilities and responsibilities for maintenance thereof.

3. To obtain in the name of the tribe, band, or group to benefit from the facilities, rights-of-way, easements, water rights, and related interests in land, other than title, from the Bureau of Indian Affairs, Department of the Interior, and from others as required for project execution by purchase, lease, gift, exchange or otherwise as authorized by Section 7 (a) (2) of P.L. 86-121.

4. To transfer sanitation facilities provided under P.L. 86-121 together with appurtenant water rights, easements, rights-of-way, and related interests in land, other than title, to any State or subdivision or public authority thereof, or to any Indian tribe, group, band, or community, or in the case of domestic appurtenances and fixtures, to any one or more of the occupants of the Indian homes served thereby.

Authority to Redelegate

The above authorities may not be redelegated.

Restrictions and Limitations

Authority No. 1: In exercising the authority delegated in No. 1 above, you shall not approve or undertake projects having an aggregate total estimated cost in excess of funds allowed to the Area for the project category involved. Projects shall conform to the policies set forth in the Indian Health Manual, Part 3, Chapter 11, Environmental Health, and the "Criteria for Sanitation Facilities Construction". Authority is also granted to the officials designated above to approve the transfer of sanitation facilities construction project funds from one project account to another for the purpose of applying savings from certain projects to meet the unforeseen fund deficiencies of other projects. Provided that funds allowed for projects to assist housing programs shall not be transferred to regular or special project accounts.

Authorities No. 2, 3, and 4: These authorities shall be used only in a manner consistent with the policies set forth in the Indian Health Manual and other applicable Departmental and Federal Regulations.

References

P.L. 86-121 (73 State. 267) 7/31/59
IHS Circular 62-15, Method of Conduct, Indian Sanitation Facilities Construction Activities, 8/1/62.

Supersession

This delegation supersedes the November 11, 1988, delegation to the Associate Director, OHPR&D, by the Director of Headquarters Operations contained in the Indian Health Manual, Part 1, Chapter 5, Exhibit 1-5.II, Subject: Sanitation Facilities Construction Projects Pursuant to the Indian Sanitation Facilities Act, Public Law 86-121.

Effective Date

This delegation is effective upon date of signature.

Luana L. Reyes

SUBJECT: GUIDELINES FOR SELECTION OF INSTRUMENT FOR USE WITH NON-IHS ENTITIES

IHS 8-78-00 Purpose and Scope
10 Policy
20 Selection of Award Instrument
30 Classes and Types of Instruments

IHS: 8-78-00 PURPOSE AND SCOPE

The purpose of this Chapter is to specify the policy and provide guidelines that apply to the use and award of the various instruments available to IHS.

The Indian Health Service (IHS) routinely enters into a number of different arrangements with a variety of organizations for the purpose of accomplishing its mission of assuring adequate health care for American Indians and Alaska natives. These arrangements may be formalized in several types of instruments, e.g., contracts, grants, cooperative agreements, interagency or intra-agency agreements, and other types of agreements.

Because it is sometimes difficult to determine when a particular instrument should be used, this Chapter establishes the framework for IHS organizations to use in selecting the appropriate instrument. This Chapter is also intended to standardize the terminology and the criteria for selection of those various instruments. The policy prescribed herein applies to all IHS components.

IHS: 8-78-10 POLICY

It is the policy of IHS to use the appropriate instrument, as governed by law, regulation, and policy, when entering into a relationship with other Federal or non-Federal entities in furtherance of the IHS mission.

IHS:
8-78-20 SELECTION OF AWARD INSTRUMENT

The selection of the appropriate instrument depends, among other things, on the activity undertaken, legislative authority, IHS role, financial arrangements, and the type of resources involved. In determining which is the proper instrument, IHS organizations shall follow the procedures set forth in this Chapter and in the policies referenced below to ensure that the selected instrument meets the criteria for use.

IHS:
8-78-30 CLASSES AND TYPES OF INSTRUMENTS

The instruments employed to consummate binding relationships between IHS and other entities fall into three distinct classes. The following provides, by class, a description of each instrument, an explanation of when its use is appropriate, the relevant regulations/policies pertaining to each instrument, and the IHS focal point (the office responsible for providing guidance on use of the instrument which, except for the Division of Management Policy which has no signatory authority, is also the office having the authority to execute the instrument):

A. Agreements with Federal Entities (with or without the transfer of funds):

It is the policy of IHS to use interagency or intra-agency agreements, as appropriate, to consummate arrangements with other Federal entities.

1. Interagency and Intra-Agency Agreements

a. An interagency agreement shall be used when IHS enters into arrangements with non-HHS Federal agencies for the purpose of providing or receiving supplies or services. An intra-agency agreement is to be used when IHS enters into arrangements with other HHS organizations for the purpose of providing or receiving supplies or services.

b. The IHS focal point is the Division of Management Policy, Office of Administration and Management.

c. Applicable requirements are found in the HHS General Administration Manual Chapter 8-77, "Agency Agreements," the PHS supplement thereto, and IHS implementing memoranda.

B. Agreements with Non-Federal Entities that Involve the Transfer of Federal Funds (or property in lieu of funds):

It is the policy of IHS to use traditional grants, cooperative agreements, and contracts, as provided in the Federal Grant and Cooperative Agreement Act, when entering into agreements with non-Federal entities that involve the transfer of Federal funds or property in lieu of funds. However, other instruments, such as memoranda of agreement or Indian Self-Determination contracts, may be used when authorized by statute.

1. Memoranda of Agreement

a. A memorandum of agreement is to be used when IHS carries out its functions of providing sanitation facilities and services pursuant to Section 7 of the Transfer Act which incorporates all of P.L. 86-121, "The Indian Sanitation Facilities Act."

b. The IHS focal point is the Office of Environmental Health and Engineering.

c. Applicable requirements are found in the Indian Sanitation Facilities Act (P.L. 86-121), IHS Circular No. 62-15, "Method of Conduct-Indian Sanitation Facilities Construction Activity Authorized Under P.L. 86-121" and the "Criteria for Sanitation Facility Construction," issued February 6, 1984.

Note: The MOA Guidelines and the Criteria for the Sanitation Facilities Construction Program replaced "Method of Conduct" and "Criteria for Sanitation Facility Construction" mentioned above.

2. Self-Determination Contracts (other than construction)

   a. A self-determination contract is to be used when IHS, pursuant to the Indian Self-Determination and Education Assistance Act (P.L. 93-638, as amended), enters into agreements with Indian tribes or tribal organizations to plan, conduct, and administer programs or services which are otherwise provided to Indian tribes and their members pursuant to law and the transaction's purpose is not to acquire something for direct benefit or use of the Government.

   b. The IHS focal point is the cognizant Contracting Officer.

   c. Applicable requirements are found in the Indian Self-Determination and Education Assistance Act (P.L. 93-638, as amended), implementing regulations, and Indian Self-Determination memoranda.

3. Procurement Contracts

   a. A procurement contract is to be used when the principal purpose of a relationship between IHS and a non-Federal entity is acquisition by IHS of property or services for the direct benefit or use of the Government. (Includes construction contracts under P.L. 93-638, as amended).

   b. The IHS focal point is the cognizant Contracting Officer.

   c. Applicable requirements for administration of procurement contracts are found in the Federal, HHS and PHS Acquisition Regulations, P. L. 93-638, as amended, and implementing regulations for construction contracts under P. L. 93-638.

4. Grants and Cooperative Agreements

   a. A grant is to be used when the principal purpose of a relationship is the transfer of money or property in lieu of funds by IHS to a non-Federal entity for the purpose of carrying out a public purpose of support or stimulation authorized by statute; the transaction is not to acquire something for the direct benefit or use of the Government. A cooperative agreement is to be used when the same criteria for use of a grant prevail and it is anticipated that IHS will be substantially involved in the proposed effort.

   b. The IHS focal point is the Chief, Grants Management Branch, Division of Acquisition and Grant Operations, Office of Administration and Management.

   c. Applicable requirements for administration of grants and cooperative agreements are found in the PHS Grants Administration Manual, PHS Grants Policy Statement and in 45 CFR Parts 74 and 92.

C. <u>Agreements with Non-Federal Entities that do not Involve the Transfer of Federal Funds (or property in lieu of funds)</u>:

Collaborative Agreements

   a. A collaborative agreement is to be used to formalize collaborative arrangements with non-Federal entities when such arrangements do not involve the transfer of Federal funds (or property in lieu of funds).

   b. The IHS focal point is the Division of Management Policy, Office of Administration and Management.

   c. Applicable requirements are found in the IHS General Administration Manual Chapter 8-79, "Use Of Collaborative Agreements."

SUBJECT: USE OF COLLABORATIVE AGREEMENTS

IHS 8-79-00 Purpose
10 Applicability
20 Definition
30 Preclearance For Use of a Collaborative Agreement
40 Contents of a Collaborative Agreement
50 Signatory Authority

IHS:
8-79-00 PURPOSE

The Indian Health Service (IHS) has historically used a variety of instruments to formalize relationships with non-Federal entities. Questions are often raised concerning how to determine which is the appropriate instrument to use given the various instruments available and the differing conditions for their use.

The purpose of this Chapter is to specify the policy and procedures that will apply to the use and award of agreements with non-Federal entities that do not involve the transfer of Federal funds (or property in lieu of funds).

IHS:
8-79-10 APPLICABILITY

A. This Chapter applies to all IHS components.

B. This Chapter applies to new agreements entered into as of the issuance date of this Chapter and to proposed extensions or modifications to on-going agreements that were entered into prior to the issuance date of this Chapter.

C. Area offices should issue procedures, as necessary, to implement this Chapter within their respective organizations.

IHS:
8-79-20 DEFINITION

"Collaborative agreement" means a formal written agreement between IHS and a non-Federal organization which describes the way which the two organizations will cooperate in an activity(ies) within the IHS mission and which does not involve the transfer of Federal funds (or property in lieu of funds). This includes reciprocal or reimbursable arrangements entered into under the authority of Section 327A of the Public Health Service Act if they do not involve the transfer of Federal funds (or property in lieu of funds). (When an arrangement under the authority of Section 327A does involve the transfer of funds or property in lieu of funds, the instrument used will ordinarily be a cooperative agreement as prescribed in IHS General Administration Manual Chapter 8-78, "Guidelines For Selection Of Instrument For Use With Non-IHS Entities.")

Examples of collaborative agreements include:

- Delineating local responsibilities of IHS and non-federal Emergency Medical Services Programs to assure emergency medical coverage.
- Defining the roles and responsibilities of IHS and tribal and local entities to provide comprehensive substance abuse services.
- Agreements with colleges and universities to accept medical and other health professional students at IHS facilities for training.
- Utilization review agreements with a Peer Review Organization.
- Agreements concerning local disaster planning with local organizations.

IHS:
8-79-30 PRECLEARANCE FOR USE OF A COLLABORATIVE AGREEMENT

A. Prior to initiating negotiations for a proposed collaborative agreement, the sponsoring office must submit a request for preclearance and must obtain concurrence for the use of such an agreement from the Director, IHS or his/her designee (for collaborative agreements to be entered into at Headquarters) or the Area Director (for collaborative agreements to be entered into by an Area Office or Service Unit). For Area Offices and Service Units, the Area Director is the only Area Office official that can provide the required concurrence. The purpose of obtaining preclearance is to ensure that the proposed effort is one that is within the IHS mission, will be of value to IHS, and the concept is supported by the official authorized to enter into the agreement. Therefore, in order not to expend significant resources or make any commitment on an arrangement not subsequently approved, the sponsoring office shall not begin negotiation of a collaborative agreement until concurrence is received.

B. At a minimum, the request for preclearance must address the need and purpose of the activity, expected benefits, all resource requirements, responsibilities of all parties, expected duration of the agreement, name of the proposed organization, and reason(s) for its selection. As part of the review, the concurring official, as specified in paragraph A immediately above, will determine which other offices should participate in the preclearance process.

C. Proposed collaborative agreements at the Area Office/Service Unit level involving any of the following must also be concurred in by the Director, IHS, or his/her designee:

1. sensitive areas such as those having political, religious, and moral implications;

2. when the agreement will have an impact on American Indians and Alaska natives generally, i.e., not limited to an individual Area Office; or

3. when there may be more than an incidental commitment of IHS resources.

D. Based upon the preclearance review of a proposed collaborative agreement which includes any of the considerations listed in paragraph C above, the Director, IHS (or his/her designee) may determine that the intended agreement should be announced in the Federal Register if he/she believes it would be beneficial to inform the public of the proposed activity. In addition, the Director, IHS, (or his/her designee) may qualify the preclearance approval to require that the proposed collaborative agreement document also be provided to the Director, IHS, (or his/her designee) for concurrence prior to signature.

E. Once concurrence required by this section has been granted, the sponsoring office may proceed with negotiation and development of a collaborative agreement in accordance with this Chapter.

IHS:
8-79-40 CONTENTS OF A COLLABORATIVE AGREEMENT

A. While there is no required format for a collaborative agreement, the sponsoring office is responsible for ensuring that, at a minimum, the document developed clearly conveys the scope of the activity to be performed and sets forth the responsibilities and obligations of all parties.

B. At a minimum, a collaborative agreement shall include the following:

- Name and address of the non-Federal organization(s) and the IHS sponsoring organization.
- A collaborative agreement number.
- Title of the agreement and a description of its purpose.
- Responsibilities of all parties and anticipated results.

- Duration of the agreement.
- A provision affording IHS the right to terminate upon thirty days' notice.
- Language to protect the Government's interests, e.g. data rights, Privacy Act, Federal Tort Claims Act, etc., if determined necessary by a legal review.
- A statement that the Director, IHS will make final decisions concerning any disputes resulting from the collaborative agreement.
- Name and address of the responsible official for each party to the agreement.
- Signature of the authorized IHS official (See IHS 8-79-50) and the authorized official of the collaborating organization.

C. Collaborative agreements will be given identification numbers by the respective contracting office for purposes of tracking and reporting. Collaborative agreements are to be sequentially numbered, using the awarding unit acronym (listed below), the prefix CA (collaborative agreement), the last two digits of the fiscal year the agreement was entered into, and an agreement number beginning with 0001 each fiscal year, e.g. SD-CA-90-0001, SD-CA-90-0002. The awarding unit acronyms are:

<u>IHS, Headquarters:</u>
HQ

<u>Area Offices:</u>

AZ	- Tucson	AK	- Alaska
CA	- California	MN	- Bemidji
MT	- Montana	NM	- Albuquerque
OK	- Oklahoma	OR	- Portland
PHX	- Phoenix	SD	- Aberdeen
TN	- Nashville	NAV	- Navajo

The contracting office shall maintain the official file for each collaborative agreement.

IHS:
8-79-50 SIGNATORY AUTHORITY

Collaborative agreements shall be signed by the official that provided preclearance as specified in paragraph A of Section 79-30 of this Chapter; however a collaborative agreement affecting a Service Unit only, may, if provided in the Area Office's implementation of the Chapter, be signed by the cognizant Service Unit Director.

Reorganization Order of January 4, 1988, elevating the IHS to a PHS Agency.

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L-S ID No.: 281686
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Statement of Organization, Functions, and Delegations of Authority; Public Health Service

Part H of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (42 FR 61317, December 2, 1977, as amended most recently at 48 FR 17652, April 25, 1983) is amended to reflect a reorganization in the Public Health Service (PHS). The Mission, Organization, and Order of Succession of the PHS are revised to reflect the current scope of public health activities. The Indian Health Service is deleted as a component of Health Resources and Services Administration and is established as a separate agency within PHS. Other organization changes within PHS are made to reflect these changes.

Chapter HB, Health Resources and Services Administration (47 FR 38409-24, August 31, 1982, as amended most recently at 52 FR 30959, August 18, 1987) is amended to delete all titles and statements relating to the Indian Health Service (HBN). A new Chapter HG, Indian Health Service is established to reflect the mission, organization and functions of the Indian Health Service.

Public Health Service

Under Chapter H, Section H-00. Public Health Service-Mission, delete the statement in its entirety and insert the following:

Section H-00. Public Health Service-Mission. The mission of the Public Health Service is to promote the protection and advancement of the Nation's physical and mental health by: Conducting medical and biomedical research; sponsoring and administering comprehensive programs for the development of health resources; preventing and controlling disease and alcohol and drug abuse; providing resources and expertise to the States and other public and private institutions, and to Tribes, Councils and organizations concerned with the health of American Indians and Alaska Natives, in the planning, direction and delivery of physical and mental health care services; enforcing laws to assure the safety and efficacy of drugs and protection against impure and unsafe foods, cosmetics, medical devices and radiation-producing projects; and coordinating with States, local and other Federal agencies to protect the public from exposure to toxic substances; coordinating with the States to set and implement national health policy and pursue effective intergovernmental relations; generating and upholding cooperative international health-related agreements, policies and programs and cooperating with Commissions and organizations to promote international health activities.

Under Section H-10. Public Health Service-Organization. Delete the section in its entirety and insert the following:

The Public Health Service is under the leadership and direction of the Assistant Secretary for Health (ASH), who is directly responsible to the Secretary of Health and Human Services. The Public Health Service (PHS) consists of the:

Office of the Assistant Secretary for Health (HA)

Agency for Toxic Substances and Disease Registry (HT)

Alcohol, Drug Abuse, and Mental Health Administration (HM)

Centers for Disease Control (HC)

Food and Drug Administration (HF)

Health Resources and Services Administration (HB)

Indian Health Service (HG)

National Institutes of Health (HN)

Section H-30. Public Health Service-Order of Succession. Delete the section in its entirety and insert the following:

During the absence or disability of the Assistant Secretary for Health, or in the event of a vacancy in this position, the Deputy Assistant Secretary for Health shall act as the Assistant Secretary for Health. In the event of the absence or disability of both the Assistant Secretary for Health and the Deputy Assistant Secretary for Health, a Public Health Service official designated by the Assistant Secretary for Health shall act as Assistant Secretary for Health. Should both the positions of Assistant Secretary for Health and the Deputy Assistant Secretary for Health be vacant, an official designated by the Secretary of Health and Human Services shall serve as acting head of the Public Health Service.

Health Resources and Services Administration

Under Chapter HB, Section HB-00, Mission, and Section HB-10. Organization and Functions, delete in their entirety titles and statements relating to the Indian Health Service (HBN).

Under HB-20, Order of Succession, amend the succession by deleting item (8) Director, Indian Health Service.

Indian Health Service

After Chapter HF, (Food and Drug Administration), add Chapter HG, (Indian Health Service) as follows:

Section HG-00. Mission. The Indian Health Service (IHS) provides a comprehensive health services delivery system for American Indians and Alaska Natives with opportunity for maximum tribal involvement in developing and managing programs to meet their health needs. The goal of IHS is to raise the health level of the Indian and Alaska Native people to the highest possible level.

To carry out its mission and to attain its goal, IHS: (1) Assists Indian Tribes in developing their health programs through activities including health

management training, technical assistance and human resource development; (2) facilitates and assists Indian Tribes in coordinating health planning, in obtaining and utilizing health resources available through Federal, State and local programs, in operating comprehensive health programs, and in health program evaluation; (3) provides comprehensive health care services, including hospital and ambulatory medical care, preventive and rehabilitative services, and development of community sanitation facilities; and (4) serves as the principal Federal advocate for Indians in the health field to assure comprehensive health services for American Indians and Alaska Natives.

Section HG-10. Organization and Functions. The Indian Health Service is under the direction of a Director who reports to the Assistant Secretary for Health. The agency consists of the following major components with functions indicated:

Office of the Director (HGA). Provides overall direction and leadership for IHS by: (1) Establishing goals, objectives, policies and priorities in pursuit of the IHS mission; (2) providing leadership to ensure the delivery of high quality, comprehensive health services; (3) coordinating IHS activities and resources internally and externally with those of other governmental and non-governmental programs, promoting optimum utilization of all available health resources; (4) developing and demonstrating alternative methods and techniques of health services management and delivery with a view to provide Indian Tribes and other Indian community groups with optional ways of participating in the Indian health program; (5) developing individual and tribal capacities to participate in Indian health programs through means and modalities which they deem appropriate to their needs and circumstances; (6) affording Indian people an opportunity to enter a career in the IHS by applying Indian preference; (7) keeping the public fully informed on the activities of the IHS; and (8) encouraging full application of the principles of EEO.

Office of Administration and Management (HGA2). (1) Provides advice and support to the Director in management and policy formulation and execution; (2) provides IHS-wide administrative leadership, direction, and coordination of all phases of management; (3) directs IHS activities in the areas of administration and management policy including: Internal control reviews, records management, debt management, third party reimbursement, delegations of authority, manpower management, procurements, personal property accountability and management, and administrative services; (4) directs the personnel management and personnel administrative activities; (5) directs the contract and grants management activities; (6) directs the resources management activities including the allocation and fiscal control of resources; (7) directs budget formulation activities and execution; (8) manages the fiscal management activities; and (9) coordinates the training and development of IHS employees in administration.

Office of Planning, Evaluation and Legislation (HGA3). (1) Advises the Director, IHS, on policy formulation; (2) conducts and manages program planning, operations research, program evaluation, health services research, legislative affairs, program statistics; (3) develops the long-range program and financial plan for the IHS in collaboration with appropriate agency staff; (4) coordinates with the Office of the Assistant Secretary for Health, the Department, and Indian Tribes and organizations on matters that involve planning, evaluation, research and legislation; (5) develops and implements long-range goals, objectives, and priorities for all activities related to resource requirements and allocation methodologies and models; (6) directs activities within the IHS which compare costs of the Agency's programs with

their benefits, including the preparation and implementation of comprehensive program evaluation plans; (7) directs and coordinates the legislative activities of IHS, including the analysis of existing and proposed legislation and regulations and the development of legislative proposals; (8) develops and manages analytical statistical reporting systems and data bases for measuring health status and appraising program activities; (9) analyses and publishes statistical data on demographics and morbidity of the American Indian and Alaska Native population; (10) administers the Privacy Act and OMB Information collection approval; (11) conducts policy analysis and develops policy options; and (12) maintains liaison with the Office of the General Counsel for the development and monitoring of IHS regulations and Federal Register notices.

Office of Tribal Activities (HGA4). (1) Advises the Director, IHS, on policy formulation regarding tribal activities, including Indian Self-Determination, and their effect on tribal health programs and community development; (2) assures that Indian tribes and tribal organizations are informed regarding pertinent health policy and program management issues; (3) ensures consultation with tribes and tribal organizations in developing policy; (4) supports tribes and tribal organizations in managing community health programs; (5) develops policies for tribal activities, including Indian Self-Determination, and oversees administrative compliance with those policies; (6) develops policy and coordinates implementation of special Indian legislation and authorities; (7) provides procedural guidance and processes to promote Indian Self-Determination; (8) maintains relevant information on Indian tribes, communities, programs, and IHS tribal policies; and (9) coordinates IHS support of tribal activities with other public and private programs.

Office of Health Programs (HGA5). (1) Advises the Director, IHS, on policy formulation on the operations and management of health programs; (2) provides Service-wide leadership in health programs in relation to IHS goals, objectives, policies, and priorities; (3) provides consultation and technical assistance to all operating and management levels of the IHS and Indian tribes in the design and implementation of health management and health delivery systems; (4) provides guidance and support to all field activities related to the day-to-day delivery of health care; (5) develops and implements contract health and Medicare and Medicaid functions into the comprehensive health program through setting medical priorities, quality care oversight, operational planning and health program evaluations; (6) directs and coordinates clinical support and scholarship programs; (7) provides leadership and direction for quality assurance activities; and (8) represents IHS health programs to agencies outside IHS, including international health agencies.

Office of Environmental Health and Engineering (HGA6). (1) Advises the Director, IHS, on policy formulation and administers the overall IHS environmental health, community injury control, real property management, biomedical engineering, emergency preparedness, safety, sanitation facilities engineering and health care facilities engineering programs; (2) develops objectives, priorities, standards and methodologies for the conduct and evaluation of Environmental Health and Facilities Engineering program activities; (3) provides consultation and technical assistance to Headquarters IHS Area Offices, tribal governments and Alaska Native corporations on matters pertaining to OEHE; and (4) coordinates and monitors IHS requirements for shared and cooperative program activities with other Federal and non-Federal agencies and organizations.

Office of Health Program Research and Development (HGA7). (1) Develops and

demonstrates methods and techniques for the improved operations and management of the health care delivery systems; (2) provides technical assistance and consultation on the development and implementation of management and service delivery systems throughout the various organizational levels of the IHS and Tribal health programs; (3) conducts and coordinates health research and development activities within the Service directed toward improving the health of Indian people; (4) provides direct or indirect health services for the Indian people in the IHS Service Units under the jurisdiction of the Office; and (5) serves as a resource for directing or assisting in various special projects conducted by the IHS.

Office of Information Resources Management (HGA8). (1) Advises the Director, IHS, on policy formulation regarding information technology and services; (2) develops, coordinates, directs, and evaluates IHS-wide plans and budgets for the management of information technology and services related to automated data processing, office automation, and telecommuncations; (3) provides technical guidance, management direction and support for the IHS-wide production of management and clinical workload information systems; (4) develops and recommends policies and procedures relating to information resource management and support services; (5) directs the provision of systems analysis and design, data processing operations, user assistance and information systems training to all elements of the IHS; (6) reviews and recommends approval or disapproval of the acquisition, use, modification or discontinuance of any data processing, office automation or telecommunications service or resource IHS-wide; (7) maintains state-of-the-art expertise in information science and technology to promote the efficient and effective conduct of the IHS mission; (8) develops and coordinates the implementation of IHS-wide information security programs; and (9) maintains liaison with officials of the PHS, DHHS, and GSA for information resources management matters.

IHS Area Offices (HGF): Aberdeen Area Office (HGFB); Alaska Native Area Office (HGFC); Albuquerque Area Office (HGFD); Bemidji Area Office (HGFE); Billings Area Office (HGFF); California Area Office (HGFG); Nashville Area Office (HGFH); Navajo Area Office (HGFJ); Oklahoma City Area Office (HGFK); Phoenix Area Office (HGFL); and Portland Area Office (HGFM).

The mission of IHS is accomplished in the field through line elements called Area Offices. Within these can be Service Units, Special Programs, Hospitals, Medical Centers, Health Centers, Health Stations, and other elements. Each Area Office is headed by a Director who reports to the Director, IHS. For the population served by their respective health delivery systems, each Area Office is responsible for: (1) Participating in and establishing goals and objectives for health programs in interpreting and determining policies and priorities within the framework of IHS policy; (2) delivering and assuring the delivery of high quality comprehensive health services; (3) providing coordination or ensuring the coordination of IHS activities and resources internally and externally with those of other governmental and nongovernmental programs and promoting optimum utilization of all available health resources; (4) participating in the development and demonstration of alternative means and techniques of health services management and delivery to provide Indian tribes and other Indian community groups with optimal ways of participating in Indian health programs, and (5) ensuring the development of individual and tribal capacities to participate in the operation of IHS commensurate with the means and modalities which Indian tribal groups deem appropriate to their needs and circumstances.

Section HG-20. Order of Succession. During the absence or disability of the

Director, IHS, or in the event of a vacancy in that office, the first official listed below who is available shall act as Director, except that during a planned period of absence, the IHS Director may specify a different order of succession. The order of succession will be:

(1) Deputy Director for Field Operations; (2) Deputy Director for Headquarters Operations; (3) Associate Director, Office of Health Programs; and (4) Associate Director, Office of Administration and Management.

Section HG-30. Delegations of Authority. All delegations and redelegations of authority made to HRSA and IHS officials which were in effect immediately prior to this reorganization, and which are consistent with the reorganization, shall continue in effect pending further redelegation.

Funding: Necessary salary and related costs will be transferred by way of an SF-1151, Non-expenditure Transfer Authorization, from the Health Resources and Services Administration Appropriation to the Indian Health Service Appropriation and the Public Health Service Management Appropriation in Fiscal Year 1988.

This reorganization is effective January 4, 1988.

Date: December 3, 1987.

Otis R. Bowen,

Secretary.

[FR Doc. 87-28470 Filed 12-10-87; 8:45 am]

BILLING CODE 4160-17-M

APPENDIX F

"Common Rule," 45 CFR 92 ("Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments").

Department of Health and Human Services
48 CFR Chapter 3
HHS Acquisition Regulation System

OMB Circular A-102 (revised 10/7/94, as further amended 8/29/97), Grants and Cooperative Agreements with State and Local Governments.

45 CFR Subtitle A

PART 92—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

(b) If HHS fails to make a finding within 180 days or issues a finding in favor of the recipient, HHS shall:

(1) Promptly advise the complainant of this fact; and

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Inform the complainant:

(i) That the complainant may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint;

(iii) That before commencing the action the complainant shall give 30 days notice by registered mail to the Secretary, the Attorney General of the United States, and the recipient;

(iv) That the notice must state: the alleged violation of the Act; the relief requested; the court in which the complainant is bringing the action; and, whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

PART 92—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Subpart A—General

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CHANGES, PROPERTY, AND SUBAWARDS

92.30 Changes.
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92.40 Monitoring and reporting program performance.
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92.42 Retention and access requirements for records.
92.43 Enforcement.
92.44 Termination for convenience.

Subpart D—After-the-Grant Requirements

92.50 Closeout.
92.51 Later disallowances and adjustments.
92.52 Collection of amounts due.

Subpart E—Entitlement [Reserved]

AUTHORITY: 5 U.S.C. 301.

SOURCE: 53 FR 8079, 8087, Mar. 11, 1988, unless otherwise noted.

EDITORIAL NOTE: For additional information, see related documents published at 49 FR 24958, June 18, 1984, 52 FR 20178, May 29, 1987, and 53 FR 8028, March 11, 1988.

Subpart A—General

§ 92.1 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.

§ 92.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§92.3 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 United States 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 inkind 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 r 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.

§92.4 Applicability.

(a) *General.* Subparts A through 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 §92.6, 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 of 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);

(v) Medical Assistance (Medicaid) (title XIX of the Act) not including the State Medicaid Fraud Control program authorized by Section 1903(a)(6)(B); and

(vi) State Children's Health Insurance Program (title XXI of the Act).

(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 § 92.4(a)(3) through (8) are subject to Subpart E.

[53 FR 8079, 8087, Mar. 11, 1988, as amended at 65 FR 33632, May 24, 2000]

§ 92.5 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 § 92.6.

§ 92.6 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.

Subpart B—Pre-Award Requirements

§ 92.10 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.

§92.11 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.

§92.12 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.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 92.20 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 cancelled 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.

§ 92.21 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 §92.43(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.

§ 92.22 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.	OMB Circular A–122.
Educational institutions.	OMB Circular A–21.
For-profit organization other than a hospital and an organization named in OBM 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.

§ 92.23 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.

§ 92.24 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 § 92.25, 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 § 92.25(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 § 92.22, 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.

§ 92.25 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 § 92.34.)

(f) *Property*. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 92.31 and 92.32.

(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.

§ 92.26 Non-Federal audit.

(a) *Basic rule*. Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.'' The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees*. State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, 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 Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' have met the audit requirements of the Act. 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, § 92.36 shall be followed.

[53 FR 8079, 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45945, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

§ 92.30 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.

(1) Approvals shall not be valid unless they are in writing, and signed by at least one of the following officials of the Department of Health and Human Services (HHS):

(i) The responsible Grants Officer or his or her designee;

(ii) The head of the HHS Operating or Staff Division that awarded the grant; or

(iii) The head of the Regional Office of the HHS Operating or Staff Division that awarded the grant.

(b) *Relation to cost principles*. The applicable cost principles (see § 92.22) 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 § 92.36 but does not apply to the procurement of equipment, supplies, and general support services.

(5) Providing medical care to individuals under research grants.

(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 § 92.22) 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.

[53 FR 8079, 8087, Mar. 11, 1988, as amended at 53 FR 8079, Mar. 11, 1988]

§ 92.31 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.

§ 92.32 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 § 92.25(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 § 92.32(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.

§ 92.33 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.

§ 92.34 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.

§ 92.35 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.''

§ 92.36 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 anaylsis 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 § 92.36. 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.

(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 §92.36(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 resonableness 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 §92.22). 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)

(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).

[53 FR 8079, 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19645, Apr. 19, 1995]

§ 92.37 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 § 92.42 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 92.10;

(2) Section 92.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in § 92.21; and

(4) Section 92.50.

REPORTS, RECORDS RETENTION, AND ENFORCEMENT

§ 92.40 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.

§92.41 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 decisionmaking 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 non-construction grants and for construction grants when required in accordance with §92.41(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 accural 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 f 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 § 92.41(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 § 92.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 92.41(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 § 92.41(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 § 92.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 92.41(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 § 92.41(b)(2).

§ 92.42 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 § 92.36(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 recordkeeping, 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 chargeback 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.

§92.43 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,

(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 § 92.35).

§ 92.44 Termination for convenience.

Except as provided in § 92.43 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 § 92.43 or paragraph (a) of this section.

Subpart D—After-the-Grant Requirements

§ 92.50 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 timeframe. 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 § 92.32(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.

§ 92.51 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 § 92.42;

(d) Property management requirements in §§ 92.31 and 92.32; and

(e) Audit requirements in § 92.26.

§ 92.52 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 adminstrative 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]

PART 93—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

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93.100 Conditions on use of funds.
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APPENDIX A TO PART 93—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 93—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 101–121 (31 U.S.C. 1352); (5 U.S.C. 301).

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6754, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 93.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a

Federal Register

Wednesday,
January 17, 2001

Part IV

Department of Health and Human Services

Office of the Secretary

48 CFR Chapter 3

Acquistition Regulation Revision; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

48 CFR Chapter 3

Acquisition Regulation Revision

AGENCY: Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services is finalizing its acquisition regulation (HHSAR) to streamline and simplify it in accordance with the tenets of the National Performance Review. In doing so, the Department has eliminated procedural guidance which it believes is too encumbering for a simplified system and has empowered appropriate levels of management and contracting personnel with the authorities required for them to successfully accomplish their mission with the least amount of resistance and oversight.

EFFECTIVE DATE: January 17, 2001.

FOR FURTHER INFORMATION CONTACT: E. S. Lanham, Office of Acquisition Management, telephone (202) 690–7590.

SUPPLEMENTARY INFORMATION: The HHSAR was published as a proposed rule on January 8, 1999 (64 FR Vol 5 pps 1343—1390). Comments were received from several departmental contracting activities and one outside source. All comments have been analyzed and considered in the formulation of this final rule.

As a result of the publication of this regulation, the existing HHSAR at 48 CFR Chapter 3, including Appendix A, is canceled. Pertinent subject matter from Appendix A has been incorporated into this version of the HHSAR.

The Department reemphasizes that it is not making significant amendments to the existing HHSAR. The amendments being made to the HHSAR concern internal procedural matters which are administrative in nature, and will not have a major effect on the general public, or to contractors or offerors of the Department. The majority of the amendments eliminate procedural guidance no longer deemed necessary, or change contracting review and approval authorities to situate them at levels more appropriate to simplification, streamlining, and empowerment.

The Department of Health and Human Services certifies this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*); therefore, no regulatory flexibility statement has been prepared. Since this rule conveys existing acquisition policies or procedures and does not promulgate any new policies or procedures which would impact the public, it has been determined that this rule will not have a significant economic effect on a substantial number of small entities, and , thus, a regulatory flexibility analysis was not performed.

Furthermore, this document does not contain new information collection requirements needing approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing approvals cited in 48 CFR section 301.106 remain in effect. The provisions of this regulation are issued under 5 U.S.C. 301; 40 U.S.C. 486 (c).

List of Subjects in 48 CFR Parts 301 through 370

Government procurement.

Under the authority of 5 U.S.C. 301; 40 U.S.C. 486(c), the Department of Health and Human Services revises 48 CFR Chapter 3 as set forth below.

Dated: December 14, 2000.

John J. Callahan,

Assistant Secretary for Management and Budget.

CHAPTER 3—HEALTH AND HUMAN SERVICES

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Subchapter A—General

PART 301—HHS ACQUISITION REGULATION SYSTEM

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Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 301.1—Purpose, Authority, Issuance

301.101 Purpose.

(a) The Department of Health and Human Services Acquisition Regulation (HHSAR) is issued to establish uniform acquisition policies and procedures for the Department of Health and Human

Services (HHS) which conform to the Federal Acquisition Regulation (FAR) System.

(b) The HHSAR implements and supplements the FAR. (Implementing material expands upon or indicates the manner of compliance with related FAR material. Supplementing material is new material which has no counterpart in the FAR.)

(c) The HHSAR contains all formal departmental policies and procedures that govern the acquisition process or otherwise control contracting relationships between the Department's contracting offices and contractors.

301.103 Authority.

(b) The HHSAR is prescribed by the Assistant Secretary for Management and Budget under the authority of 5 U.S.C. 301 and section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary.

(c) The HHSAR is issued in the Code of Federal Regulations (CFR) as Chapter 3 of Title 48, Department of Health and Human Services Acquisition Regulation. It may be referenced as ''48 CFR Chapter 3.''

301.106 OMB approval under the Paperwork Reduction Act.

(a) The following OMB control numbers apply to the information collection and recordkeeping requirements contained in this chapter:

HHSAR segment	OMB control No.
315.4	0990–0139
324.70	0990–0136
342.7101	0990–0131
352.224–70	0990–0137
352.224–70	0990–0136
352.233–70	0990–0133
352.270–1	0990–0129
352.270–2	0990–0129
352.270–3	0990–0129
352.270–5	0990–0130
352.270–8	0990–0128
352.270–9	0990–0128
370.1	0990–0129
370.2	0990–0129

(b) The OMB control number ''OMB No. 0990–0115'' is to be included in the upper right corner of the first page of all solicitations, purchase orders, and contracts issued by departmental contracting activities. The number represents approval of the HHS acquisition process and covers recordkeeping and reporting requirements which are unique to individual acquisitions (*e.g.,* requirements contained in specifications, statements of work, etc.).

Subpart 301.2—Administration

301.270 Executive Committee for Acquisition.

(a) The Deputy Assistant Secretary for Grants and Acquisition Management has established the Executive Committee for Acquisition (ECA) to assist and facilitate the planning and development of departmental acquisition policies and procedures and to assist in responding to other agencies and organizations concerning policies and procedures impacting the Federal acquisition process.

(b) The ECA consists of members and alternates from the Office of Acquisition Management, Administration for Children and Families, Agency for Healthcare Research and Quality, Health Care Financing Administration, Program Support Center, Centers for Disease Control and Prevention, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, and Substance Abuse and Mental Health Services Administration. The ECA is chaired by the Director, Office of Acquisition Management. All meetings will be held at the call of the Chair, and all activities will be carried out under the direction of the Chair.

(c) The ECA, to facilitate the planning, development, and coordination of governmentwide and departmentwide acquisition policies and procedures, is to:

(1) Advise and assist the Chair concerning major acquisition policy matters;

(2) Review and appraise, at appropriate intervals, the overall effectiveness of existing policies and procedures; and

(3) Review and appraise the impact of new major acquisition policies, procedures, regulations, and development on current acquisition policies and procedures.

(d) The Chair will periodically issue a list of current members and alternates specifying the name, title, organization, address, and telephone number of each. The member organizations are responsible for apprising the Chair whenever a new member or alternate is to be appointed to the ECA, or an organizational change retitles the individual or organization.

Subpart 301.4—Deviations From the FAR

301.403 Individual deviations.

Requests for individual deviations to either the FAR or HHSAR shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Director, Office of Acquisition Management for review and approval.

301.404 Class deviations.

Requests for class deviations to either the FAR or HHSAR shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Deputy Assistant Secretary for Grants and Acquisition Management for review and approval.

301.470 Procedure.

(a) When a contracting office determines that a deviation is needed, it shall prepare a deviation request in memorandum form and forward it through administrative channels to the official designated in 301.403 or 301.404. In an exigency situation, the contracting office may request a deviation verbally, through normal acquisition channels, but is required to confirm the request in writing as soon as possible.

(b) A deviation request shall clearly and precisely set forth the:

(1) Nature of the needed deviation;

(2) Identification of the FAR or HHSAR citation from which the deviation is needed;

(3) Circumstances under which the deviation would be used;

(4) Intended effect of the deviation;

(5) Period or applicability;

(6) Reasons which will contribute to complete understanding and support of the requested deviation. A copy of pertinent background papers such as a contractor's request should accompany the deviation request.; and

(7) Suggested wording for the deviation (if applicable).

Subpart 301.6—Career Development, Contracting Authority, and Responsibilities

301.602 Contracting officers.

301.602–3 Ratification of unauthorized commitments.

(b) *Policy.* (1) The Government is not bound by agreements or contractual commitments made to prospective contractors by persons to whom contracting authority has not been delegated. However, execution of otherwise proper contracts made by individuals without contracting authority, or by contracting officers in excess of the limits of their delegated authority, may be later ratified. The ratification must be in the form of a written document clearly stating that ratification of a previously unauthorized act is intended and must be signed by the head of the contracting activity (HCA).

(2) The HCA is the official authorized to ratify an unauthorized commitment (but see paragraph (b)(3) of this section).

(3) Ratification authority for actions up to $25,000 may be redelegated by the HCA to the chief of the contracting office (CCO). No other redelegations are authorized.

(c) *Limitations.* (5) The concurrence of legal counsel concerning the payment issue is optional.

(e) *Procedures.* (1) The individual who made the unauthorized contractual commitment shall furnish the reviewing contracting officer all records and documents concerning the commitment and a complete written statement of facts, including, but not limited to: a statement as to why the contracting office was not used, a statement as to why the proposed contractor was selected, a list of other sources considered, a description of work to be performed or products to be furnished, the estimated or agreed contract price, a citation of the appropriation available, and a statement whether the contractor has commenced performance.

(2) The contracting officer will review the submitted material, and prepare the ratification document if he/she determines that the commitment may be ratifiable. The contracting officer shall forward the ratification document and the submitted material to the HCA or CCO with any comments or information which should be considered in evaluation of the request for ratification. If legal review is desirable, the HCA or CCO will coordinate the request for ratification with the Office of General Counsel, Business and Administrative Law Division.

(3) If ratification is authorized by the HCA or CCO, the file will be returned, along with the ratification document, to the contracting officer for issuance of a purchase order or contract, as appropriate.

301.603 Selection, appointment, and termination of appointment.

301.603–1 General.

(a) The appointment and termination of appointment of contracting officers shall be made by the head of the contracting activity (HCA). This authority is not delegable.

(b) The contracting officer appointment document for personnel in the GS–1101, 1102, and 1105 series, as well as personnel in any other series who will obligate the Government to the expenditure of funds in excess of the micro-purchase threshold, shall be the Standard Form (SF)—1402, Certificate of Appointment. The HCA may determine an alternative appointment document for appointments at or below that threshold. Changes to appointments shall be made by issuing a new appointment document. Each appointment document shall be prepared and maintained in accordance with FAR 1.603–1 and shall state the limits of the individual's authority.

(c) An individual must be certified at the appropriate level under the HHS Acquisition Certification Program as a prerequisite to being appointed as a contracting officer with authority to obligate funds in excess of the micro-purchase threshold (see 301.603–3(a)). The HCA will determine and require appropriate training for individuals appointed as contracting officers at lower dollar levels. An individual shall be appointed as a contracting officer only in instances where a valid organizational need can be demonstrated. Factors to be considered in assessing the need for an appointment of a contracting officer include volume of actions, complexity of work, and structure of the organization.

301.603–2 Selection.

Nominations for appointment of contracting officers shall be submitted to the HCA through appropriate organizational channels for review. The nomination package, which is usually initiated by the prospective contracting officer's immediate supervisor, shall normally include the nominee's current personal qualifications statement or job history, including the information required by FAR 1.603–2, a copy of his/her most recent performance appraisal, and a copy of the certificate issued under the HHS Acquisition Certification Program indicating the nominee's current certification level, if applicable. The HCA will determine the documentation required, consistent with FAR 1.603–2, when the resulting appointment and authority will not exceed the micro-purchase threshold.

301.603–3 Appointment.

(a) Contracting officer appointments shall be made at levels commensurate with nominees' certification levels as follows:

(1) Level I—Purchasing Agent—Required for all personnel in the GS–1102 and 1105 series having signature authority for simplified acquisitions, including orders from GSA sources over the micro-purchase threshold.

(2) Level II—Acquisition Official—Required for all personnel in the GS–1102 series. Sufficient for delegation of contracting officer authority up to $500,000.

(3) Level III—Senior Acquisition Official—Required for all personnel in the GS–1102 series for delegation of contracting officer authority above $500,000.

(4) Level IV—Acquisition Manager—Required for delegation of pre-award review and approval authority as specified in subpart 304.71.

(b) If it is essential to appoint an individual who does not fully meet the certification requirements of this section for the contracting officer authority sought, an interim appointment may be granted by the HCA. Interim appointments may not exceed one (1) year in total, and shall not be granted unless the individual can meet the certification requirements within one year from the date of appointment. If the certification requirements are not met by that date, the appointment will automatically terminate and cannot be renewed.

301.603–4 Termination.

Termination of contracting officer appointments shall be accomplished in accordance with FAR 1.603–4.

301.603–70 Delegation of contracting officer responsibilities.

(a) Contracting officer responsibilities which do not involve the obligation (or deobligation) of funds or result in establishing or modifying contractual provisions may be delegated by the contracting officer by means of a written memorandum which clearly delineates the delegation and its limits.

(b) Contracting officers may designate individuals as ordering officials to make purchases or place orders under blanket purchase agreements, indefinite delivery contracts, or other pre-established mechanisms. Ordering officials, including those under NIH's DELPRO, are not contracting officers.

(c) Project officers are required to complete the training specified in 307.170, while ordering officials and others should receive sufficient instruction from the contracting officer to ensure the appropriate exercise of the responsibilities and knowledge of their limitations.

PART 302—DEFINITIONS OF WORDS AND TERMS

Subpart 302.1—Definitions

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302.101 Definitions.

Subpart 302.2—Definitions Clause

302.201 Contract clause.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 302.1—Definitions

302.101 Definitions.

Chief of the contracting office (CCO) is a mid-level management official in charge of a contracting office who controls and oversees the daily contracting operation of an Operating Division (OPDIV) or major component of an OPDIV. The CCO is subordinate to the head of the contracting activity, and is located at a management level above other contracting personnel, usually as a branch chief or division director.

Head of the agency or *agency head,* unless otherwise specified, means the head of the Operating Division (OPDIV) for ACF, AHRQ, HCFA, PSC, CDCP, FDA, HRSA, IHS, NIH, and SAMHSA, or the Assistant Secretary for Management and Budget (ASMB) for the Office of the Secretary (OS).

Head of the contracting activity (HCA) is defined in terms of certain organizational positions within the Office of Grants and Acquisition Management (OGAM), Administration for Children and Families (ACF), Agency for Healthcare Research and Quality (AHRQ), Health Care Financing Administration (HCFA), Program Support Center (PSC), Centers for Disease Control and Prevention (CDCP), Food and Drug Administration (FDA), Health Resources and Services Administration (HRSA), Indian Health Service (IHS), National Institutes of Health (NIH), and Substance Abuse and Metal Health Services Administration (SAMHSA), as follows:

OGAM–OS—Director, Office of Acquisition Management
ACF—Director, Division of Acquisition Management
AHRQ—Director, Division of Contracts Management
HCFA—Director, Acquisition and Grants Group
PSC—Director, Division of Acquisition Management
CDCP—Director, Procurement and Grants Office
FDA—Director, Policy, Evaluation and Support Staff, Office of Facilities, Acquisition, and Central Services
HRSA—Director, Division of Grants and Procurement Management
IHS—Director, Division of Acquisitions and Grants Management
NIH—Director, Office of Acquisition Management and Policy
SAMHSA—Director, Division of Contracts Management

In addition, the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM) is designated as an HCA. Each HCA is responsible for conducting an effective and efficient acquisition program. Adequate controls shall be established to assure compliance with applicable laws, regulations, procedures, and the dictates of good management practices. Periodic reviews shall be conducted and evaluated by qualified personnel, preferably assigned to positions other than in the contracting office being reviewed, to determine the extent of adherence to prescribed policies and regulations, and to detect a need for guidance and/or training. The HCA shall be certified, or be certifiable, at Level IV of the HHS Acquisition Certification Program. Individuals appointed as HCA's who do not meet the Level IV requirements shall have one year from the date of appointment to obtain Level IV certification. The heads of contracting activities may redelegate their HCA authorities to the extent that redelegation is not prohibited by the terms of their respective delegations of authority, by law, by the Federal Acquisition Regulation, by the HHS Acquisition Regulation, or by other regulations. However, HCA and other contracting approvals and authorities shall not be redelegated below the levels specified in the HHS Acquisition Regulation or, in the absence of coverage in the HHS Acquisition Regulation, the Federal Acquisition Regulation. To ensure proper control of redelegated acquisition authorities, HCA's shall maintain a file containing successive delegations of HCA authority through and including the contracting officer level. Personnel delegated responsibility for acquisition functions must possess a level of experience, training, and ability commensurate with the complexity and magnitude of the acquisition actions involved.

Subpart 302.2—Definitions clause

302.201 Contract clause.

The FAR clause, Definitions, at 52.202–1 shall be used as prescribed in FAR 2.201, except as follows:

(a) Paragraph (a) at 352.202–1 shall be used in place of paragraph (a) of the FAR clause.

(b) Paragraph (h), or its alternate, at 352.202–1 shall be added to the end of the FAR clause. Use paragraph (h) when a fixed-priced contract is anticipated; use the alternate to paragraph (h) when a cost-reimbursement contract is anticipated. This is an authorized deviation.

PART 303—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 303.1—Safeguards

Sec.
303.101 Standards of conduct.
303.101–3 Agency regulations.

Subpart 303.2—Contract Gratuities to Government Personnel

303.203 Reporting suspected violations of the Gratuities clause.

Subpart 303.3—Reports of Suspected Antitrust Violations

303.303 Reporting suspected antitrust violations.

Subpart 303.4—Contingent Fees

303.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

303.602 Exceptions.

Subpart 303.7—Voiding and Rescinding Contracts

303.704 Policy.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 303.1—Safeguards

301.101 Standards of conduct.

303.101–3 Agency regulations.

The Department of Health and Human Services' Standards of Conduct are prescribed in 45 CFR part 73.

Subpart 303.2—Contractor Gratuities to Government Personnel

303.203 Reporting suspected violations of the Gratuities clause.

Departmental personnel shall report suspected violations of the Gratuities clause in accordance with subpart M, Reporting Violations, of 45 CFR part 73. Refer to subpart B, Gifts from Outside Sources, (5 CFR 2635.201) for an explanation regarding what is prohibited and what is permitted.

Subpart 303.3—Reports of Suspected Antitrust Violations

303.303 Reporting suspected antitrust violations.

A copy of each report of suspected antitrust violations submitted to the Attorney General by the HCA shall also be submitted to the Director, Office of Acquisition Management.

Subpart 303.4—Contingent Fees

303.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(c) Reports shall be made promptly to the contracting officer.

(d)(4) Suspected fraudulent or criminal matters to be reported to the Department of Justice shall be prepared in letter format and forwarded through acquisition channels to the head of the contracting activity for signature. The letter must contain all pertinent facts

and background information considered by the contracting officer and chief of the contracting office that led to the decision that fraudulent or criminal matters may be present. A copy of the signed letter shall be sent to the Director, Office of Acquisition Management.

Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

303.602 Exceptions.

Approval of an exception to the policy stated in FAR 3.601 shall be made by the HCA (not delegable).

Subpart 303.7—Voiding and Rescinding Contracts

303.704 Policy.

For purposes of implementing FAR subpart 3.7, the authorities granted to the ''agency head or designee'' shall be exercised by the HCA (not delegable).

PART 304—ADMINISTRATIVE MATTERS

Subpart 304.6—Contract Reporting

Sec.
304.602 Federal Procurement Data System.

Subpart 304.8—Government Contract Files

304.804–70 Contract closeout audits.

Subpart 304.70—Acquisition Instrument Identification Numbering System

304.7000 Scope of subpart.
304.7001 Numbering acquisitions.

Subpart 304.71—Review and Approval of Proposed Contract Awards

304.7100 Policy.
304.7101 Procedures.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 304.6—Contracting Reporting

304.602 Federal Procurement Data System (FPDS).

The Departmental Contracts Information System (DCIS) represents the Department's implementation of the FPDS. All departmental contracting activities are required to participate in the DCIS and follow the procedures stated in the Enhanced Departmental Contracts Information System Manual and amendments to it. The HCA (not delegable) shall ensure that all required contract information is collected, submitted, and received into the DCIS on or before the 15th of each month for all appropriate contract and contract modifications award of the prior month.

Subpart 304.8—Government Contract Files

304.804–70 Contract closeout audits.

(a) Contracting officers shall rely, to the maximum extent possible, on non-Federal single audits to close physically completed cost-reimbursement contracts with colleges and universities, hospitals, non-profit firms, and State and local governments. In addition, where appropriate, a sample of these contractors may be selected for audit, in accordance with the decision-making process set forth in the following paragraph (b).

(b) Contracting officers shall request contract closeout audits on physically completed, cost-reimbursement, for-profit contracts in accordance with the following:

(1) Decisions on: The need for and allocation of contract audit resources and services; the selection of contracts or contractors to be audited; the identification of the audit agency to perform the audit; and the type or scope of closeout audit to be conducted, shall be made by the Office of Inspector General (OIG) and Office of Grants and Acquisition Management, in consultation with the Department's Contract Audit Users Work Group. These decisions shall be based upon the needs of the customer, risk analysis, return on investment, and the availability of audit resources. When an audit is warranted prior to closing a contract, the contracting officer shall submit the audit request to the OIG's Office of Audit via the appropriate OPDIV representative on the Contract Audit Users Work Group.

(2) Except where a contracting officer suspects misrepresentation or fraud, contract closeout field audits shall not be requested if the cost of performance is likely to exceed the potential cost recovery. Contracts that are not selected for a field audit may be closed on the basis of a desk review, subject to any later on-site audit findings. The release executed by the contractor shall contain the following statement:

> The Contractor agrees, pursuant to the clause in this contract entitled ''Allowable Cost'' or ''Allowable Cost and Fixed Fee'' (as appropriate), that the amount of any sustained audit exceptions resulting from any audit made after final payment shall be refunded to the Government.''

Subpart 304.70—Acquisition Instrument Identification Numbering System

304.7000 Scope of subpart.

This subpart prescribes policy and procedures for assigning identifying numbers to contracts and related instruments, including solicitation documents, purchase orders, and delivery orders. The HCA (not delegable) is responsible for establishing the numbering system within the OPDIV.

304.7001 Numbering acquisitions.

(a) *Acquisitions which require numbering.* The following acquisitions shall be numbered in accordance with the system prescribed in paragraphs (b) and (c) of this section:

(1) Contracts, including letter contracts and task orders under basic ordering agreements, which involve the payment of $2,500 or more for the acquisition of personal property or nonpersonal services. (The number assigned to a letter contract shall be assigned to the superseding definitized contract).

(2) Contracts which involve the payment of $2,000 or more for construction (including renovation or alteration).

(3) Contracts which involve more than one payment regardless of amount.

(4) Requests for proposals and invitations for bids.

(5) Requests for quotations.

(6) Basic ordering agreements.

(b) *Numbering system for contracts.* All contracts which require numbering (paragraphs (a)(1) through (3) of this section) shall be assigned a number consisting of the following:

(1) The three digit identification code assigned to the contracting office by the Office of Grants and Acquisition Management (OGAM).

(2) A two digit fiscal year designation; and

(3) A four digit serial number. For example, the initial contract executed by the Office of Acquisition Management, OS, for fiscal year 1996 would be numbered 100–96–0001. While it is required that a different series of four digit serial numbers be used for each fiscal year, serial numbers assigned need not be sequential.

(c) *Numbering system for other acquisitions.* The HCA is responsible for developing a numbering system for the acquisitions other than contracts listed in paragraphs, (a)(4) through (a)(6) of this section, and any other types of acquisitions that may be used.

(d) *Assignment of identification codes.* Each contracting office of the Department shall be assigned a three digit identification code by the OGAM. Requests for the assignment of codes for newly established contracting offices shall be submitted by the headquarters acquisition staff office of the contracting activity to the OGAM. A listing of the

contracting office identification codes currently in use is contained in the Enhanced Departmental Contracts Information System Manual.

Subpart 304.71—Review and Approval of Proposed Contract Awards

304.7100 Policy.

This subpart requires each HCA (not delegable) to establish review and approval procedures for proposed contracts actions to ensure that:

(a) Contract awards are in conformance with law, established policies and procedures, and sound business practices;

(b) Contractual documents properly reflect the mutual understanding of the parties; and

(c) The contracting officer is informed of deficiencies and items of questionable acceptability, and corrective action is taken.

304.7101 Procedures.

(a) All contractual documents, regardless of dollar value, are to be reviewed by the contracting officer prior to award.

(b) The HCA is responsible for establishing review and approval procedures and designating acquisition officials to serve as reviewers. Each HCA is responsible for determining the criterion (criteria) to be used in determining which contracts are to be reviewed, and that a sampling of proposed contracts not included in the ''to be reviewed'' group are reviewed and approved.

(c) Officials assigned responsibility for review and approval of contract actions must possess qualifications in the field of acquisition commensurate with the level of review performed, and, at a minimum, possess those acquisition skills expected of a contracting officer. However, if any official is to serve as the contracting officer and sign the contractual document, the review and approval function shall be performed by an appropriate official at least one level above.

PART 305—PUBLICIZING CONTRACT ACTIONS

Subpart 305.2—Synopsis of Proposed Contract Actions

Sec.
305.202 Exceptions.

Subpart 305.3—Synopsis of Contract Awards

305.303 Announcement of contract awards.

Subpart 305.5—Paid Advertisements

305.502 Authority.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 305.2—Synopsis of Proposed Contract Actions

305.202 Exceptions.

(b) When a contracting office believes that it has a situation where advance notice is not appropriate or reasonable, it shall prepare a memorandum citing all pertinent facts and details and send it, through normal acquisition channels, to the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM) requesting relief from synopsizing. The DASGAM shall review the request and decide whether an exception to synopsizing is appropriate or reasonable. If it is, the DASGAM shall take the necessary coordinating actions required by FAR 5.202 (b). Whatever the decision is on the request, the DASGAM shall promptly notify the contracting office when a determination has been made.

Subpart 305.3—Synopses of Contract Awards

305.303 Announcement of contract awards.

(a) *Public announcement.* Any contract, contract modification, or delivery order in the amount of $3 million or more shall be reported by the contracting officer to the Office of the Deputy Assistant Secretary for Legislation (Congressional Liaison), Room 406G, Hubert H. Humphrey Building. Notification shall be accomplished by providing a copy of the contract or award document face page to the referenced office prior to the day of award, or in sufficient time to allow for an announcement to be made by 5 p.m. Washington, DC time on the day of award.

Subpart 305.5—Paid Advertisements

305.502 Authority.

The contracting officer is authorized to publish advertisements, notices, and notices that proposals are being sought in newspapers and periodicals in accordance with the requirements and conditions referenced in FAR subpart 5.5.

PART 306—COMPETITION REQUIREMENTS

Subpart 306.2—Full and Open Competition After Exclusion of Sources

Sec.
306.202 Establishing or maintaining alternative sources.

Subpart 306.3—Other Than Full and Open Competition

306.302 Circumstances permitting other than full and open competition.
306.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
306.302–7 Public interest.
306.303 Justification.
306.303–1 Requirements
306.303–2 Content.
306.304 Approval of the justification.

Subpart 306.5—Competition Advocates

306.501 Requirement.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 306.2—Full and Open Competition After Exclusion of Sources

306.202 Establishing or maintaining alternative sources.

(a) The reference to the agency head in FAR 6.202 (a) shall mean the appropriate competition advocate cited in 306.501.

(b)(1) The required determination and findings (D&F) shall be prepared by the contracting officer based on the data provided by program personnel, and shall be signed by the appropriate competition advocate. The D&F signatory is not delegable.

Subpart 306.3—Other Than Full and Open Competition

306.302 Circumstances permitting other than full and open competition.

306.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a) (2) (ii) Follow-on contracts for the continuation of major research and development studies on long-term social and health programs, major research studies, or clinical trials may be deemed to be available only from the original source when it is likely that award to any other source would result in unacceptable delays in fulfilling the Department's or OPDIV's requirements.

(b) *Application.* (4) When the head of the program office has determined that a specific item of technical equipment or parts must be obtained to meet the activity's program responsibility to test and evaluate certain kinds and types of products, and only one source is available. (This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive acquisitions. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item of equipment required.)

306.302–7 Public interest.

(a) *Authority.* (2) Agency head, in this instance, means the Secretary.

(c) *Limitations.* An ''approval package'' must be prepared by the contracting officer and staffed through departmental acquisition channels to the Secretary. The package shall include a determination and findings for the Secretary to sign that contains all pertinent information to support justification for exercising the exemption to competition, and a letter for the Secretary to sign notifying Congress of the determination to award a contract under the authority of 41 U.S.C. 253(c)(7).

306.303 Justifications.

306.303–1 Requirements.

(b) Preliminary arrangements or agreements with the proposed contractor shall have no effect on the rationale used to support an acquisition for other than full and open competition.

(f) When a program office desires to obtain certain goods or services by contract without full and open competition, it shall, at the time of forwarding the requisition or request for contract, furnish the contracting office a justification explaining why full and open competition is not feasible. All justifications shall be initially reviewed by the contracting officer.

(1) Justifications in excess of the simplified acquisition threshold shall be in the form of a separate, self-contained document, prepared in accordance with FAR 6.303 and 306.303, and called a ''JOFOC'' (Justification for Other Than Full and Open Competition). Justifications at or below the simplified acquisition threshold may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

(2) Justifications, whether over or under the simplified acquisition threshold, shall fully describe what is to be acquired, offer reasons which go beyond inconvenience, and explain why it is not feasible to obtain competition. The justifications shall be supported by verifiable facts rather than mere opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

306.303–2 Content.

(a)(1) The program office and name, address, and telephone number of the project officer shall also be included.

(2) This item shall include project identification such as the authorizing program legislation, to include citations or other internal program identification data such as title, contract number, etc.

(3) The description may be in the form of a statement of work, purchase description, or specification. A statement is to be included to explain whether the acquisition is an entity in itself, whether it is one in a series, or part of a related group of acquisitions.

(c) Each JOFOC shall conclude with at least signature lines for the project officer, project officer's immediate supervisor, contracting officer, and approving official.

306.304 Approval of the justification.

(a)(2) The competition advocates are listed in 306.501. This authority is not delegable.

(3) The competition advocate shall exercise this approval authority, except where the individual designated as the competition advocate does not meet the requirements of FAR 6.304 (a)(3)(ii). This authority is not delegable.

(4) The senior procurement executive of the Department is the Assistant Secretary for Management and Budget.

(c) A class justification shall be processed the same as an individual justification.

Subpart 306.5—Competition Advocates

306.501 Requirement.

The Department's competition advocate is the Deputy Assistant Secretary for Grants and Acquisition Management. The competition advocates for the Department's primary contracting officers are as follows:

ACF—Director, Office of Management Services
HCFA—Director, Office of Internal Customer Support
OS—Deputy Assistant Secretary for Grants and Acquisition Management
PSC—Director, Administrative Operations Service
AHRQ—Executive Officer
CDCP—Director, Office of Program Support
FDA—Director, Office of Facilities, Acquisition, and Central Services
HRSA—Associate Administrator for Operations and Management
IHS—Director, Office of Management and Support
NIH—(R&D)—Director, Office of Extramural Research (Other than R&D)—Director, Office of Intramural Research
SAMHSA—Associate Administrator for Management

PART 307—ACQUISITION PLANNING

Subpart 307.1—Acquisition Plans

Sec.
307.104 General procedures.
307.105 Contents of written acquisition plans.
307.170 Program training requirements.
307.170–1 Policy exceptions.
307.170–2 Training course prerequisites.

Subpart 307.3—Contractor Versus Government Performance

307.302 General.
307.303 Determining availability of private commercial sources.
307.304 Procedures.
307.307 Appeals.

Subpart 307.70—Considerations in Selecting an Award Instrument

307.7000 Scope of subpart.
307.7001 Distinction between acquisition and assistance.
307.7002 Procedures.

Subpart 307.71—Requests for Contract

307.7100 Scope of subpart.
307.7101 General.
307.7102 Procedures.
307.7103 Responsibilities.
307.7104 Transmittal.
307.7105 Format and content.
307.7106 Statement of work.
307.7107 Review.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 307.1—Acquisition Planning

307.104 General procedures.

(d) Each contracting activity shall prepare an Annual Acquisition Plan (AAP). The AAP is a macro plan, containing a list of anticipated contract actions over the simplified acquisition threshold and their associated funding, as well as the aggregate planned dollars for simplified acquisitions by quarter, developed for each fiscal year. The AAP shall conform to reasonable budget expectations and shall be reviewed at least quarterly and modified as appropriate. The chief of the contracting office (CCO) shall obtain this information from the program planning/budget office of the contracting activity and use the AAP to provide necessary reports and monitor the workload of the contracting office. For contract actions, the plan shall contain, at a minimum:

(1) A brief description (descriptive title, perhaps one or two sentences if necessary);

(2) Estimated award amount;

(3) Requested award date;

(4) Name and phone number of contact person (usually the project officer);

(5) Other information required for OPDIV needs.

(e) Once the AAP is obtained, the contracting officer/contract specialist shall initiate discussions with the assigned project officer for each planned negotiated acquisition over $100,000 except for:

(1) Acquisitions made under interagency agreements, and

(2) Contract modifications which exercise options, make changes authorized by the Changes clause, or add funds to an incrementally funded contract. (The HCA may prescribe procedures for contract actions not covered by this subpart.)

(f) The purpose of the discussions between the contracting and project officers is to develop an individual acquisition planning schedule and to address the things that will need to be covered in the request for contract (RFC), including clearances, acquisition strategy, sources, etc. The project officer must either have a statement of work (SOW) ready at this time or must discuss in more detail the nature of the services/supplies that will be required.

(g) Standard lead-times for processing various types of acquisitions and deadlines for submission of acceptable RFCs (that is, RFCs which include all required elements such as clearances, funding documents, and an acceptable SOW) for award in a given fiscal year shall be established by the HCA or designee not lower than the CCO.

(h) The outcome of the discussions referenced in paragraph (f) of this section between the project officer and the contracting officer/contracting specialist will be an agreement concerning the dates of significant transaction-specific acquisition milestones, including the date of submission of the RFC to the contracting officer. This milestone schedule document will be prepared with those dates and will be signed by the project officer and the contracting officer. The milestones cannot be revised except by mutual agreement of these same individuals. If the planning schedule indicates the need to obtain approval of a Justification for Other than Full and Open Competition, the CCO must sign the milestone agreement. This document shall be retained in the contract file. All other considerations that will affect the acquisition (technical, business, management) shall be addressed in the RFC (see 307.71).

307.105 Contents of written acquisition plans.

The written acquisition plan required by FAR 7.105 must be contained in the request for contract, as specified in subpart 307.71, and is the final product of the planning process.

307.170 Program training requirements.

(i) All program personnel selected to serve as project officers for HHS contracts shall have successfully completed either the Department's appropriate ''Basic Project Officer'' course, or an equivalent course (see paragraph (c) of this section).

(b) At least fifty percent of the HHS program personnel performing the function of technical proposal evaluator on a technical evaluation team or panel for any competitively solicited HHS contract shall have successfully completed the appropriate ''Basic Project Officer'' course, or an equivalent course (see paragraph (c) of this section). This requirement applies to the initial technical proposal evaluation and any subsequent technical evaluations that may be required.

(c) Determination of course equivalency shall be made by the HCA (not delegable) of the cognizant contracting activity. The contracting officer is responsible for ensuring that the project officer and technical proposal evaluators have successfully completed the required training discussed in 307.170–2.

307.170–1 Policy exceptions.

In the event there is an urgent requirement for a specific individual to serve as a project officer and that individual has not successfully completed the prerequisite training course, the HCA (not delegable) may waive the training requirement and authorize the individual to perform the project duties, provided that:

(a) The individual first meets with the cognizant contracting officer to review the DHHS Project Officers' Contracting Handbook,'' and to discuss the important aspects of the contracting—program office relationship as appropriate to the circumstances; and

(b) The individual attends the next scheduled and appropriate ''Basic Project Officer'' course.

307.170–2 Training course prerequisites.

(a) *Project officers.* (1) Newly appointed project officers, and project officers with less than three years experience and no previous related training, are required to take the appropriate ''Basic Project Officer'' course. (The grade level for project officers attending the course should be GS–7 and above.) All project officers are encouraged to take the appropriate ''Writing Statements of Work'' course.

(2) Project officers with more than three years experience, and project officers with less than three years experience who have successfully completed the appropriate basic course, are qualified (and encouraged) to take the ''Advanced Project Officer'' course.

(3) Additional information on prerequisites for attendance of these courses may be found in the ''DHHS Acquisition Training and Certification Program Handbook.''

(b) *Technical proposal evaluators.* Technical proposal evaluators, regardless of experience, are required to take the appropriate ''Basic Project Officer'' course or its equivalent. Upon successful completion of the basic course, it is recommended that they take the appropriate ''Advanced Project Officer'' course. Peer and objective reviewers are excluded from these requirements.

Subpart 307.3—Contractor Versus Government Performance

307.302 General.

(a) General Administration Manual (GAM) Chapter 18–10, Commercial-Industrial Activities of the Department of Health and Human Services Providing Products or Services for Government Use, assigns responsibilities for making method-of-performance decisions (contract vs. in-house performance) to various management levels within the Department depending on the dollar amount of capital investment or annual operating costs. It also requires that each operating division (OPDIV) and staff division (STAFFDIV) designate a ''Commercial-Industrial Control Officer'' (CICO) to be responsible for ensuring compliance with the requirements of the Chapter.

307.303 Determining availability of private commercial sources.

In accordance with the provisions of GAM Chapter 18–10, OPDIVs and STAFFDIVs must prepare and maintain a complete inventory of all individual commercial or industrial activities. They must also conduct periodic reviews of each activity and contract in the inventory to determine if the existing performance, in-house or by contract, continues to be in accordance with the policy guidelines of GAM Chapter 18–10.

307.304 Procedures.

Contracting officers shall ensure that no acquisition action involving a commercial-industrial activity is initiated unless it is in compliance with the requirements of GAM Chapter 18–10. The contracting officer must check each request for contract expected to result in a contract in excess of $100,000 to ensure that it contains a statement as to whether the proposed contract is or is not subject to review under GAM Chapter 18–10 requirements. If the contracting officer has any questions regarding the determination of applicability or nonapplicability, or if the required statement is missing, the

program office submitting the request for contract should be contacted and the situation rectified. If the issue cannot be resolved with the program office, the contracting office shall refer the matter to the CICO for a final determination. The HCA is responsible for ensuring that contracting activities are in full compliance with FAR Subpart 7.3.

307.307 Appeals.

The review and appeals procedure discussed in FAR 7.307 are addressed in GAM Chapter 18–10.

Subpart 307.70—Considerations in Selecting an Award Instrument

307.7000 Scope of subpart.

This subpart provides guidance on the appropriate selection of award instruments consistent with 31 U.S.C. 6301–6308. This subpart explains the use of the contract as the award instrument for acquisition relationships, and the grant or cooperative agreement as the instrument for assistance relationships. This subpart provides guidance for determining whether to use the acquisition or assistance process to fulfill program needs.

307.7001 Distinction between acquisition and assistance.

(a) 31 U.S.C. 6301–6308 requires the use of contracts to acquire property or services for the direct benefit or use of the Government and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a public purpose of support or stimulation authorized by Federal statute.

(b) A contract is to be used as the legal instrument to reflect a relationship between the Federal Government and a recipient whenever:

(1) The principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; *or*

(2) The Department determines in a specific instance that the use of a type of contract is appropriate. That is, it is determined in a certain situation that specific needs can be satisfied best by using the acquisition process. However, this authority does not permit circumventing the criteria for use of acquisition or assistance instruments. Use of this authority is restricted to extraordinary circumstances and only with the prior approval of the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM).

(c) A grant or cooperative agreement is to be used as the legal instrument to reflect a relationship between the Federal Government and a recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute.

(1) A grant is the legal instrument to be used when no substantial involvement is anticipated between the Department and the recipient during performance of the contemplated activity.

(2) A cooperative agreement is the legal instrument to be used when substantial involvement is anticipated between the Department and the recipient during performance of the contemplated activity.

(d) As a general rule, contracts are to be used for the following purposes:

(1) Evaluation (including research of an evaluative nature) of the performance of Government programs or projects or grantee activity initiated by the funding agency for its direct benefit or use.

(2) Technical assistance rendered to the Government, or on behalf of the Government, to any third party, including those receiving grants or cooperative agreements.

(3) Surveys, studies, and research which provide specific information desired by the Government for its direct activities, or for dissemination to the public.

(4) Consulting services or professional services of all kinds if provided to the Government or, on behalf of the Government, to any third party.

(5) Training projects where the Government selects the individuals or specific groups whose members are to be trained or specifies the content of the curriculum (not applicable to fellowship awards.)

(6) Planning for Government use.

(7) Production of publications or audiovisual materials required primarily for the conduct of the direct operations of the Government.

(8) Design or development of items for Government use or pursuant to agency definition or specifications.

(9) Conferences conducted on behalf of the Government.

(10) Generation of management information or other data for Government use.

307.7002 Procedures.

(a) OPDIV program officials should use existing budget and program planning procedures to propose new activities and major changes in ongoing programs. It is the responsibility of these program officials to meet with the HCA and the principal grants management official, or their designees, to distinguish the relationships and determine whether award is to be made through the acquisition process or assistance process. This determination should be made prior to the time when the annual acquisition plan is reviewed and approved so that the plan will reflect all known proposed contract actions. The cognizant contracting officer will confirm the appropriateness of the use of the contract instrument when reviewing the request for contract.

(b) Shifts from one award instrument to another must be fully documented in the appropriate files to show a fundamental change in program purpose that unequivocally justifies the rationale for the shift.

(c) OPDIVs must ensure that the choice of instrument is determined in accordance with 31 U.S.C. 6301–6308 and applicable departmental policies. If, however, there are major individual transactions or programs which contain elements of both acquisition and assistance in such a way that they cannot be characterized as having a principal purpose of one or the other, guidance should be obtained from the DASGAM, through normal channels, before proceeding with a determination.

(d) Any public notice, program announcement, solicitation, or request for applications or proposals must indicate whether the intended relationship will be one of acquisition or assistance and specify the award instrument to be used.

Subpart 307.71—Requests for Contract

307.7100 Scope of subpart.

This subpart prescribes the format and contents of the request for contract (RFC) and provides procedures for its preparation and submission.

307.7101 General.

The program office's preparation of the RFC and submission to the contracting office completes the presolicitation phase of the acquisition planning process and commences the solicitation phase. The RFC is the formal document which initiates the preparation of the solicitation by the contracting office and sets the acquisition process in motion. It is the result of the planning by the project officer and contracting officer and contains much of the pertinent information necessary for the development of a sound, comprehensive solicitation.

307.7102 Procedures.

The program office should submit the RFC to the contracting office no later than the date agreed to by the

contracting officer and the project officer in the milestone schedule (see 307.104(h)), unless a revised due date has been established by mutual agreement.

307.7103 Responsibilities.

(a) It is the responsibility of the project officer to prepare the RFC so that it complies with the requirements of this subpart and any OPDIV guidance issued in accordance with this subpart.

(b) Prior to the submission of the RFC to the contracting office, the head of the program office sponsoring the project shall review the RFC to ensure that all required information is provided in the prescribed format, and a technical review of the statement of work has been made. The level and extent of the technical review is to be commensurate with the estimated cost, importance, and complexity of the proposed acquisition, and must be thorough enough to ensure that vague and ambiguous language is eliminated, the statement of work is structured by phases or tasks, if appropriate, and methods are available for assessing the contractor's technical, cost, and delivery performance.

307.7104 Transmittal.

The RFC must be conveyed to the contracting office by use of a covering memorandum or other form of transmittal. The transmittal document must be signed by the head of the sponsoring program office and include both a statement attesting to the conclusiveness of the review described in 307.7103(b) and a list identifying all attachments to the RFC.

307.7105 Format and content.

The Department does not prescribe a standard format for the RFC. A format similar to what is in this section is recommended. However, any document or group of documents will be acceptable as an RFC as long as all of the required information (paragraph (a) of this section), and as much of the optional information (paragraph (b) of this section) as is relevant, is included.

(a) The RFC must include:

(1) *Purpose of the contract.* A brief, general description of the requirement, including the citation of the legislation which authorizes the program or project, and a statement as to the intended purpose/use of the proposed contract.

(2) *Period of performance.* The number of months (or other time period) required for total performance and, if applicable, for each phase of work indicated in the statement of work, as well as the proposed starting date.

(3) *Estimated cost and funds citation.* An estimate of the total cost of the proposed contract and, if applicable, the estimate for each phase indicated in the statement of work. The project officer must provide a cost breakdown of all contributing cost factors, an estimate of the technical staff hours, direct material, subcontracting, travel, etc., and may consult with contracting and cost advisory personnel in developing this information. This section must include the certification of funds availability for the proposed acquisition, along with the appropriation and accounting information citations. When funds for the proposed acquisition are not currently available for obligation but are anticipated, a statement of intent to commit funds from the financial management officer shall be included in lieu of the certification of funds availability. (Contracts cannot be awarded unless funds are available, but see FAR 32.703–2).

(4) *Specification, purchase description, or statement or work.* A description of the work to be performed that may be in the form of a specification, purchase description, or statement of work. Guidance concerning the statement of work and its contents is contained in 307.7106. Use of the specification is primarily limited to supply or service contracts where the material end item or service to be delivered is well defined by the Government. To the maximum extent possible, requirements should be defined as performance-based statements of work that focus on outcomes or results. If the RFC for a service contract is not utilizing a performance-based statement of work, with associated measures and a quality surveillance plan, the rationale for this determination must be documented. If a performance-based service contract is utilized, the RFC must detail the performance standards that must be met, the quality surveillance plan that will be implemented and the performance incentives to be used, if applicable.

(5) *Schedule of deliverables/reporting requirements.* A description of what is to be delivered, including, if applicable, technical and financial progress reports and any final report, and the required date of delivery for each deliverable. Reporting requirements should be tailored to the instant acquisition and should not be unnecessarily extensive or detailed. All delivery and reporting requirements shall include the quantities, the place of delivery, and time of delivery.

(6) *Sources for solicitation.* A list of known potential sources by name, size, type of ownership, and mailing address. The project officer is encouraged to use trade and professional journals and publications and conduct a thorough market research to identify new prospective sources to supplement the list of known sources. Efforts to identify set-aside possibilities, e.g., 8(a), HUBZone, and small business, and efforts to identify sources such as small disadvantaged and women-owned small businesses must be documented.

(7) *Project officer and alternate.* The project officer's name, title, organization, mailing address, and telephone number, along with the same data for the project officer's alternate, and a statement that these individuals have completed the Department's project officer training course (see 307.l70)

(b) The RFC must include, if applicable to the acquisition:

(1) *Background and need.* The background, history, and necessity for the proposed contract. This section is to include prior, present, and planned efforts by the program office in the same or related areas, and a description of efforts by other departmental activities and Federal agencies in the same or related program areas, if known. In addition, specific project information, such as the relevance or contribution to overall program objectives, reasons for the need, priority, and project overlap are to be provided.

(2) *Reference materials.* A list, by title and description, of study reports, plans, drawings, and other data to be made available to prospective offerors for use in preparation of proposals and/or the contractor for use in performance of the contract. The project officer must indicate whether this material is currently available or when it will be available, and how it may be accessed by potential offerors.

(3) *Technical evaluation criteria and instructions.* Technical evaluation criteria, which have been developed based on the requirements of the specific project, and any instructions and information which will assist in the preparation of prospective offerors' technical proposals. Evaluation factors may include understanding of the problem, technical approach, experience, personnel, facilities, etc. Criteria areas discussed in the statement of work and the relative order of importance or weights assigned to each of these areas for technical evaluation purposes must be identified.

(4) *Special program clearances or approvals.* Any required clearance or approval. The following special program clearances or approvals should be reviewed for applicability to each

acquisition. The ones which are applicable should be addressed during the planning discussions between the project officer and contracting officer/ contract specialist (see 307.104(f)) and immediate action should be initiated by the project officer to obtain the necessary clearances or approvals. Comprehensive checklists of these and any OPDIV special approvals, clearances, and requirements shall be provided for reference purposes to program offices by the servicing contracting activity. If the approval or clearance has been requested and is being processed at the time of RFC submission, a footnote to this effect, including all pertinent details, must be included in this section.

(i) *Commercial activities.* (OMB Circular No. A–76). A request for contract (RFC) must contain a statement as to whether the proposed solicitation is or is not to be used as part of an OMB Circular No. A–76 cost comparison. (See General Administration Manual (GAM) Chapter 18–10; FAR subpart 7.3, subpart 307.3; OMB Circular No. A–76.)

(ii) *Printing.* The acquisition of printing and high volume duplicating by contract is prohibited unless it is authorized by the Joint Committee on Printing of the U.S. Congress. Procedures to be followed are contained in the ''Government Printing and Binding Regulations'' and the HHS Printing Management Manual and FAR subpart 8.8.

(iii) *Paperwork Reduction Act.* Under the Paperwork Reduction Act of 1995, a Federal agency shall not collect information or sponsor the collection of information from ten or more persons (other than Federal employees acting within the scope of their employment) unless, in advance, the agency has submitted a request for Office of Management and Budget (OMB) review, to the OMB, and the OMB has approved the proposed collection of information. Procedures for the approval may be obtained by contacting the OPDIV reports clearance officer. (See 5 CFR part 1320).

(iv) *Publications.* All projects that will result in contracts which include publications development (print products, electronic bulletin boards, posting on the internet) require review and approval by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS–615, Publication Planning and Clearance Request, must be forwarded to OASPA through the OPDIV public affairs officer. Publications are defined in Chapter 5–00–15 of the Public Affairs Management Manual.

(v) *Public affairs services.* Projects for the acquisition of public affairs services in excess of $5,000 must be submitted to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval on Form HHS–524, Request for Public Affairs Services Contract.

(vi) *Audiovisual.* All projects which will result in contracts which include audiovisuals, regardless of the audio, video, or audiovisual medium employed, require review and approval by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS–524A, Publication Planning and Clearance Request, must be forwarded to OASPA through the OPDIV public affairs officer. Audiovisuals are defined in chapter 6–00–15 of the Public Affairs Management Manual.

(vii) *Privacy Act (5 U.S.C. 552a).* Whenever the Department contracts for the design, development, operation, or maintenance of a system of records on individuals on behalf of the Department to accomplish a departmental function, the Privacy Act is applicable. The program official, after consultation with the activity's Privacy Act Coordinator and the Office of General Counsel, as necessary, shall include a statement in the request for contract as to the applicability of the Act. Whenever an acquisition is subject to the Act, the program official prepares a ''system notice'' and has it published in the **Federal Register**. (See HHS Privacy Act regulation, 45 CFR part 5b; FAR subpart 24.1 and subpart 324.1.)

(viii) *Foreign research.* All foreign research contract projects to be conducted in a foreign country and financed by HHS funds (U.S. dollars) must have clearance by the Department of State with respect to consistency with foreign policy objectives. This clearance should be obtained prior to negotiation. Procedures for obtaining this clearance are set forth in the HHS General Administration Manual, Chapter 20–60.

(5) *Identification and disposition of data.* Identification of the data expected to be generated by the acquisition and an indication of whether the data are to be delivered to the Department or to be retained by the contractor is required. The project officer must also include information relative to the use, maintenance, disclosure, and disposition of data. The project officer must include a statement as to whether or not another acquisition, based upon the data generated by the proposed acquisition, is anticipated.

(6) *Government property.* If known, the type of Government property, individual items, and quantities of Government property to be furnished to, or allowed to be acquired by, the resultant contractor should be indicated. The project officer must specify when the Government property is to be made available.

(7) *Special terms and conditions.* Any suggested special terms and conditions not already covered in the statement of work or the applicable contract general provisions is required.

(8) *Justification for other than full and open competition.* If the proposed acquisition is to be awarded using other than full and open competition, a justification prepared in accordance with FAR subpart 6.3 and subpart 306.3 is required.

307.7106 Statement of work.

(a) *General.* A statement of work (SOW) differs from a specification and purchase description primarily in that it describes work or services to be performed in reaching an end result rather than a detailed, well defined description or specification of the end product. The SOW may enumerate or describe the methods (statistical, clinical, laboratory, etc.) that will be used. However, it is preferable for the offeror to propose the method of performing the work. The SOW should specify the desired results, functions, or end items without telling the offeror what has to be done to accomplish those results unless the method of performance is critical or required for the successful performance of the contract. The SOW should be clear and concise and must completely define the responsibilities of the Government and the contractor. The SOW should be worded so as to make more than one interpretation virtually impossible because it has to be read and interpreted by persons of varied backgrounds, such as attorneys, contracting personnel, cost estimators, accountants, scientists, educators, functional specialists, etc. The SOW must clearly define the obligations of both the contractor and the Government so as to protect the interests of both. Ambiguous statements of work can create unsatisfactory performance, delays, and disputes, and can result in higher costs.

(b) *Term (level of effort) vs. completion work statement.* Careful distinctions must be drawn between term (level of effort) SOWs, which essentially require the furnishing of technical effort and which may include a report thereof, and completion type work statements, which require development of tangible items designed to meet specific performance and/or design characteristics. (See FAR 16.306(d) for distinction).

(1) *Term (or level of effort).* A term or level of effort type SOW is appropriate for research where one seeks to discover the feasibility of later development, or to gather general information. A term or level of effort type SOW may only specify that some number of labor-hours be expended on a particular course of research, or that a certain number of tests be run, without reference to any intended conclusion.

(2) *Completion.* A completion type SOW is appropriate to development work where the feasibility of producing an end item is already known. A completion type SOW may describe what is to be achieved through the contracted effort, such as development of new methods, new end items, or other tangible results.

(c) *Phasing.* Individual research, development, or demonstration projects frequently lie well beyond the present state of the art and entail procedures and techniques of great complexity and difficulty. Under these circumstances, a contractor, no matter how carefully selected, may be unable to deliver the desired result. Moreover, the job of evaluating the contractor's progress is often difficult. Such a contract is frequently phased and often divided into stages of accomplishment, each of which must be completed and approved before the contractor may proceed to the next. Phasing makes it necessary to develop methods and controls, including reporting requirements for each phase of the contract and criteria for evaluation of the report submitted, that will provide, at the earliest possible time, appropriate data for making decisions relative to future phases. A phased contract may include stages of accomplishment such as research, development, and demonstration. Within each phase, there may be a number of tasks which should be included in the SOW. When phases of work can be identified, the SOW will provide for phasing and the request for proposals will require the submission of proposed costs by phases. The resultant contract will reflect costs by phases, require the contractor to identify incurred costs by phases, establish delivery schedules by phase, and require the written acceptance of each phase. The provisions of the Limitation of Cost clause shall apply to the estimated cost of each phase. Contractors shall not be allowed to incur costs for phases which are dependent upon successful completion of earlier phases until written acceptance of the prior work is obtained from the contracting officer.

(d) *Elements of the SOW.* The elements of the SOW will vary with the objective, complexity, size, and nature of the acquisition. In general, it should cover the following matters as appropriate.

(1) *A general description of the required objectives and desired results.* Initially, a broad, nontechnical statement of the nature of the work to be performed. This should summarize the actions to be performed by the contractor and the results that the Government expects.

(2) *Background information helpful to a clear understanding of the requirements and how they evolved.* Include a brief historical summary as appropriate and the relationship to overall program objectives.

(3) *A detailed description of the technical requirements.* A comprehensive description of the work to be performed to provide whatever details are necessary for prospective offerors to submit meaningful proposals.

(4) *Subordinate tasks or types of work.* A listing of the various tasks or types of work (it may be desirable in some cases to indicate that this is not all-inclusive). The degree of task breakout is directly dependent on the size and complexity of the work to be performed and the logical groupings. A single cohesive task should not be broken out merely to conform to a format. Indicate whether the tasks are sequential or concurrent for offeror planning purposes.

(5) *Reference material.* All reference material to be used in the conduct of the project that tells how the work is to be carried out must be identified. Applicability should be explained, and a statement made as to where the material can be obtained.

(6) *Level of effort.* When a level of effort is required, the number and type of personnel required should be stated. If known, the type and degree of expertise should be specified.

(7) *Special requirements.* (as applicable). An unusual or special contractual requirement, which would impact on contract performance, should be included as a separate section.

(8) *Deliverables reporting requirements.* All deliverables and/or reports must be clearly and completely described.

307.7107 Review.

Upon receipt of the RFC, the contracting officer shall review its contents to ensure that all pertinent information has been provided by the program office and that it includes an acceptable SOW. If pertinent information is missing or the SOW is inadequate, the contracting officer shall obtain or clarify the information as soon as possible so that the acquisition schedule can be met. If the program office delays furnishing the information or clarification, the contracting officer should notify the head of the sponsoring program office, in writing, of the possible slippage in the acquisition schedule and the need for an expeditious remedy. The contracting officer should also notify the chief of the contracting office. A program office's or project officer's continued failure to adhere to agreed on milestones should also be reported to the head of the contracting activity.

PART 309—CONTRACTOR QUALIFICATIONS

Subpart 309.4—Debarment, Suspension, and Ineligibility

Sec.
309.403 Definitions.
309.404 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.
309.405 Effect of listing.
309.406 Debarment.
309.406–3 Procedures.
309.407 Suspension.
309.407–3 Procedures.
309.470 Reporting of suspected causes of debarment, suspension, or the taking of evasive actions.
309.470–1 Situations where reports are required.
309.470–2 Contents of reports.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 309.4—Debarment, Suspension, and Ineligibility

309.403 Definitions.

Acquiring agency's head or designee, as used in the FAR, shall mean, unless otherwise stated in this subpart, the head of the contracting activity. Acting in the capacity of the acquiring agency's head, the head of the contracting activity may make the required justifications or determinations, and take the necessary actions, specified in FAR 9.405, 9.406 and 9.407 for his or her respective activity, but only after obtaining the written approval of the debarring or suspending official, as the case may be.

Debarring official means the Assistant Secretary for Management and Budget, or his/her designee.

Initiating official means either the contracting officer, the head of the contracting activity, the Deputy Assistant Secretary for Grants and Acquisition Management, or the Inspector General.

Suspending official means the Assistant Secretary for Management and Budget, or his/her designee.

309.404 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(c) The Office of Grants and Acquisition Management (OGAM) shall perform the actions required by FAR 9.404(c).

(4) OGAM shall maintain all documentation submitted by the initiating official recommending the debarment or suspension action and all correspondence and other pertinent documentation generated during the OGAM review.

309.405 Effect of listing.

(a) The head of the contracting activity (HCA) (not delegable) may, with the written concurrence of the debarring or suspending official, make the determinations referenced in FAR 9.405(a), regarding contracts for their respective activities.

(1) If a contracting officer considers it necessary to award a contract, or consent to a subcontract with a debarred or suspended contractor, the contracting officer shall prepare a determination, including all pertinent documentation, and submit it through acquisition channels to the head of the contracting activity. The documentation must include the date by which approval is required and a compelling reason for the proposed action. Some examples of circumstances that may constitute a compelling reason for the award to, or consent to a subcontract with, a debarred or suspended contractor include:

(i) The property or services to be acquired are available only from the listed contractor;

(ii) The urgency of the requirement dictates that the Department deal with the listed contractor; or

(iii) There are other compelling reasons which require business dealings with the listed contractor.

(2) If the HCA decides to approve the requested action, he/she shall request the concurrence of the debarring or suspending official and, if given, shall inform the contracting officer in writing of the decision within the required time period.

309.406 Debarment.

309.406–3 Procedures.

(a) *Investigation and referral.* Whenever an apparent cause for debarment becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470–2, if known, and forward it through appropriate channels with a written recommendation, to the debarring official. Contracting officers shall forward their reports in accordance with 309.470–1. The debarring official shall initiate an investigation through such means as he/she deems appropriate.

(b) *Decisionmaking process.* The debarring official shall review the results of the investigation, if any, and make a written determination whether or not debarment procedures are to be commenced. A copy of the determination shall be promptly sent through appropriate channels to the initiating official, and the contracting officer, if necessary. If the debarring official determines to commence debarment procedures, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.406–3(c). If the proposed action is not based on a conviction or judgement and the contractor's submission in response to the notice raises a genuine dispute over facts material to the proposed debarment, the debarring official shall arrange for fact-finding hearings and take the necessary action specified in FAR 9.406–3(b)(2). The debarring official shall also ensure that written findings of facts are prepared, and shall base the debarment decisions on the facts as found, after considering information and argument submitted by the contractor and any other information in the administrative record. The Office of the General Counsel shall represent the Department at any fact-finding hearing and may present witnesses for HHS and question any witnesses presented by the contractor.

309.407 Suspension.

309.407–3 Procedures.

(a) *Investigation and referral.* Whenever an apparent cause for suspension becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470–2, if known, and forward it through appropriate channels, with a written recommendation, to the suspending official. Contracting officers shall forward their reports in accordance with 309.470–1. The suspending official shall initiate an investigation through such means as he/she deems appropriate.

(b) *Decisionmaking process.* The suspending official shall review the results of the investigation, if any, and make a written determination whether or not suspension should be imposed. A copy of this determination shall be promptly sent through appropriate channels to the initiating official and the contracting officer, if necessary. If the suspending official determines to impose suspension, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.407–3(c). If the action is not based on an indictment, and, subject to the provisions of FAR 9.407–3(b)(2), the contractor's submission in response to the notice raises a genuine dispute over facts material to the suspension, the suspending official shall, after suspension has been imposed, arrange for fact-finding hearings and take the necessary actions specified in FAR 9.407–3(b)(2).

309.470 Reporting of suspected causes for debarment or suspension, or the taking of evasive actions.

309.470–1 Situations where reports are required.

A report incorporating the information required by 309.470–2 shall be forwarded, in duplicate, by the contracting officer through acquisition channels to OGAM when:

(a) A contractor has committed, or is suspected of having committed, any of the acts described in FAR 9.406–2 or FAR 9.407–2; or

(b) A contractor is suspected of attempting to evade the prohibitions of debarment or suspension imposed under this subject, or any other comparable regulation, by changes of address, multiple addresses, formation of new companies, or by other devices.

309.470–2 Contents of reports.

Each report prepared under 309.470–1 shall be coordinated with the Office of the General Counsel and shall include the following information, where available:

(a) Name and address of contractor.

(b) Name of the principal officers, partners, owners, or managers.

(c) All known affiliates, subsidiaries, or parent firms, and the nature of the affiliation.

(d) Description of the contract or contracts concerned, including the contract number, and office identifying numbers or symbols, the amount of each contract, the amount paid the contractor and the amount still due, and the percentage of work completed and to be completed.

(e) The status of vouchers.

(f) Whether contract funds have been assigned pursuant to the Assignment of Claims Act, as amended, (31 U.S.C. 3727, 41 U.S.C. 15), and, if so assigned, the name and address of the assignee and a copy of the assignment.

(g) Whether any other contracts are outstanding with the contractor or any affiliates, and, if so, the amount of the contracts, whether these funds have

been assigned pursuant to the Assignment of Claims Act, as amended, (31 U.S.C. 3727, 41 U.S.C. 15), and the amounts paid or due on the contracts.

(h) A complete summary of all available pertinent evidence.

(i) A recommendation as to the continuation of current contracts.

(j) An estimate of damages, if any, sustained by the Government as a result of the action of the contractor, including an explanation of the method used in making the estimate.

(k) The comments and recommendations of the contracting officer and statements regarding whether the contractor should be suspended or debarred, whether any limitations should be applied to the action, and the period of any proposed debarment.

(l) As an enclosure, a copy of the contract(s) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation or a written summary of any information for which documentation is not available.

PART 313—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 313.3—Simplified Acquisition Methods

Sec.
313.301 Governmentwide commercial purchase card.
313.303 Blanket purchase agreements (BPAs).
313.303–5 Purchases under BPAs.
313.305 Imprest funds and third party drafts.
313.305–1 General.
313.306 SF 44, Purchase Order—Invoice—Voucher.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 313.3—Simplified Acquisition Methods.

313.301 Governmentwide commercial purchase card.

(b) The Department has issued general guidance concerning the use of governmentwide commercial purchase cards, and has authorized the OPDIVs to establish procedures for the use, administrative and management controls, and training necessary to comply with FAR 13.301.

313.303 Blanket Purchase Agreements (BPAs).

313.303–5 Purchases under BPAs.

(e)(5) Delivery documents, invoices, etc., signed by the Government employee receiving the item or service will be forwarded to the fiscal office or other paying office as designated by the OPDIV. Payment will be made on the basis of the signed document, invoice, etc. Contracting offices will ensure that established procedures allowing for availability of funds are in effect prior to placement of orders.

313.305 Imprest funds and third party drafts.

313.305–1 General.

Requests to establish imprest funds shall be made to the responsible fiscal office. At larger activities where the cashier may not be conveniently located near the purchasing office, a Class C Cashier may be installed in the purchasing office. Documentation of cash purchases shall be in accordance with instructions contained in the HHS Voucher Audit Manual Part 1, Chapter 1–10.

313.306 SF 44, Purchase Order—Invoice—Voucher.

(d) Since the Standard Form (SF) 44 is an accountable form, a record shall be maintained of serial numbers of the form, to whom issued, and date issued. SF 44's shall be kept under adequate lock and key to prevent unauthorized use. A reservation of funds shall be established to cover total anticipated expenditures prior to use of the SF 44.

PART 314—SEALED BIDDING

Subpart 314.2—Solicitation of Bids

Sec.
314.202 General rules for solicitation of bids.
314.202–7 Facsimile bids.
314.213 Annual submission of representations and certifications.

Subpart 314.4—Opening of Bids and Award of Contract

314.404 Rejection of bids.
314.404–1 Cancellation of invitations after opening.
314.407 Mistakes in bids.
314.407–3 Other mistakes disclosed before award.
314.407–4 Mistakes after award.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 314.2—Solicitation of Bids

314.202 General rules for solicitation of bids.

314.202–7 Facsimile bids.

If the head of the contracting activity (HCA) (not delegable) has determined that the contracting activity will allow use of facsimile bids and proposals, the HCA shall prescribe internal procedures, in accordance with the FAR, to ensure uniform processing and control.

314.213 Annual submission of representations and certifications.

Each HCA (not delegable) shall determine whether the contracting activity will allow use of the annual submission of representations and certifications by bidders.

Subpart 314.4—Opening of Bids and Award of Contract

314.404 Rejection of bids.

314.404–1 Cancellation of invitations after opening.

The chief of the contracting office (CCO) (not delegable) shall make the determinations required to be made by the agency head in FAR 14.404–1.

314.407 Mistakes in bids.

314.407–3 Other mistakes disclosed before award.

(e) Authority has been delegated to the Departmental Protest Control Officer, Office of Acquisition Management, Office of Grants and Acquisition Management, to make administrative determinations in connection with mistakes in bid alleged after opening and before award. This authority may not be redelegated.

(f) Each proposed determination shall have the concurrence of the Chief, Business Law Branch, Business and Administrative Law Division, Office of General Counsel.

(i) Doubtful cases shall not be submitted by the contracting officer directly to the Comptroller General, but shall be submitted to the Departmental Protest Control Officer.

314.407–4 Mistakes after award.

(c) Authority has been delegated to the Departmental Protest Control Officer to make administrative determinations in connection with mistakes in bid alleged after award. This authority may not be redelegated.

(d) Each proposed determination shall have the concurrence of the Chief, Business Law Branch, Business and Administrative Law Division, Office of the General Counsel.

PART 315—CONTRACTING BY NEGOTIATION

Subpart 315.2—Solicitation and Receipt of Proposals and Information

Sec.
315.204 Contract format.
315.204–5 Part IV—Representations and instructions.
315.208 Submission, modification, revision, and withdrawal of proposals.
315.209 Solicitation provisions and contract clauses.

Subpart 315.3—Source Selection

315.305 Proposal evaluation.
315.306 Exchanges with offerors after receipt of proposals.
315.307 Proposal revisions.
315.370 Finalization of details with the selected source.
315.371 Contract preparation and award.
315.372 Preparation of negotiation memorandum.

Subpart 315.4—Contract Pricing

315.404 Proposal analysis.
315.404–2 Information to support proposal analysis.
315.404–4 Profit.

Subpart 315.6—Unsolicited Proposals

315.605 Content of unsolicited proposals.
315.606 Agency procedures.
315.606–1 Receipt and initial review.
315.609 Limited use of data.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 315.2—Solicitation and Receipt of Proposals and Information

315.204 Contract format.

315.204–5 Part IV—Representations and instructions.

(a) *Section K, Representations, certifications, and other statements of offerors.*

(1) This section shall begin with the following and continue with the applicable representations and certifications:

To Be Completed by the Offeror: (The Representations and Certifications must be executed by an individual authorized to bind the offeror.) The offeror makes the following Representations and Certifications as part of its proposal (check or complete all appropriate boxes or blanks on the following pages).

_____
(Name of Offeror)

_____
(RFP No.)

_____
(Signature of Authorized Individual)

_____
(Date)

_____
(Typed Name of Authorized Individual)

Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

(c) *Section M, Evaluation factors for award.*

(1) *General.* (i) The evaluation factors must be developed by the project officer and submitted to the contracting officer in the request for contract (RFC) for inclusion in the request for proposal (RFP). Development of these factors and the assignment of the relative importance or weight to each require the exercise of judgment on a case-by-case basis because they must be tailored to the requirements of the individual acquisition. Since the factors will serve as a standard against which all proposals will be evaluated, it is imperative that they be chosen carefully to emphasize those considered to be critical in the selection of a contractor.

(ii) The finalized evaluation factors cannot be changed except by a formal amendment to the RFP issued by the contracting officer. No factors other than those set forth in the RFP shall be used in the evaluation of proposals.

(2) *Review of evaluation factors.*

(i) The evaluation factors should be reviewed by the contracting officer in terms of the work statement. This review is not intended to dictate technical requirements to the program office or project officer, but rather to ensure that the evaluation factors are clear, concise, and fair so that all potential offerors are fully aware of the bases for proposal evaluation and are given an equal opportunity to compete.

(ii) The project officer and the contracting officer should then review the evaluation factors together to ascertain the following:

(A) The factors are described in sufficient detail to provide the offerors (and evaluators) with a total understanding of the factors to be involved in the evaluation process;

(B) The factors address the key programmatic concerns which the offerors must be aware of in preparing proposals;

(C) The factors are specifically applicable to the instant acquisition and are not merely restatements of factors from previous acquisitions which are not relevant to this acquisition; and

(D) The factors are selected to represent only the significant areas of importance which must be emphasized rather than a multitude of factors. (All factors tend to lose importance if too many are included. Using too many factors will prove as detrimental as using too few.)

(3) *Examples of topics that form a basis for evaluation factors.* Typical examples of topics that form a basis for the development of evaluation factors are listed in the following paragraphs. These examples are intended to assist in the development of actual evaluation factors for a specific acquisition and should only be used if they are applicable to that acquisition. They are not to be construed as actual examples of evaluation factors to be included in the RFP.

(i) Understanding of the problem and statement of work:

(ii) Method of accomplishing the objectives and intent of the statement of work;

(iii) Soundness of the scientific or technical approach for executing the requirements of the statement of work (to include, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach);

(iv) Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved;

(v) Feasibility and/or practicality of successfully accomplishing the requirements (to include a statement and discussion of anticipated major difficulties and problem areas and recommended approaches for their resolution);

(vi) Availability of required special research, test, and other equipment or facilities;

(vii) Managerial capability (ability to achieve delivery or performance requirements as demonstrated by the proposed use of management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts, if applicable, as evidenced by the management plan and demonstrated by previous experience);

(viii) Availability, qualifications, experience, education, and competence of professional, technical, and other personnel, to include proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts);

(ix) Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel;

(x) Quality of offeror's past performance on recent projects of similar size and scope; and

(xi) Extent of proposed participation of small disadvantaged business concerns in performance of the contract.

315.208 Submission, modification, revision, and withdrawal of proposals.

(b) When the head of the contracting activity (HCA) for a health agency determines that certain classes of biomedical or behavioral research and development acquisitions should be subject to conditions other than those specified in FAR 52.215–1(c)(3), the HCA may authorize the use of the provision at 352.215–70 in addition to the provision at FAR 52.215–1. This is an authorized deviation.

(2) When the provision at 352.215–70 is included in the solicitation and a proposal is received after the exact time specified for receipt, the contracting officer, with the assistance of cost and technical personnel, shall make a written determination as to whether the proposal meets the requirements of the provision at 352.215–70 and, therefore, can be considered.

315.209 Solicitation provisions and contract clauses.

(a) Paragraph (e) of the provision at 352.215–1 shall be used in place of that specified at FAR 52.215–1(e). This is an authorized deviation.

(g) If the head of the contracting activity (HCA)(not delegable) has determined that the contracting activity will allow the use of the annual submission of representations and certifications by offerors, the provisions of FAR 14.213 shall be followed.

Subpart 315.3—Source Selection

315.305 Proposal evaluation.

(a)(1) *Cost or price evaluation.* The contracting officer shall evaluate business proposals adhering to the requirements for cost or price analysis included in FAR 15.404. The contracting officer must determine the extent of analysis in each case depending on the amount of the proposal, the technical complexity, and related cost or price. The contracting officer should request the project officer to analyze items such as the number of labor hours proposed for various labor categories; the mix of labor hours and categories of labor in relation to the technical requirements of the project; the kinds and quantities of material, equipment, and supplies; types, numbers and hours/days of proposed consultants; logic of proposed subcontracting; analysis of the travel proposed including number of trips, locations, purpose, and travelers; and kinds and quantities of information technology. The project officer shall provide his/her opinion as to whether these elements are necessary and reasonable for efficient contract performance. Exceptions to proposed elements shall be supported by adequate rationale to allow for effective negotiations or award if discussions are not conducted. The contracting officer should also request the assistance of a cost/price analyst when considered necessary. In all cases, the negotiation memorandum must include the rationale used in determining that the price or cost is fair and reasonable.

(2) *Past performance evaluation.* When evaluating past performance, the contracting officer is responsible for conducting reference checks to obtain information concerning the performance history of offerors. The contracting officer may require the assistance of the project officer as well as other Government technical personnel in performing this function.

(3) *Technical evaluation.*

(i) Technical evaluation plan.

(A) A technical evaluation plan may be required by the contracting officer, at his/her discretion, when an acquisition is sufficiently complex as to warrant a formal plan.

(B) The technical evaluation plan should include at least the following:

(*1*) A list of recommended technical evaluation panel members, their organizations, a list of their major consulting clients (if applicable), their qualifications, and curricula vitae (if applicable);

(*2*) A justification for using non-Government technical evaluation panel members. (Justification is not required if non-Government evaluators will be used in accordance with standard contracting activity procedures or policies);

(*3*) A statement that there is no apparent or actual conflict of interest regarding any recommended panel member;

(*4*) A copy of each rating sheet, approved by the contracting officer, to be used to assure consistency with the evaluation criteria; and

(*5*) A brief description of the general evaluation approach.

(C) The technical evaluation plan must be signed by an official within the program office in a position at least one level above the project officer, or in accordance with contracting activity procedures.

(D) The technical evaluation plan should be submitted to the contracting officer for review and approval before the solicitation is issued. The contracting officer shall make sure that the significant factors and subfactors relating to the evaluation are reflected in the evaluation criteria when conducting the review of the plan.

(ii) Technical evaluation panel.

(A) *General.* (*1*) A technical evaluation panel is required for all acquisitions subject to this subpart which are expected to exceed $500,000 and in which technical evaluation is considered a key element in the award decision. The contracting officer has the discretion to require a technical evaluation panel for acquisitions not exceeding $500,000 based on the complexity of the acquisition.

(*2*) The technical evaluation process requires careful consideration regarding the size, composition, expertise, and function of the technical evaluation panel. The efforts of the panel can result in the success or failure of the acquisition.

(B) *Role of the project officer.* (*1*) The project officer is the contracting officer's technical representative for the acquisition action. The project officer may be a voting member of the technical evaluation panel, and may also serve as the chairperson of the panel, unless he/she is prohibited by law or contracting activity procedures to do so.

(*2*) The project officer is responsible for recommending panel members who are knowledgeable in the technical aspects of the acquisition and who are competent to identify strengths and weaknesses of the various proposals. The program training requirements specified in 307.170 must be adhered to when selecting prospective panel members (government employees).

(*3*) The project officer shall ensure that persons possessing expertise and experience in addressing issues relative to sex, race, national origin, and handicapped discrimination are included as panel members in acquisitions which address those issues. The intent is to balance the composition of the panel so that qualified and concerned individuals may provide insight to other panel members regarding ideas for, and approaches to be taken in, the evaluation of proposals.

(*4*) The project officer is to submit the recommended list of panel members to an official within the program office in a position at least one level above the project officer, or in accordance with contracting activity procedures. This official will review the recommendations and select the chairperson.

(*5*) The project officer shall arrange for adequate and secure working space for the panel.

(C) *Role of the contracting officer.* (*1*) The term ''contracting officer,'' as used in this subpart, may be the contracting officer or his/her designated representative within the contracting office.

(*2*) The contracting officer shall not serve as a member of the technical evaluation panel but should be available to:

(*i*) Address the initial meeting of the technical evaluation panel;

(*ii*) Provide assistance to the evaluators as required; and

(*iii*) Ensure that the scores adequately reflect the written technical report comments.

(D) *Conflict of interest.* (*1*) If a panel member has an actual or apparent conflict of interest related to a proposal

under evaluation, he/she shall be removed from the panel and replaced with another evaluator. If a suitable replacement is not available, the panel shall perform the review without a replacement.

(*2*) For the purposes of this subpart, conflicts of interest are defined in the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), Supplemental Standards of Ethical Conduct for Employees of the Department of Health and Human Services (5 CFR part 5501), and the Procurement Integrity Act. For outside evaluators serving on the technical evaluation panel, see paragraph (a)(3)(ii)(F) of this section.

(E) *Continuity of evaluation process.* (*1*) The technical evaluation panel is responsible for evaluating the original proposals, making recommendations to the chairperson regarding weaknesses and deficiencies of proposals, and, if required by the contracting officer, assisting the contracting officer during communications and discussions, and reviewing supplemental, revised and/or final proposal revisions. To the extent possible, the same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. The following are examples of circumstances when it would not be necessary for the technical evaluation panel to evaluate revised proposals submitted during the acquisition:

(*i*) The answers to questions do not have a substantial impact on the proposal;

(*ii*) Final proposal revisions are not materially different from the original proposals; or

(*iii*) The rankings of the offerors are not affected because the revisions to the proposals are relatively minor.

(*2*) The chairperson, with the concurrence of the contracting officer, may decide not to have the panel evaluate the revised proposals. Whenever this decision is made, it must be fully documented by the chairperson and approved by the contracting officer.

(*3*) When technical evaluation panel meetings are considered necessary by the contracting officer, the attendance of evaluators is mandatory. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson shall remove and/or replace the individual after discussing the situation with the contracting officer and obtaining his/her concurrence and the approval of the official responsible for appointing the panel members.

(*4*) Whenever continuity of the evaluation process is not possible, and either new evaluators are selected or a reduced panel is decided upon, each proposal which is being reviewed at any stage of the acquisition shall be reviewed at that stage by all members of the revised panel unless it is impractical to do so because of the receipt of an unusually large number of proposals.

(F) *Use of outside evaluators.* (*1*) The National Institutes of Health (NIH) and the Substance Abuse and Mental Health Services Administration (SAMHSA) are required to have a peer review of research and development contracts in accordance with Public Law 93–352 as amended by Public Law 94–63; 42 U.S.C. 289 a and 42 U.S.C. 290aa–3 respectively. This legislation requires peer review of projects and proposals, and not more than one-fourth of the members of a peer review group may be officers or employees of the United States. NIH and SAMHSA are therefore exempt from the provisions of 315.305(a)(3)(ii) to the extent that 42 U.S.C. 289a and 290aa–3 apply. Conflicts of interest are addressed at 42 CFR part 52h. Other agencies subject to statutory scientific peer review requirements are also exempt from the requirements of paragraph (a)(3)(ii) of this section to the extent that these requirements are inconsistent with their legislative requirements.

(*2*) In general, decisions to disclose proposals outside the Government for evaluation purposes shall be made by the official responsible for appointing panel members for the acquisition, after consultation with the contracting officer and in accordance with operating division procedures. The decision to disclose either a solicited or unsolicited proposal outside the Government for the purpose of obtaining an evaluation shall take into consideration the avoidance of organizational conflicts of interest and any competitive relationship between the submitter of the proposal and the prospective evaluator(s).

(*3*) When it is determined to disclose a solicited proposal outside the Government for evaluation purposes, the following or similar conditions shall be included in the written agreement with evaluator(s) prior to disclosure:

Conditions for Evaluating Proposals

The evaluator agrees to use the data (trade secrets, business data, and technical data) contained in the proposal only for evaluation purposes.

The foregoing requirement does not apply to data obtained from another source without restriction.

Any notice or legend placed on the proposal by either the Department or the submitter of the proposal shall be applied to any reproduction or abstract provided to the evaluator or made by the evaluator. Upon completion of the evaluation, the evaluator shall return the Government furnished copy of the proposal or abstract, and all copies thereof, to the Departmental office which initially furnished the proposal for evaluation.

Unless authorized by the Department's initiating office, the evaluator shall not contact the submitter of the proposal concerning any aspects of its contents.

The evaluator is obligated to obtain commitments from its employees and subcontractors, as necessary, to effect the purposes of these conditions.

(iii) Receipt of proposals.

(A) After the closing date set by the solicitation for the receipt of proposals, the contracting officer will use a transmittal memorandum to forward the technical proposals to the project officer or chairperson for evaluation. The business proposals will be retained by the contracting officer for evaluation.

(B) The transmittal memorandum shall include at least the following:

(*1*) A list of the names of the organizations submitting proposals;

(*2*) A reference to the need to preserve the integrity of the source selection process;

(*3*) A statement that only the contracting officer is to conduct discussions.

(*4*) A requirement for a technical evaluation report in accordance with paragraph (a)(3)(vi) of this section; and

(*5*) The establishment of a date for receipt of the technical evaluation report.

(iv) Convening the technical evaluation panel.

(A) Normally, the technical evaluation panel will convene to evaluate the proposals. However, there may be situations when the contracting officer determines that it is not feasible for the panel to convene. Whenever this decision is made, care must be taken to assure that the technical review is closely monitored to produce acceptable results.

(B) When a panel is convened, the chairperson is responsible for the control of the technical proposals provided to him/her by the contracting officer for use during the evaluation process. The chairperson will generally distribute the technical proposals prior to the initial panel meeting and will establish procedures for securing the proposals whenever they are not being evaluated to insure their confidentiality. After the evaluation is complete, all proposals must be returned to the contracting officer by the chairperson.

(C) The contracting officer shall address the initial meeting of the panel and state the basic rules for conducting

the evaluation. The contracting officer shall provide written guidance to the panel if he/she is unable to attend the initial panel meeting. The guidance should include:

(*1*) Explanation of conflicts of interest;

(*2*) The necessity to read and understand the solicitation, especially the statement of work and evaluation criteria, prior to reading the proposals;

(*3*) The need for evaluators to restrict the review to only the solicitation and the contents of the technical proposals;

(*4*) The need for each evaluator to review all the proposals;

(*5*) The need to watch for ambiguities, inconsistencies, errors, and deficiencies which should be surfaced during the evaluation process;

(*6*) An explanation of the evaluation process and what will be expected of the evaluators throughout the process;

(*7*) The need for the evaluators to be aware of the requirement to have complete written documentation of the individual strengths and weaknesses which affect the scoring of the proposals; and

(*8*) An instruction directing the evaluators that, until the award is made, information concerning the acquisition must not be disclosed to any person not directly involved in the evaluation process.

(v) Rating and ranking of proposals. The evaluators will individually read each proposal, describe tentative strengths and weaknesses, and independently develop preliminary scores in relation to each evaluation factor set forth in the solicitation. After this has been accomplished, the evaluators shall discuss in detail the individual strengths and weakness described by each evaluator and, if possible, arrive at a common understanding of the major strengths and weaknesses and the potential for correcting each offeror's weakness(es). Each evaluator will score each proposal, and then the technical evaluation panel will collectively rank the proposals. Generally, ranking will be determined by adding the numerical scores assigned to the evaluation factors and finding the average for each offeror. The evaluators should then identify whether each proposal is acceptable or unacceptable. Predetermined cutoff scores shall not be employed.

(vi) Technical evaluation report. A technical evaluation report shall be prepared and furnished to the contracting officer by the chairperson and maintained as a permanent record in the contract file. The report must reflect the ranking of the proposals and identify each proposal as acceptable or unacceptable. The report must also include a narrative evaluation specifying the strengths and weaknesses of each proposal, a copy of each signed rating sheet, and any reservations, qualifications, or areas to be addressed that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal must be included. The report should also include specific points and questions which are to be raised in discussions or negotiations.

315.306 Exchanges with offerors after receipt of proposals.

(d) *Exchanges with offerors after establishment of the competitive range.* The contracting officer and project officer should discuss the uncertainties and/or deficiencies that are included in the technical evaluation report for each proposal in the competitive range. Technical questions should be developed by the project officer and/or the technical evaluation panel and should be included in the technical evaluation report. The management, past performance and cost or price questions should be prepared by the contracting officer with assistance from the project officer and/or panel as required. The method of requesting offerors in the competitive range to submit the additional information will vary depending on the complexity of the questions, the extent of additional information requested, the time needed to analyze the responses, and the time frame for making the award. However, to the extent practicable, all questions and answers should be in writing. Each offeror in the competitive range shall be given an equitable period of time for preparation of responses to questions to the extent practicable. The questions should be developed so as to disclose the ambiguities, uncertainties, and deficiencies of the offeror.

315.307 Proposal revisions.

(b) Final proposal revisions are subject to a final evaluation of price or cost and other salient factors by the contracting officer and project officer with assistance from a cost/price analyst, and an evaluation of technical factors by the technical evaluation panel, as necessary. Proposals may be technically rescored and reranked by the technical evaluation panel and a technical evaluation report prepared. To the extent practicable, the evaluation shall be performed by the same evaluators who reviewed the original proposals. A final evaluation of past performance will be made by the contracting officer and project officer. The technical evaluation panel may be involved in the final evaluation of past performance if the panel is comprised solely of Government personnel.

315.370 Finalization of details with the selected source.

(a) After selection of the successful proposal, finalization of details with the selected offeror may be conducted if deemed necessary. However, no factor which could have any effect on the selection process may be introduced after the common cutoff date for receipt of final proposal revisions. The finalization process shall not in any way prejudice the competitive interest or rights of the unsuccessful offerors. Finalization of details with the selected offeror shall be restricted to definitizing the final agreement on terms and conditions, assuming none of these factors were involved in the selection process.

(b) Caution must be exercised by the contracting officer to insure that the finalization process is not used to change the requirements contained in the solicitation, nor to make any other changes which would impact on the source selection decision. Whenever a material change occurs in the requirements, the competition must be reopened and all offerors submitting final proposal revisions must be given an opportunity to resubmit proposals based on the revised requirements. Whenever there is a question as to whether a change is material, the contracting officer should obtain the advice of technical personnel and legal counsel before reopening the competition. Significant changes in the offeror's cost proposal may also necessitate a reopening of competition if the changes alter the factors involved in the original selection process.

(c) Should finalization details beyond those specified in paragraph (a) of this section be required for any reason, discussions must be reopened with all offerors submitting final proposal revisions.

(d) Upon finalization of details, the contracting officer should obtain a confirmation letter from the successful offeror which includes any revisions to the technical proposal, the agreed to price or cost, and, as applicable, a certificate of current cost or pricing data.

315.371 Contract preparation and award.

(a) The contracting officer must perform the following actions after finalization details have been completed:

(1) Prepare the negotiation memorandum in accordance with 315.372;

(2) Prepare the contract containing all agreed to terms and conditions and clauses required by law or regulation;

(3) Include in the contract file the pertinent documents referenced in FAR 4.803; and

(4) Obtain the appropriate approval of the proposed contract award(s) in accordance with subpart 304.71 and contracting activity procedures.

(b) After receiving the required approvals, the contract should be transmitted to the prospective contractor for signature. The prospective contractor must be informed that the contract is not effective until accepted by the contracting officer.

(c) The contract shall not be issued until the finance office certifies that the funds are available for obligation.

315.372 Preparation of negotiation memorandum.

The negotiation memorandum or summary of negotiations is a complete record of all actions leading to award of a contract and is prepared by the contract negotiator to support the source selection decision discussed in FAR 15.308. It should be in sufficient detail to explain and support the rationale, judgments, and authorities upon which all actions were predicated. The memorandum will document the negotiation process and reflect the negotiator's actions, skills, and judgments in concluding a satisfactory agreement for the Government. Negotiation memorandums shall contain discussion of the following or a statement of nonapplicability; however, information already contained in the contract file need not be reiterated. A reference to the document which contains the required information is acceptable.

(a) *Description of articles and services and period of performance.* A description of articles and services, quantity, unit price, total contract amount, and period of contract performance should be set forth (if Supplemental Agreement—show previous contract amount as revised, as well as information with respect to the period of performance).

(b) *Acquisition planning.* Summarize or reference any acquisition planning activities that have taken place.

(c) *Synopsis of acquisition.* A statement as to whether the acquisition has or has not been publicized in accordance with FAR Subpart 5.2. A brief statement of explanation should be included with reference to the specific basis for exemption under the FAR, if applicable.

(d) *Contract type.* Provide sufficient detail to support the type of contractual instrument recommended for the acquisition. If the contract is a cost-sharing type, explain the essential cost-sharing features.

(e) *Extent of competition.* The extent to which full and open competition was solicited and obtained must be discussed. The discussion shall include the date of solicitation, sources solicited, and solicitation results. If a late proposal was received, discuss whether or not the late proposal was evaluated and the rationale for the decision.

(f) *Technical evaluation.* Summarize or reference the results presented in the technical evaluation report.

(g) *Business evaluation.* Summarize or reference results presented in the business report.

(h) *Past performance.* Summarize or reference results of past performance evaluation and reference checks.

(i) *Competitive range (if applicable).* Describe how the competitive range was determined and state the offerors who were included in the competitive range and the ones who were not.

(j) *Cost breakdown and analysis.* Include a complete cost breakdown together with the negotiator's analysis of the estimated cost by individual cost elements. The negotiator's analysis should contain information such as:

(1) A comparison of cost factors proposed in the instant case with actual factors used in earlier contracts, using the same cost centers of the same supplier or cost centers of other sources having recent contracts for the same or similar item.

(2) Any pertinent Government-conducted audit of the proposed contractor's record of any pertinent cost advisory report.

(3) Any pertinent technical evaluation inputs as to necessity, allocability and reasonableness of labor, material and other direct expenses.

(4) Any other pertinent information to fully support the basis for and rationale of the cost analysis.

(5) If the contract is an incentive type, discuss all elements of profit and fee structure.

(6) A justification of the reasonableness of the proposed contractor's estimated profit or fixed fee, considering the requirements of FAR 15.404–4 and HHSAR 315.404–4.

(k) *Cost realism.* Describe the cost realism analysis performed on proposals.

(l) *Government-furnished property and Government-provided facilities.* With respect to Government-furnished or Government-provided facilities, equipment, tooling, or other property, include the following:

(1) Where no property is to be provided, a statement to that effect.

(2) Where property is to be provided, a full description, the estimated dollar value, the basis of price comparison with competitors, and the basis of rental charge, if rental is involved.

(3) Where the furnishing of any property or the extent has not been determined and is left open for future resolution, a detailed explanation.

(m) *Negotiations.* Include a statement as to the date and place negotiations were conducted, and identify members of both the Government and contractor negotiating teams by area of responsibility. Include negotiation details relative to the statement of work, terms and conditions, and special provisions. The results of cost or price negotiations must include the information required by FAR 31.109 and 15.406–3. In addition, if cost or pricing data was required to be submitted, the negotiation record must also contain the extent to which the contracting officer relied upon the factual cost or pricing data submitted and used in negotiating the cost or price.

(n) *Other considerations.* Include coverage of areas such as:

(1) Financial data with respect to a contractor's capacity and stability.

(2) Determination of contractor responsibility.

(3) Details as to why the method of payment, such as progress payment, advance payment, etc., is necessary. Also cite any required D & F's.

(4) Information with respect to obtaining of a certificate of current cost or pricing data.

(5) Other required special approvals.

(6) If the contract represents an extension of previous work, the status of funds and performance under the prior contract(s) should be reflected. Also, a determination should be made that the Government has obtained enough actual or potential value from the work previously performed to warrant continuation with the same contractor. (Project officer should furnish the necessary information.)

(7) If the contract was awarded by full and open competition, state where the unsuccessful offerors' proposals are filed.

(8) State that equal opportunity provisions of the proposed contract have been explained to the contractor, and it is aware of its responsibilities. Also state whether or not a clearance is required.

(9) If the contract is for services, a statement must be made, in accordance with FAR 37.103, that the services to be acquired are nonpersonal in nature.

(o) *Terms and conditions.* Identify the general and special clauses and conditions that are contained in the contract, such as option arrangements, incremental funding, anticipatory costs, deviations from standard clauses, etc. The basis and rationale for inclusion of any special terms and conditions must be stated and, where applicable, the document which granted approval for its use identified.

(p) *Recommendation.* A brief statement setting forth the recommendations for award.

(q) *Signature.* The memorandum must be signed by the contract negotiator who prepared the memorandum.

Subpart 315.4—Contract Pricing

315.404 Proposal analysis.

315.404–2 Information to support proposal analysis.

(a)(2) When some or all information sufficient to determine the reasonableness of the proposed cost or price is already available or can be obtained by phone from the cognizant audit agency, contracting officers may request less-than-complete field pricing support (specifying in the request the information needed) or may waive in writing the requirement for audit and field pricing support by documenting the file to indicate what information is to be used instead of the audit report and the field pricing report.

(3) When initiating audit and field pricing support, the contracting officer shall do so by sending a request to the cognizant administrative contracting officer (ACO), with an information copy to the cognizant audit office. When field pricing support is not available, the contracting officer shall initiate an audit by sending, in accordance with agency procedures, two (2) copies of the request to the OIG Office of Audits' Regional Audit Director. In both cases, the contracting officer shall, in the request:

(i) Prescribe the extent of the support needed;

(ii) State the specific areas for which input is required;

(iii)Include the information necessary to perform the review (such as the offeror's proposal and the applicable portions of the solicitation, particularly those describing requirements and delivery schedules);

(iv) Provide the complete address of the location of the offeror's financial records that support the proposal;

(v) Identify the office having audit responsibility if other than the HHS Regional Audit Office; and

(vi) Specify a due date for receipt of a verbal report to be followed by a written audit report. (If the time available is not adequate to permit satisfactory coverage of the proposal, the auditor shall so advise the contracting officer and indicate the additional time needed.) One copy of the audit request letter that was submitted to the Regional Audit Director and a complete copy of the contract price proposal shall be submitted to OIG/OA/DAC. Whenever, an audit review has been conducted by the Office of Audits, two (2) copies of the memorandum of negotiation shall be forwarded to OIG/OA/DAC by the contracting officer.

315.404–4 Profit.

(b) *Policy.* (1) The structured approach for determining profit or fee (hereafter referred to as profit) provides contracting officers with a technique that will ensure consideration of the relative value of the appropriate profit factors described in paragraph (d) of this section in the establishment of a profit objective for the conduct of negotiations. The contracting officer's analysis of these profit factors is based on information available to him/her prior to negotiations. The information is furnished in proposals, audit data, assessment reports, preaward surveys and the like. The structured approach also provides a basis for documentation of this objective, including an explanation of any significant departure from this objective in reaching an agreement. The extent of documentation should be directly related to the dollar value and complexity of the proposed acquisition. Additionally, the negotiation process does not require agreement on either estimated cost elements or profit elements. The profit objective is a part of an overall negotiation objective which, as a going-in objective, bears a distinct relationship to the cost objective and any proposed sharing arrangement. Since profit is merely one of several interrelated variables, the Government negotiator generally should not complete the profit negotiation without simultaneously agreeing on the other variables. Specific agreement on the exact weights or values of the individual profit factors is not required and should not be attempted.

(ii) The profit-analysis factors set forth at FAR 15.404–4(d) shall be used for establishing profit objectives under the following listed circumstances. Generally, it is expected that this method will be supported in a manner similar to that used in the structured approach (profit factor breakdown and documentation of the profit objective); however, factors within FAR 15.404–4(d) considered inapplicable to the acquisition will be excluded from the profit objective.

(A) Contracts not expected to exceed $100,000;

(B) Architect-engineer contracts;

(C) Management contracts for operations and/or maintenance of Government facilities;

(D) Construction contracts;

(E) Contracts primarily requiring delivery of material supplies by subcontractors;

(F) Termination settlements; and

(G) Cost-plus-award-fee contracts (However, contracting officers may find it advantageous to perform a structured profit analysis as an aid in arriving at an appropriate fee arrangement). Other exceptions may be made in the negotiation of contracts having unusual pricing situations, but shall be justified in writing by the contracting officer in situations where the structured approach is determined to be unsuitable.

(c) *Contracting officer responsibilities.* A profit objective is that part of the estimated contract price objective or value which, in the judgment of the contracting officer, constitutes an appropriate amount of profit for the acquisition being considered. This objective should realistically reflect the total overall task to be performed and the requirements placed on the contractor. Development of a profit objective should not begin until a thorough review of proposed contract work has been made; a review of all available knowledge regarding the contractor pursuant to FAR subpart 9.1, including audit data, preaward survey reports and financial statements, as appropriate, has been conducted; and an analysis of the contractor's cost estimate and comparison with the Government's estimate or projection of cost has been made.

(d) *Profit—analysis factors* (1) *Common factors.* The following factors shall be considered in all cases in which profit is to be negotiated. The weight ranges listed after each factor shall be used in all instances where the structured approach is used.

Profit factors	Weight ranges (in percent)
Contractor effort:	
Material acquisition	1 to 5.
Direct labor	4 to 15.
Overhead	4 to 9.
General management (G&A).	4 to 8.

Profit factors	Weight ranges (in percent)
Other costs	1 to 5.
Other factors:	
Cost risk	0 to 7.
Investment	−2 to +2.
Performance	−1 to +1.
Socioeconomic programs	−.5 to +.5.
Special situations..	

(i) Under the structured approach, the contracting officer shall first measure ''Contractor Effort'' by the assignment of a profit percentage within the designated weight ranges to each element of contract cost recognized by the contracting officer. The amount calculated for the cost of money for facilities capital is not to be included for the computation of profit as part of the cost base. The suggested categories under ''Contractor Effort'' are for reference purposes only. Often individual proposals will be in a different format, but since these categories are broad and basic, they provide sufficient guidance to evaluate all other items of cost.

(ii) After computing a total dollar profit for ''Contractor Effort,'' the contracting officer shall then calculate the specific profit dollars assigned for cost risk, investment, performance, socioeconomic programs, and special situations. This is accomplished by multiplying the total Government Cost Objective, exclusive of any cost of money for facilities capital, by the specific weight assigned to the elements within the ''Other Factors'' category. Form HHS–674, Structured Approach Profit/Fee Objective, should be used, as appropriate, to facilitate the calculation of this profit objective. Form HHS–674 is illustrated in 353.370–674.

(iii) In making a judgment of the value of each factor, the contracting officer should be governed by the definition, description, and purpose of the factors together with considerations for evaluating them.

(iv) The structured approach was designed for arriving at profit objectives for other than nonprofit organizations. However, if appropriate adjustments are made to reflect differences between profit and nonprofit organizations, the structured approach can be used as a basis for arriving at profit objectives for nonprofit organizations. Therefore, the structured approach, as modified in paragraph (d)(1)(iv)(B) of this section, shall be used to establish profit objectives for nonprofit organizations.

(A) For purposes of this section, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, and which are exempt from Federal income taxation under Section 501 of the Internal Revenue Code.

(B) For contracts with nonprofit organizations where profit is involved, an adjustment of up to 3 percentage points will be subtracted from the total profit objective percentage. In developing this adjustment, it will be necessary to consider the following factors;

(*1*) Tax position benefits;

(*2*) Granting of financing through advance payments; and

(*3*) Other pertinent factors which may work to either the advantage or disadvantage of the contractor in its position as a nonprofit organization.

(2) *Contractor effort.* Contractor effort is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirement in an efficient manner. This factor, which is apart from the contractor's responsibility for contract performance, takes into account what resources are necessary and what the contractor must do to accomplish a conversion of ideas and material into the final service or product called for in the contract. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary efforts on the part of individual contractors can vary widely in both value and quantity, and that the profit objective should reflect the extent and nature of the contractor's contribution to total performance. A major consideration, particularly in connection with experimental, developmental, or research work, is the difficulty or complexity of the work to be performed, and the unusual demands of the contract, such as whether the project involves a new approach unrelated to existing technology and/or equipment or only refinements to these items. The evaluation of this factor requires an analysis of the cost content of the proposed contract as follows:

(i) *Material acquisition.* (Subcontracted items, purchased parts, and other material.) Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required subcontracted items, purchased parts, material or services. The contracting officer shall determine whether the contractor will obtain the items or services by routine order from readily available sources or by detailed subcontracts for which the prime contractor will be required to develop complex specifications. Consideration shall also be given to the managerial and technical efforts necessary for the prime contractor to select subcontractors and to perform subcontract administration functions. In application of this criterion, it should be recognized that the contribution of the prime contractor to its purchasing program may be substantial. Normally, the lowest unadjusted weight for direct material is 2 percent. A weighting of less than 2 percent would be appropriate only in unusual circumstances when there is a minimal contribution by the contractor.

(ii) *Direct labor.* (Professional, service, manufacturing and other labor). Analysis of the various labor categories of the cost content of the contract should include evaluation of the comparative quality and quantity of professional and semiprofessional talents, manufacturing and service skills, and experience to be employed. In evaluating professional and semiprofessional labor for the purpose of assigning profit dollars, consideration should be given to the amount of notable scientific talent or unusual or scarce talent needed in contrast to nonprofessional effort. The assessment should consider the contribution this talent will provide toward the achievement of contract objectives. Since nonprofessional labor is relatively plentiful and rather easily obtained by the contractor and is less critical to the successful performance of contract objectives, it cannot be weighted nearly as high as professional or semiprofessional labor. Service contract labor should be evaluated in a like manner by assigning higher weights to engineering or professional type skills required for contract performance. Similarly, the variety of manufacturing and other categories of labor skills required and the contractor's manpower resources for meeting these requirements should be considered. For purposes of evaluation, categories of labor (*i.e.,* quality control, receiving and inspection, etc.) which do not fall within the definition for professional, service or manufacturing labor may be categorized as appropriate. However, the same evaluation considerations as outlined in this paragraph will be applied.

(iii) *Overhead and general management* (G&A). (A) Analysis of these overhead items of cost should include the evaluation of the makeup of these expenses and how much they contribute to contract performance. To the extent practicable, analysis should include a determination of the amount of labor within these overhead pools and how this labor should be treated if it were considered as direct labor under

the contract. The allocable labor elements should be given the same profit considerations that they would receive if they were treated as direct labor. The other elements of these overhead pools should be evaluated to determine whether they are routine expenses, such as utilities and maintenance, and hence given lesser profit consideration, or whether they are significant contributing elements. The composite of the individual determinations in relation to the elements of the overhead pools will be the profit consideration given the pools as a whole. The procedure for assigning relative values to these overhead expenses differs from the method used in assigning values of the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(B) It is not necessary that the contractor's accounting system break down overhead expenses within the classifications of research overhead, other overhead pools, and general administrative expenses, unless dictated otherwise by Cost Accounting Standards (CAS). The contractor whose accounting system reflects only one overhead rate on all direct labor need not change its system (if CAS exempt) to correspond with these classifications. The contracting officer, in an evaluation of such a contractor's overhead rate, could break out the applicable sections of the composite rate which could be classified as research overhead, other overhead pools, and general and administrative expenses, and follow the appropriate evaluation technique.

(C) Management problems surface in various degrees and the management expertise exercised to solve them should be considered as an element of profit. For example, a contract for a new program for research or an item which is on the cutting edge of the state of the art will cause more problems and require more managerial time and abilities of a higher order than a follow-on contract. If new contracts create more problems and require a higher profit weight, follow-ons should be adjusted downward because many of the problems should have been solved. In any event, an evaluation should be made of the underlying managerial effort involved on a case-by-case basis.

(D) It may not be necessary for the contracting officer to make a separate profit evaluation of overhead expenses in connection with each acquisition action for substantially the same project with the same contractor. Where an analysis of the profit weight to be assigned to the overhead pool has been made, that weight assigned may be used for future acquisitions with the same contractor until there is a change in the cost composition of the overhead pool or the contract circumstances, or the factors discussed in paragraph (d)(2)(iii)(C) of this section are involved.

(iv) *Other costs.* Analysis of this factor should include all other direct costs associated with contractor performance (*e.g.,* travel and relocation, direct support, and consultants). Analysis of these items of cost should include, the significance of the cost of contract performance, nature of the cost, and how much they contribute to contract performance. Normally, travel costs require minimal administrative effort by the contractor and, therefore, usually receive a weight no greater than 1%. Also, the contractor may designate individuals as ''consultants'' but in reality these individuals may be obtained by the contractor to supplement its workforce in the performance of routine duties required by contract. These costs would normally receive a minimum weight. However, there will be instances when the contractor may be required to locate and obtain the services of consultants having expertise in fields such as medicine or human services. In these instances, the contractor will be required to expend greater managerial and technical effort to obtain these services and, consequently, the costs should receive a much greater weight.

(3) *Other factors* (i) *Contract cost risk.* The contract type employed basically determines the degree of cost risk assumed by the contractor. For example, where a portion of the risk has been shifted to the Government through cost-reimbursement provisions, unusual contingency provisions, or other risk-reducing measures, the amount of profit should be less than where the contractor assumes all the risk.

(A) In developing the prenegotiation profit objective, the contracting officer will need to consider the type of contract anticipated to be negotiated and the contractor risk associated therewith when selecting the position in the weight range for profit that is appropriate for the risk to be borne by the contractor. This factor should be one of the most important in arriving at prenegotiation profit objective. Evaluation of this risk requires a determination of the degree of cost responsibility the contractor assumes; the reliability of the cost estimates in relation to the task assumed; and the complexity of the task assumed by the contractor. This factor is specifically limited to the risk of contract costs. Thus, risks on the part of the contractor such as reputation, losing a commercial market, risk of losing potential profits in other fields, or any risk which falls on the contracting office, such as the risk of not acquiring a satisfactory report, are not within the scope of this factor.

(B) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-a-fixed-fee contract requiring the contractor to use its best efforts to perform a task and a firm fixed-price contract for a service or a complex item. A cost-plus-a-fixed-fee contract would reflect a minimum assumption of cost responsibility, whereas a firm-fixed-price contract would reflect a complete assumption of cost responsibility. Where proper contract selection has been made, the regard for risk by contract type would usually fall into the following percentage ranges:

	Percent
Cost-reimbursement type contracts	0–3
Fixed-price type contracts	2–7

(C) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates. Prior experience assists the contractor in preparing reliable cost estimates on new acquisitions for similar related efforts. An excessive cost estimate reduces the possibility that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(D) The third determination is that of the difficulty of the contractor's task. The contractor's task can be difficult or easy, regardless of the type of contract.

(E) Contractors are likely to assume greater cost risk only if contracting officers objectively analyze the risk incident to proposed contracts and are willing to compensate contractors for it. Generally, a cost-plus-fixed fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm fixed-price contract justify a reward of less than the minimum in the structured approach. Where proper contract-type selection has been made, the reward for risk, by contract type, will usually fall into the following percentage ranges:

(*1*) Type of contract and percentage ranges for profit objectives developed by using the structured approach for

research and development and manufacturing contracts:

	Percent
Cost-Plus-fixed fee	0 to 0.5
Cost-plus-incentive fee:	
With cost incentive only	1 to 2
With multiple incentives	1.5 to 3
Fixed-price-incentive:	
With cost incentive only	2 to 4
With multiple incentives	3 to 5
Prospective price redetermination.	3 to 5
Firm fixed-price	5 to 7

(*2*) Type of contract and percentage ranges for profit objectives developed by using the structured approach for service contracts:

	Percent
Cost-plus-fixed-fee	0 to 0.5
Cost-plus-incentive fee	1 to 2
Fixed-price incentive	2 to 3
Firm fixed-price	3 to 4

(F) These ranges may not be appropriate for all acquisitions. For instance, a fixed-price-incentive contract that is closely priced with a low ceiling price and high incentive share may be tantamount to a firm fixed-price contract. In this situation, the contracting officer may determine that a basis exists for high confidence in the reasonableness of the estimate and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula can be considered to contain cost-plus incentive-fee contract features. In this situation, the contracting officer may determine that the Government is retaining much of the contract cost responsibility and that the risk assumed by the contractor is minimal. Similarly, if a cost-plus-incentive-fee contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive contract. In such a pricing environment, the contracting officer may determine that the Government has transferred a greater amount of cost responsibility to the contractor than is typical under a normal cost-plus-incentive-fee contract.

(G) The contractor's subcontracting program may have a significant impact on the contractor's acceptance or risk under a contract form. It could cause risk to increase or decrease in terms of both cost and performance. This consideration should be a part of the contracting officer's overall evaluation in selecting a factor to apply for cost risk. It may be determined, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost risk evaluation may, as a result, be below the range which would otherwise apply for the contract type being proposed. The contract cost risk evaluation should not be lowered, however, merely on the basis that a substantial portion of the contract costs represents subcontracts without any substantial transfer of contractor's risk.

(H) In making a contract cost risk evaluation in an acquisition action that involves definitization of a letter contract, unpriced change orders, and unpriced orders under basic ordering agreements, consideration should be given to the effect on total contract cost risk as a result of having partial performance before definitization. Under some circumstances it may be reasoned that the total amount of cost risk has been effectively reduced. Under other circumstances it may be apparent that the contractor's cost risk remained substantially unchanged. To be equitable, the determination of profit weight for application to the total of all recognized costs, both those incurred and those yet to be expended, must be made with consideration to all attendant circumstances—not just the portion of costs incurred or percentage of work completed prior to definitization.

(I) Time and material and labor hour contracts will be considered to be cost-plus-a-fixed-fee contracts for the purpose of establishing profit weights unless otherwise exempt under paragraph (b)(1)(ii) of this section in the evaluation of the contractor's assumption of contract cost risk.

(ii) *Investment.* HHS encourages its contractors to perform their contracts with the minimum of financial, facilities, or other assistance from the Government. As such, it is the purpose of this factor to encourage the contractor to acquire and use its own resources to the maximum extent possible. The evaluation of this factor should include an analysis of the following:

(A) *Facilities.* (Including equipment). To evaluate how this factor contributes to the profit objective requires knowledge of the level of facilities utilization needed for contract performance, the source and financing of the required facilities, and the overall cost effectiveness of the facilities offered. Contractors who furnish their own facilities which significantly contribute to lower total contract costs should be provided with additional profit. On the other hand, contractors who rely on the Government to provide or finance needed facilities should receive a corresponding reduction in profit. Cases between these examples should be evaluated on their merits with either positive or negative adjustments, as appropriate, in profit being made. However, where a highly facilitized contractor is to perform a contract which does not benefit from this facilitization or where a contractor's use of its facilities has a minimum cost impact on the contract, profit need not be adjusted. When applicable, the prospective contractor's computation of facilities capital cost of money for pricing purposed under CAS 414 can help the contracting officer identify the level of facilities investment to be employed in contract performance.

(B) *Payments.* In analyzing this factor, consideration should be given to the frequency of payments by the Government to the contractor. The key to this weighting is to give proper consideration to the impact the contract will have on the contractor's cash flow. Generally, negative consideration should be given for advance payments and payments more frequent than monthly with maximum reduction being given as the contractor's working capital approaches zero. Positive consideration should be given for payments less frequent than monthly with additional consideration given for a capital turn-over rate on the contract which is less than the contractor's or the industry's normal capital turn-over rate.

(iii) *Performance.* (Cost-control and other past accomplishments.) The contractor's past performance should be evaluated in such areas as quality of service or product, meeting performance schedules, efficiency in cost control (including need for and reasonableness of cost incurred), accuracy and reliability of previous cost estimates, degree of cooperation by the contractor (both business and technical), timely processing of changes and compliance with other contractual provisions, and management of subcontract programs. Where a contractor has consistently achieved excellent results in these areas in comparison with other contractors in similar circumstances, this performance merits a proportionately greater opportunity for profit. Conversely, a poor record in this regard should be reflected in determining what constitutes a fair and reasonable profit.

(iv) *Federal socioeconomic programs.* This factor, which may apply to special circumstances or particular acquisitions, relates to the extent of a contractor's successful participation in Government sponsored programs such as small business, small disadvantaged business, women-owned small business, and energy conservation efforts. The contractor's policies and procedures which energetically support

Government socioeconomic programs and achieve successful results should be given positive considerations. Conversely, failure or unwillingness on the part of the contractor to support Government socioeconomic programs should be viewed as evidence of poor performance for the purpose of establishing a profit objective.

(v) *Special situations* (A) *Inventive and developmental contributions.* The extent and nature of contractor-initiated and financed independent development should be considered in developing the profit objective, provided that the contracting officer has made a determination that the effort will benefit the contract. The importance of the development in furthering health and human services purposes, the demonstrable initiative in determining the need and application of the development, the extent of the contractor's cost risk, and whether the development cost was recovered directly or indirectly from Government sources should be weighed.

(B) *Unusual pricing agreements.* Occasionally, unusual contract pricing arrangements are made with the contractor wherein it agrees to cost ceilings, *e.g.,* a ceiling on overhead rates for conditions other than those discussed at FAR 42.707. In these circumstances, the contractor should receive favorable consideration in developing the profit objective.

(C) *Negative factors.* Special situations need not be limited to those which only increase profit levels. A negative consideration may be appropriate when the contractor is expected to obtain spin-off-benefits as a direct result of the contract (*e.g.,* products or services with commercial application).

(4) *Facilities capital cost of money.* When facilities capital cost of money (cost of capital committed to facilities) is included as an item of cost in the contractor's proposal, a reduction in the profit objective shall be made in an amount equal to the amount of facilities capital cost of money allowed in accordance with the Facilities Capital Cost-of Money Cost Principal. If the contractor does not propose this cost, a provision must be inserted in the contract that facilities capital cost of money is not an allowable cost.

Subpart 315.6—Unsolicited Proposals

315.605 Content of unsolicited proposals.

(d) Certification by offeror—To ensure against contacts between Department employees and prospective offerors which would exceed the limits of advance guidance set forth in FAR 15.604 resulting in an unfair advantage to an offeror, the contracting officer shall ensure that the following certification is furnished to the prospective offeror and the executed certification is included as part of the resultant unsolicited proposal:

Unsolicited Proposal

Certification by Offeror

This is to certify, to the best of my knowledge and belief, that:

(a) This proposal has not been prepared under Government supervision.

(b) The methods and approaches stated in the proposal were developed by this offeror.

(c) Any contact with employees of the Department of Health and Human Services has been within the limits of appropriate advance guidance set forth in FAR 15.604.

(d) No prior commitments were received from departmental employees regarding acceptance of this proposal.

Date: _____

Organization: _____

Name: _____

Title: _____

(This certification shall be signed by a responsible official of the proposing organization or a person authorized to contractually obligate the organization.)

315.606 Agency procedures.

(a) The HCA is responsible for establishing procedures to comply with FAR 15.606(a).

(b) The HCA or his/her designee shall be the point of contract for coordinating the receipt and handling of unsolicited proposals.

315.606–1 Receipt and initial review.

(d) An unsolicited proposal shall not be refused consideration merely because it was initially submitted as a grant application. However, contracts shall not be awarded on the basis of unsolicited proposals which have been rejected for grant support on the grounds that they lack scientific merit.

315.609 Limited use of data.

The legend, Use and Disclosure of Data, prescribed in FAR 15.609(a) is to be used by the offeror to restrict the use of data for evaluation purposes only. However, data contained within the unsolicited proposal may have to be disclosed as a result of a request submitted pursuant to the Freedom of Information Act. Because of this possibility, the following notice shall be furnished to all prospective offerors of unsolicited proposals whenever the legend is provided in accordance with FAR 15.604(a)(7):

The Government will attempt to comply with the ''Use and Disclosure of Data'' legend.

However, the Government may not be able to withhold a record (data, document, etc.) nor deny access to a record requested by an individual (the public) when an obligation is imposed on the Government under the Freedom of Information Act, 5 U.S.C. 552, as amended. The Government determination to withhold or disclose a record will be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act. Records which the offeror considers to be trade secrets and commercial or financial information and privileged or confidential must be identified by the offeror as indicated in the referenced legend.

PART 316—TYPES OF CONTRACTS

Subpart 316.3—Cost-Reimbursement Contracts

Sec.
316.307 Contract clauses.

Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

316.603 Letter contracts.
316.603–3 Limitations.
316.603–70 Information to be furnished when requesting authority to issue a letter contract.
316.603–71 Approval for modifications to letter contracts.

Subpart 316.7—Agreements

316.770 Unauthorized types of agreements.
316.770–1 Letter of intent.
316.770–2 Memorandums of understanding.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 316.3—Cost-Reimbursement Contracts

316.307 Contract clauses.

(a) If the contract is with a hospital (profit or nonprofit) for research and development, modify the ''Allowable Cost and Payment'' clause at FAR 52.216–7 by deleting from paragraph (a) the words ''Subpart 31.2 of the Federal Acquisition Regulation (FAR)'' and substituting ''45 CFR Part 74 Appendix E.''

(j) The contracting officer shall insert the clause at 352.216–72, Additional Cost Principles, in all solicitations and resultant cost-reimbursement contracts.

Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

316.603 Letter contracts.

316.603–3 Limitations.

An official one level above the contracting officer shall execute the prescribed written statement.

316.603–70 Information to be furnished when requesting authority to issue a letter contract.

The following information should be included by the contracting officer in any memorandum requesting approval to issue a letter contract:

(a) Name and address of proposed contractor.

(b) Location where contract is to be performed.

(c) Contract number, including modification number, if possible.

(d) Brief description of work and services to be performed.

(e) Performance or delivery schedule.

(f) Amount of letter contract.

(g) Estimated total amount of definitized contract.

(h) Type of definitive contract to be executed (fixed price, cost-reimbursement, etc.)

(i) Statement of the necessity and advantage to the Government of the use of the proposed letter contract.

(j) Statement of percentage of the estimated cost that the obligation of funds represents. In rare instances where the obligation represents 50 percent or more of the proposed estimated cost of the acquisition, a justification for that obligation must be included which would indicate the basis and necessity for the obligation (e.g., the contractor requires a large initial outlay of funds for major subcontract awards or an extensive purchase of materials to meet an urgent delivery requirement). In every case, documentation must assure that the amount to be obligated is not in excess of an amount reasonably required to perform the work.

(k) Period of effectiveness of a proposed letter contract. If more than 180 days, complete justification must be given.

(l) Statement of any substantive matters that need to be resolved.

316.603–71 Approval for modifications to letter contracts.

All letter contract modifications (amendments) must be approved one level above the contracting officer. Request for authority to issue letter contract modifications shall be processed in the same manner as requests for authority to issue letter contracts and shall include the following:

(a) Name and address of the contractor.

(b) Description of work and services.

(c) Date original request was approved and indicate approving official.

(d) Letter contract number and date issued.

(e) Complete justification as to why the letter contract cannot be definitized at this time.

(f) Complete justification as to why the level of funding must be increased.

(g) Complete justification as to why the period of effectiveness is increased beyond 180 days, if applicable.

(h) If the funding of the letter contract is to be increased to more than 50 percent of the estimated cost of the acquisition, the information required by 316.603–70(j) must be included.

Subpart 316.7—Agreements

316.770 Unauthorized types of agreements.

316.770–1 Letters of intent.

A letter of intent is an informal unauthorized agreement between the Government and a prospective contractor which indicates that products or services will be produced after completion of funding and/or other contractual formalities. Letters of intent are often solicited by prospective contractors or may be originated by Government personnel. Letters of intent are not authorized by the FAR and are prohibited for use by Department personnel.

316.770–2 Memorandums of understanding.

A ''memorandum of understanding'' is an unauthorized agreement, usually drafted during the course of negotiations, to modify mandatory FAR and HHSAR provisions in such a manner as to make them more acceptable to a prospective contractor. It may be used to bind the contracting officer in attempting to exercise rights given the Government under the contract, or may contain other matters directly contrary to the language of the solicitation or prospective contractual document. Use of memorandums of understanding is not authorized. Any change in a solicitation or contract shall be made by amendment or modification to that document. When a change to a prescribed contract clause is considered necessary, a deviation shall be requested.

PART 317—SPECIAL CONTRACTING METHODS

Subpart 317.2—Options

Sec.
317.201 Definition.

Subpart 317.71—Supply and Service Acquisitions Under the Government Employees Training Act.

317.7100 Scope of subpart.
317.7101 Applicable regulations.
317.7102 Acquisition of training.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 317.2—Options

317.201 Definitions.

An option must:

(a) Identify the supplies or services as a discrete option quantity in addition to the basic quantity of supplies or services to be delivered under the initial contract award;

(b) Establish a price or specify a method of calculation which will make the price certain;

(c) Be agreed to and included in the initial contract award; and

(d) Permit the Government the right to exercise the option unilaterally.

Subpart 317.71—Supply and Service Acquisitions Under the Government Employees Training Act

317.7100 Scope of subpart.

This subpart provides alternate methods for obtaining training under the Government Employees Training Act (GETA), 5 U.S.C. Chapter 41.

317.7101 Applicable regulations.

Basic policy, standards, and delegations of authority to approve training are contained in HHS Personnel Manual Instruction 410–1.

317.7102 Acquisition of training.

(a) Off-the-shelf training, whether for individuals or for groups of employees, shall be acquired under the GETA by officials delegated authority in HHS Transmittal 95.5, Personnel Manual (3/30/95).

(b) Training must be acquired through the contracting office if there are costs for training course development or for modification of off-the-shelf training courses.

PART 319—SMALL BUSINESS PROGRAMS

Subpart 319.2—Policies

Sec.
319.201 General policy.

Subpart 319.5—Set-Asides for Small Business

319.501 General.
319.506 Withdrawing or modifying set-asides.

Subpart 319.7—Subcontracting with Small Business, Small Disadvantaged Business and Women-Owned Small Business Concerns

319.705 Responsibilities of the contracting officer under the subcontracting assistance program.
319.705–5 Awards involving subcontracting plans.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 319.2—Policies

319.201 General policy.

(d) The functional management responsibilities for the Department's Small Business Program, (small, HUBZone, small disadvantaged, and women-owned small business programs) are delegated to the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU).

(e) (1) The Department's Small Business Program shall be carried out by appointed small business specialists (SBS) at the OPDIV Level. Appointments, and termination of appointments, shall be made in writing by the head of the OPDIV after consultation and concurrence by the Director, OSDBU. The small business specialist shall be responsible directly to the appointing authority and shall be at an organizational level outside the direct acquisition chain of command, i.e., should report directly to the head of the OPDIV or designee. The Director, OSDBU will exercise functional management authority over small business specialists regarding the small business programs.

(2) The head of each OPDIV shall appoint a qualified full-time small business specialist (SBS) in the following activities: Administration for Children and Families (ACF), Agency for Healthcare Research and Quality (AHRQ), Health Care Financing Administration (HCFA), Substance Abuse and Mental Health Services Administration (SAMHSA), Food and Drug Administration (FDA), Health Resources and Services Administration (HRSA), Indian Health Service (IHS), National Institutes of Health (NIH), Centers for Disease Control and Prevention (CDCP), and Program Support Center (PSC). A SBS shall also be appointed for the Office of the Secretary (OS). As deemed necessary, additional small business specialists may be appointed in larger contracting activities. When the volume of contracting does not warrant assignment of a full-time SBS, an individual shall be appointed as the specialist on a part-time basis. The responsibilities of this assignment shall take precedence over other responsibilities.

Subpart 319.5—Set-Asides For Small Business

319.501 General.

(d) Subsequent to the contracting officer's recommendation on Form HHS653, Small Business Set-Aside Review Form, the SBS shall review each proposed acquisition and either concur or non-concur with the contracting officer's recommendation. If the contracting officer disapproves the SBS's set-aside recommendation, the reasons must be documented on the Form HHS–653, and the form placed in the contract file. The contracting officer will make the final determination as to whether the proposed acquisition will be set-aside or not.

319.506 Withdrawing or modifying set-asides.

(d) Immediately upon notice from the contracting officer, the SBS shall provide telephone notification regarding all set-aside withdrawals to the OSDBU Director.

Subpart 319.7—Subcontracting with Small Business, Small Disadvantaged Business and Women-Owned Small Business Concerns

319.705 Responsibilities of the contracting officer under the subcontracting assistance program.

319.705–5 Awards involving subcontracting plans.

(a)(3) The SBA PCR shall be allowed a period of one to five working days to review the contract award package, depending upon the circumstances and complexity of the individual acquisition.

PART 323—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 323.70—Safety and Health

Sec.
323.7000 Scope of subpart.
323.7001 Policy.
323.7002 Actions required.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 323.70—Safety and Health

323.7000 Scope of subpart.

This subpart prescribes the use of a safety and health clause in contracts involving hazardous materials or operations, and provides procedures for administering safety and health provisions.

323.7001 Policy.

Various statutes and regulations (e.g. Walsh-Healy Act; Service Contract Act) require adherence to minimum safety and health standards by contractors engaged in potentially hazardous work. The guidance contained in FAR subpart 23.3 shall be used for hazardous materials as the primary reference. When the guidance is judged insufficient or does not meet the safety and health situation in the instant acquisition, this subpart shall be followed.

323.7002 Actions required.

(a) *Contracting activities.* Contracting activities shall use the clause set forth in 352.223–70, or a clause reading substantially the same, in prospective contracts and subcontracts involving hazardous materials or operations for the following:

(1) Services or products;

(2) Research, development, or test projects;

(3) Transportation of hazardous materials; and

(4) Construction, including construction of facilities on the contractor's premises.

(b) *Safety officers.* OPDIV safety officers shall advise and assist initiators of acquisition requests and contracting officers in:

(1) Determining whether safety and health provisions should be included in a prospective contract;

(2) Evaluating a prospective contractor's safety and health programs; and

(3) Conducting post-award reviews and surveillance to the extent deemed necessary.

(c) *Initiators.* Initiators of acquisition requests for items described in paragraph (a) of this section shall:

(1) During the preparation of a request for contract, and in the solicitation, ensure that hazardous materials and operations to be used in the performance of the contract are clearly identified; and

(2) During the period of performance:

(i) Apprise the contracting office of any noncompliance with safety and health provisions identified in the contract; and

(ii) Cooperate with the safety officer in conducting review and surveillance activities.

PART 324—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 324.1—Protection of Individual Privacy

Sec.
324.100 Scope of subpart.
324.102 General.
324.103 Procedures.

Subpart 324.2—Freedom of Information Act

324.202 Policy.

Subpart 324.70—Confidentiality of Information

324.7001 General.
324.7002 Policy.
324.7003 Applicability.
324.7004 Required clause.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 324.1—Protection of Individual Privacy

324.100 Scope of subpart.

This subpart implements 45 CFR Part 5b, Privacy Act Regulations, and FAR Subpart 24.1, Protection of Individual Privacy, which implements the Privacy Act of 1974 (Public Law 93–579, December 31, 1974; 5 U.S.C. 552a) and OMB Circular No. A–108, July 9, 1975.

324.102 General.

(a) It is the Department's policy to protect the privacy of individuals to the maximum possible extent while permitting the exchange of records required to fulfill the Department's administrative and program responsibilities and its responsibilities for disclosing records to which the general public is entitled under the Freedom of Information Act (5 U.S.C. 552). The Privacy Act of 1974 and the Department's implementation under 45 CFR part 5b apply ''when an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish any agency function* * *'' The key factor is whether a departmental function is involved. Therefore, the Privacy Act requirements apply to a departmental contract when, under the contract, the contractor must maintain or operate a system of records to accomplish a departmental function.

(e) The program official, and, as necessary, the official designated as the activity's Privacy Act Coordinator and the Office of General Counsel, shall determine the applicability of the Act to each proposed acquisition. The program official is required to include a statement in the request for contract indicating whether the Privacy Act is or is not applicable to the proposed acquisition.

(f) Whenever the contracting officer is informed that the Privacy Act is not applicable, but the resultant contract will involve the collection of individually identifiable personal data by the contractor, the contracting officer shall include provisions to protect the confidentiality of the records and the privacy of individuals identified in the records (see subpart 324.70).

324.103 Procedures.

(a) All requests for contract shall be reviewed by the contracting officer to determine whether the Privacy Act requirements are applicable. If applicable, the contracting officer shall include the solicitation notification and contract clause required by FAR 24.104 in the solicitation, and the contract clause in the resultant contract. In addition, the contracting officer shall ensure that the solicitation notification, contract clause, and other pertinent information specified in this subpart are included in any contract modification which results in the Privacy Act requirements becoming applicable to a contract.

(b)(1) The contracting officer shall identify the system(s) of records on individuals in solicitations, contracts, and contract modifications to which the Privacy Act and the implementing regulations are applicable.

(2) The contracting officer shall include a statement in the contract notifying the contractor that the contractor and its employees are subject to criminal penalties for violations of the Act (5 U.S.C. 552a(i)) to the same extent as employees of the Department. The statement shall require that the contractor assure that each contractor employee knows the prescribed rules of conduct, and each contractor employee is aware that he/she can be subjected to criminal penalties for violations of the Act. The contracting officer shall provide the contractor with a copy of the rules of conduct and other requirements set forth in 45 CFR part 5b.

(c) The contracting officer shall include in the contract the disposition to be made of the system(s) of records on individuals upon completion of performance of the contract. For example, the contract may require the contractor to completely destroy the records, to remove personal identifiers, to turn the records over to the Department, or to keep the records but take certain measures to keep the records confidential and protect the individuals' privacy.

(d) Whenever an acquisition is determined to be subject to the Privacy Act requirements, a ''system notice,'' prepared by the program official and describing the Department's intent to establish a new system of records on individuals, to make modifications to an existing system, or to disclose information in regard to an existing system, is required to be published in the **Federal Register**. A copy of the ''system notice'' shall be attached to the request for contract or purchase request. If a ''system notice'' is not attached, the contracting officer shall inquire about its status and shall obtain a copy from the program official for inclusion in the contract file. If a ''system notice'' has not been published in the **Federal Register**, the contracting officer may proceed with the acquisition but shall not award the contract until the ''system notice'' is published, and publication is verified by the contracting officer.

Subpart 324.2—Freedom of Information Act

324.202 Policy.

(a) The Department's regulation implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, is set forth in 45 CFR part 5.

(b) The contracting officer, upon receiving a FOIA request, shall follow Department and operating division procedures. As necessary, actions should be coordinated with the cognizant Freedom of Information (FOI) Officer and the Business and Administrative Law Division of the Office of General Counsel. The contracting officer must remember that only the FOI Officer has the authority to release or deny release of records. While the contracting officer should be familiar with the entire FOIA regulation in 45 CFR part 5, particular attention should be focused on §§ 5.65 and 5.66; also of interest are §§ 5.32, 5.33, and 5.35.

Subpart 324.70—Confidentiality of Information

324.7001 General.

In performance of certain HHS contracts, it is necessary for the contractor to generate data, or be furnished data by the Government, which is about individuals, organizations, or Federal programs. This subpart and the accompanying contract clause require contractors to prudently handle disclosure of certain types of information not subject to the Privacy Act or the HHS human subject regulations set forth in 45 CFR part 46. This subpart and contract clause address the kinds of data to be generated by the contractor and/or data to be furnished by the Government that are considered confidential and how it should be treated.

324.7002 Policy.

It is the policy of HHS to protect personal interests of individuals, corporate interests of non-governmental organizations, and the capacity of the Government to provide public services when information from or about individuals, organizations, or Federal agencies is provided to or obtained by contractors in performance of HHS contracts. This protection depends on the contractor's recognition and proper handling of the information. As a result, the ''Confidentiality of Information'' contract clause was developed.

324.7003 Applicability.

(a) The ''Confidentiality of Information'' clause, set forth in 352.224–70, should be used in

solicitations and resultant contracts whenever the need exists to keep information confidential. Examples of situations where the clause may be appropriate include:

(1) Studies performed by the contractor which generate information or involve Government-furnished information that is personally identifiable, such as medical records, vital statistics, surveys, and questionnaires;

(2) Contracts which involve the use of salary structures, wage schedules, proprietary plans or processes, or confidential financial information of organizations other than the contractor's; and

(3) Studies or research which may result in preliminary or invalidated findings which, upon disclosure to the public, might create erroneous conclusions which, if acted upon, could threaten public health or safety.

(b) With regard to protecting individuals, this subpart and contract clause are not meant to regulate or control the method of selecting subjects and performing studies or experiments involving them. These matters are dealt with in the HHS regulation entitled ''Protection of Human Subjects,'' 45 CFR Part 46. If a system of records under contract, or portions thereof, is determined to be subject to the requirements of the Privacy Act, in accordance with FAR 24.1 and 324.1 and Title 45 CFR part 5b, the procedures cited in those references are applicable and the Privacy Act contract clause shall be included in the contract. If the contract also involves confidential information, as described in this section, which is not subject to the Privacy Act, the contract shall include the ''Confidentiality of Information'' clause in addition to the Privacy Act clause.

324.7004 Required clause.

The clause set forth in 352.224–70 shall be included in any RFP and resultant contract(s) where it has been determined that confidentiality of information provisions may apply. Any RFP announcing the intent to include this clause in any resultant contract(s) shall indicate, as specifically as possible, the types of data which would be covered and requirements for handling the data.

PART 325—FOREIGN ACQUISITION

Subpart 325.1—Buy American Act—Supplies

Sec.
325.102 Policy.
325.108 Excepted articles, materials, and supplies.

Subpart 325.3—Balance of Payments Program

325.302 Policy.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 325.1—Buy American Act—Supplies

325.102 Policy.

(b) The head of the contracting activity (not delegable) shall make the determinations required by FAR 25.102(a)(1) through (5) and 25.102(b)(2).

325.108 Excepted articles, materials, and supplies.

(b) Articles, materials, and supplies not listed in FAR 25.108(d) may be excepted only after a written determination has been made by the head of the contracting activity (not delegable). These determinations are required only in instances where it has been determined that only suppliers of foreign source end items shall be solicited. However, approvals and determinations covering individual acquisitions in the following categories may be made by the contracting officer:

(1) Acquisition of spare and replacement parts for foreign manufactured items, if the acquisition must be restricted to the original manufacturer or its supplier; and

(2) Acquisition of foreign drugs when it has been determined, in writing, by the responsible program official, that only the requested foreign drug will fulfill the requirement.

Subpart 325.3—Balance of Payments Program

325.302 Policy.

All determinations addressed in FAR 25.302 shall be made by the head of the contracting activity (not delegable).

PART 328—BONDS AND INSURANCE

Subpart 328.3—Insurance

Sec.
328.301 Policy.
328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
328.311–2 Agency solicitation provisions and contract clauses.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 328.3—Insurance

328.301 Policy.

It is Department policy to limit the Government's reimbursement of its contractors' liability to third persons for claims not covered by insurance in cost-reimbursement contracts to the Limitation of Funds or Limitation of Cost clause of the contract. In addition, the amount of the Government's reimbursement will be limited to final judgments or settlements approved in writing by the Government.

328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

328.311–2 Agency solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 352.228–7, Insurance—Liability to Third Persons, in all solicitations and resulting cost-reimbursement contracts, in lieu of the clause at FAR 52.228–7 required by FAR 28.311–1. This is an authorized deviation.

PART 330—COST ACCOUNTING STANDARDS

Subpart 330.2—CAS Program Requirements

Sec.
330.201 Contract requirements.
330.201–5 Waiver.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 330.2—CAS Program Requirements

330.201 Contract requirements.

330.201–5 Waiver.

(c) The requirements of FAR 30.201–5 shall be exercised by the Director, Office of Acquisition Management (DOAM). Requests for waivers shall be forwarded through normal acquisition channels to the DOAM.

PART 332—CONTRACT FINANCING

Subpart 332.4—Advance Payments for Non-Commercial Items

Sec.
332.402 General.
332.403 Applicability.
332.407 Interest.
332.409 Contracting officer action.
332.409–1 Recommendation for approval.

Subpart 332.5—Progress Payments Based on Costs

332.501 General.
332.501–2 Unusual progress payments.

Subpart 332.7—Contract Funding

332.702 Policy.
332.703 Contract funding requirements.
332.703–1 General.
332.704 Limitations of cost or funds.
332.705 Contract clauses.
332.705–2 Clauses for limitation of costs or funds.

Subpart 332.9—Prompt Payment

332.902 Definitions.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 332.4—Advance Payments for Non-Commercial Items

332.402 General.

(e) The determination that the making of an advance payment is in the public interest (see FAR 32.402(c)(1)(iii)(A)) shall be made by the respective chief of the contracting office (CCO)(not delegable).

332.403 Applicability.

All contracts for research work with educational institutions located in the United States shall provide for financing by use of advance payments, in reasonable amounts, unless otherwise prohibited by law.

332.407 Interest.

(d) The HCA (not delegable) is authorized to make the determinations in FAR 32.407(d) and as follows. In addition to the interest-free advance payments for the types of contracts listed in FAR 32.407(d), advance payments without interest may be approved for nonprofit contracts which are without fee with educational institutions and other nonprofit organizations, whether public or private, which are for the performance of work involving health services, educational programs, or social service programs, including, but not limited to, programs such as:

(1) Community health representative services for an Indian Tribe or Band;

(2) Narcotic addict rehabilitative services;

(3) Comprehensive health care service program for Model Neighborhood programs;

(4) Planning and development of health maintenance organizations;

(5) Dissemination of information derived from educational research;

(6) Surveys or demonstrations in the field of education;

(7) Producing or distributing educational media for handicapped persons including captioned films for the hearing impaired;

(8) Operation of language or area centers;

(9) Conduct of biomedical research and support services;

(10) Research surveys or demonstrations involving the training and placement of health manpower and health professionals, and dissemination of related information; and

(11) Surveys or demonstrations in the field of social service.

332.409 Contracting officer action.

332.409–1 Recommendation for approval.

The information in FAR 32.409–1 (or FAR 32.409–2) shall be transmitted to the HCA in the form of a briefing memorandum.

Subpart 332.5—Progress Payments Based on Cost

332.501 General.

332.501–2 Unusual progress payments.

(a)(3) The approval of an unusual progress payment shall be made by the head of the contracting activity (HCA)(not delegable).

Subpart 332.7—Contract Funding

332.702 Policy.

An incrementally funded contract is a contract in which the total work effort is to be performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance.

(a) Incremental funding may be applied to cost-reimbursement type contracts for the acquisition of research and development and other types of nonpersonal, nonseverable services. It shall not be applied to contracts for construction services, architect-engineer services, or severable services.Incremental funding allows nonseverable cost-reimbursement contracts, awarded for more than one year, to be funded from succeeding fiscal years.

(b) It is departmental policy that contracts for projects of multiple year duration be fully funded, whenever possible, to cover the entire project. However, incrementally funded contracts may be used when:

(1) A project, which is part of an approved program, is anticipated to be of multiple year duration, but funds are not currently available to cover the entire project;

(2) The project represents a valid need for the fiscal year in which the contract is awarded and of the succeeding fiscal years of the project's duration, during which additional funds may be obligated by increasing the allotment to the contract;

(3) The project is so significant to the approved program that there is reasonable assurance that it will command a high priority for proposed appropriations to cover the entire multiple year duration; and

(4) The statement of work is specific and is defined by separate phases or increments so that, at the completion of each, progress can be effectively measured.

332.703 Contract funding requirements.

332.703–1 General.

(b) The following general guidelines are applicable to incrementally funded contracts:

(1) The estimated total cost of the project (all planned phases or increments) is to be taken into consideration when determining the requirements which must be met before entering into the contract; i.e., justification for noncompetitive acquisition, approval or award, etc.

(2) The RFP and resultant contract are to include a statement of work which describes the total project covering the proposed multiple year period of performance and indicating timetables consistent with planned phases or increments and corresponding allotments of funds.

(3) Offerors will be expected to respond to RFPs with technical and cost proposals for the entire project indicating distinct break-outs of the planned phases or increments, and the multiple year period of performance.

(4) Negotiations will be conducted based upon the total project, including all planned phases or increments, and the multiple year period of performance.

(5) Sufficient funds must be obligated under the basic contract to cover no less than the first year of performance, unless the contracting officer determines it is advantageous to the Government to fund the contract for a lesser period. In that event, the contracting officer shall ensure that the obligated funds are sufficient to cover a complete phase or increment of performance representing a material and measurable part of the total project, and the contract period shall be reduced accordingly.

(6) Because of the magnitude of the scope of work and multiple year period of performance under an incrementally funded contract, there is a critical need for careful program planning. Program planning must provide for appropriate surveillance of the contractor's performance and adequate controls to ensure that projected funding will not impinge on the program office's ability to support, within anticipated appropriations, other equally important contract or grant programs.

(7) An incrementally funded contract must contain precise requirements for progress reports to enable the project officer to effectively monitor the contract. The project officer should be required to prepare periodic performance evaluation reports to facilitate the program office's ultimate decision to allot additional funds under the contract.

332.704 Limitation of cost or funds.

For detailed instruction regarding administrative actions in connection with anticipated cost overruns, see subpart 342.71

332.705 Contract clauses.

332.705–2 Clauses for limitation of costs or funds.

(c)(1) When using the Limitation of Funds clause (FAR 52.232–22) in the solicitation and resultant incrementally funded contract, the contracting officer shall insert the following legend between the clause title and the clause text:

(This clause supersedes the Limitation of Cost clause found in the General Provisions of this contract.)

(2) The contracting officer shall also include a clause reading substantially as that shown in 352.232–74 in the Special Provisions of the resultant incrementally funded contract.

(3) The request for proposals must inform prospective offerors of the Department's intention to enter into an incrementally funded contract. Therefore, the contracting officer shall include the provision at 352.232–75 in the request for proposals whenever the use of incremental funding is contemplated.

Subpart 332.9—Prompt Payment

332.902 Definitions.

Fiscal office means the office responsible for: determining whether interest penalties are due a contractor and, if so, the amount; determining whether an invoice offers a financially advantageous discount; maintaining records for and submission of prompt payment reports to the Deputy Assistant Secretary, Finance (DASF), ASMB, OS; and processing payments to the Treasury Department to allow for payment to a contractor when due. The fiscal office may fulfill the roles of the ''designated billing office'' and the ''designated payment office.''

PART 333—PROTESTS, DISPUTES, AND APPEALS

Subpart 333.1—Protests

Sec.

333.102 General.
333.103 Protests to the agency.
333.104 Protests to GAO.

Subpart 333.2—Disputes and Appeals

333.203 Applicability.
333.209 Suspected fraudulent claims.
333.211 Contracting officer's decision.
333.212 Contracting officer's duties upon appeal.
333.212–70 Formats.
333.213 Obligation to continue performance.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 333.1—Protests

333.102 General.

(a) Contracting officers shall consider all protests or objections regarding the award of a contract, whether submitted before or after award, provided the protests are filed in a timely manner and are submitted by interested parties. To be considered timely, protests based on alleged improprieties in any type of solicitation which are apparent before bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In the case of negotiated acquisitions, alleged improprieties which do not exist in initial solicitations, but which are subsequently incorporated by amendment, must be protested not later than the next closing date for receipt of proposals following the incorporation of the amendment. In other cases, protests shall be filed not later than ten (10) calendar days after the basis for protest is known or should have been known, whichever is earlier. Provided a protest has been filed initially with the contracting officer, any subsequent protest to the Secretary or GAO filed within ten (10) calendar days of notification of adverse action will be considered. Written confirmation of all oral protests shall be requested from protestants and must be timely filed.

(g)(1) The Office of Acquisition Management (OAM) has been designated as the headquarters office to serve as the liaison for protests lodged with GAO. Within the OAM, the Departmental Protest Control Officer (DPCO) has been designated as the individual to be contacted by GAO.

(2) Each contracting activity shall designate a protest control officer to serve as an advisor to the contracting officer and to monitor protests from the time of initial notification until the protest has been resolved. The protest control officer should be a senior acquisition specialist in the headquarters acquisition staff office. In addition, contracting activities should designate similar officials within their principal components to the extent practicable and feasible. A copy of each appointment and termination of appointment of protest control officers shall be forwarded to the Director, OAM.

333.103 Protests to the agency.

(f)(1) The contracting officer is authorized to make the determination, using the criteria in FAR 33.104(b), to award a contract notwithstanding the protest after obtaining the concurrence of the contracting activity's protest control officer and the Office of General Counsel—Business and Administrative Law Division (OGC–BAL). If the protest has been lodged with the Secretary, is addressed to the Secretary, or requests referral to the Secretary, approval shall also be obtained from the Director, OAM before making the award.

(2) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with the applicable provisions in 333.102(a). In the following cases, written protests received by the contracting officer before award shall be forwarded, through acquisition channels, to the DPCO for processing. Files concerning these protests shall be submitted in duplicate, or as otherwise specified by the DPCO and sent in the most expeditious manner, marked ''IMMEDIATE ACTION—PROTEST BEFORE AWARD'', and contain the documentation referenced in 333.104(a)(3).

(i) The protestant requests referral to the Secretary of Health and Human Services;

(ii) The protest is known to have been lodged with the Comptroller General or the Secretary, or is addressed to either; or

(iii) The contracting officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the protest be considered by the Secretary or the Comptroller General. Otherwise, protests addressed to the contracting officer may be answered by the contracting officer, with the concurrence of the contracting activity's protest control officer and OGC–BAL.

(3) Protests received after award shall be treated as indicated in FAR 33.103(b)(3).

333.104 Protests to GAO.

(a) *General procedures.* (3) Protests lodged with GAO, whether before or after award, shall be processed by the DPCO. Protest files shall be prepared by the contracting office and distributed as follows: two copies to the DPCO, one copy to the contracting activity's protest control officer, and one copy to OGC–BAL. Files shall include the following documentation:

(i) The contracting officer's statement of facts and circumstances, including a discussion of the merits of the protest, and conclusions and recommendations,

including documentary evidence on which they are based.

(ii) A copy of the IFB or RFP.

(iii) A copy of the abstract of bids or proposals.

(iv) A copy of the bid or proposal of the successful offeror to whom award has been made or is proposed to be made.

(v) A copy of the bid or proposal of the protestant, if any.

(vi) The current status of award. When award has been made, this shall include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.

(vii) A copy of any mutual agreement to suspend work on a no-cost basis, when appropriate (see FAR 33.104(c)(4)).

(viii) Copies of the notice of protest given offerors and other parties when the notice is appropriate (see FAR 33.104(a)(2)).

(ix) A copy of the technical evaluation report, when applicable, and a copy of each evaluator's rating for relevant proposals.

(x) A copy of the negotiation memorandum, when applicable.

(xi) The name and telephone number of the person in the contracting office who may be contacted for information relevant to the protest.

(xii) A copy of the competitive range memorandum. and

(xiii) Any document which is referred to in the contracting officer's statement of facts. The files shall be assembled in an orderly manner and shall include an index of enclosures.

(4) The DPCO is responsible for making the necessary distributions referenced in FAR 33.104 (a)(4).

(5) The contracting officer shall furnish the protest file containing the documentation specified in paragraph (a)(3) of this section, except the item in paragraph (a)(3)(i), to the DPCO within fourteen (14) calendar days from receipt of the protest. The contracting officer shall provide the documentation required by item (a)(3)(i) of this section to the DPCO within twenty-one (21) calendar days from receipt of the protest. Since the statute allows only a short time period in which to respond to protests lodged with GAO, the contracting officer shall handle each protest on a priority basis. The DPCO shall prepare the report and submit it and the protest file to GAO in accordance with FAR 33.104(a)(4)(i).

(6) Since the DPCO will furnish the report to GAO, the protestor, and other interested parties, comments on the report from the protestor and other interested parties will be requested to be sent to the DPCO.

(7) The Office of Acquisition Management (OAM) has been designated as the headquarters office, and the DPCO as the individual, that GAO should contact concerning all protests lodged with GAO.

(b) *Protests before award.* (1) To make an award notwithstanding a protest, the contracting officer shall prepare a finding using the criteria in FAR 33.104(b)(1), have it executed by the head of the contracting activity (HCA)(not delegable), and forward it, along with a written request for approval to make the award, to the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM).

(2) If the request to make an award notwithstanding the protest is approved by the DASGAM, the DPCO shall notify GAO. Whether the request is approved or not, the DPCO shall telephonically notify the contracting activity's protest control officer of the decision of the DASGAM, and the contracting activity's protest control officer shall immediately notify the contracting officer. The DPCO shall confirm the decision by memorandum to the contracting activity's protest control officer.

(4) The contracting officer shall prepare the protest file in accordance with paragraph (a)(3) of this section, and forward the required number of copies to the DPCO (see paragraph (a)(5) of this section).

(c) *Protests after award.* (2) If the contracting officer believes performance should be allowed to continue notwithstanding the protest, a finding shall be prepared by the contracting officer using the criteria in FAR 33.104(c)(2), executed by the HCA (not delegable), and forwarded, along with a written request for approval, to the Director, OAM. The same procedures for notification stated in paragraph (b)(2) of this section shall be followed.

(6) The contracting officer shall prepare the protest file in accordance with paragraph (a)(3) of this section, and forward the required number of copies to the DPCO (see paragraph (a)(5) of this section).

(d) *Findings and notice.* The contracting officer shall perform the actions required by FAR 33.104 (d); however, notification to GAO and other interested parties shall be made by the DPCO.

(g) *Notice to GAO.* The Deputy Assistant Secretary for Grants and Acquisition Management shall be the official to comply with the requirements of FAR 33.104 (g).

(i) *Express option.* When GAO invokes the express option, the contracting officer shall prepare the complete protest file as described in paragraph (a)(3) of this section, to include the item in paragraph (a)(3)(i), and deliver it (hand-carry, if necessary) to the DPCO in time to meet the submittal date established by GAO. The DPCO will notify the contracting officer of the submittal date after GAO has finalized its requirements.

Subpart 333.2—Disputes and Appeals

333.203 Applicability.

(c) The Armed Services Board of Contract Appeals (ASBCA) has been designated by the Secretary as the authorized ''Board'' to hear and determine disputes for the Department.

333.209 Suspected fraudulent claims.

The contracting officer shall submit any instance of a contractor's suspected fraudulent claim to the Office of the Inspector General for investigation.

333.211 Contracting officer's decision.

(a)(2) The contracting officer shall refer a proposed final decision to the Office of General Counsel, Business and Administrative Law Division (OGC–BAL), for advice as to the legal sufficiency and format before sending the final decision to the contractor. The contracting officer shall provide OGC–BAL with the pertinent documents with the submission of each proposed final decision.

(a)(4)(v) When using the paragraph in FAR 33.211 (a)(4)(v), the contracting officer shall insert the words ''Armed Services'' before each mention of the term ''Board of Contract Appeals''.

(h) At any time within the period of appeal, the contracting officer may modify or withdraw his/her final decision. If an appeal from the final decision has been taken to the ASBCA, the contracting officer will forward his/her recommended action to OGC–BAL with the supplement to the contract file which supports the recommended correction or amendment.

333.212 Contracting officer's duties upon appeal.

(a) Appeals shall be governed by the rules set forth in the ''Rules of the Armed Services Board of Contract Appeals'', or by the rules established by the U.S. Court of Federal Claims, as appropriate.

(b) OGC–BAL is designated as the Government Trial Attorney to represent the Government in the defense of appeals before the ASBCA. A decision by the ASBCA will be transmitted by the Government Trial Attorney to the

appropriate contracting officer for compliance in accordance with the ASBCA's decision.

(c) If an appeal is filed with the ASBCA, the contracting officer shall assemble a file within 30 days of receipt of an appeal, or advice that an appeal has been filed, that consists of all documents pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken;

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witness on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent. The contracting officer shall furnish the appeal file to the Government Trial Attorney for review and approval. After approval, the contracting officer shall prepare four copies of the file, one for the ASBCA, one for the appellant, one for the Government Trial Attorney, and one for the contracting office.

(d) At all times after the filing of an appeal, the contracting officer shall render whatever assistance is requested by the Government Trial Attorney. When an appeal is set for hearing, the concerned contracting officer, acting under the guidance of the Government Trial Attorney, shall be responsible for arranging for the presence of Government witnesses and specified physical and documentary evidence at both the pre-hearing conference and hearing.

(e) If a contractor which has filed an appeal with the ASBCA elects to accept fully the decision from which the appeal was taken, or any modification to it, and gives written notification of acceptance to the Government Trial Attorney or the concerned contracting officer, the Government Trial Attorney will notify the ASBCA of the disposition of the dispute in accordance with Rule 27 of the ASBCA.

(f) If the contractor has elected to appeal to the U.S. Court of Federal Claims, the U.S. Department of Justice will represent the Department. However, the contracting officer shall still coordinate all actions through OGC–BAL.

333.212–70 Formats.

(a) The following format is suggested for use in transmitting appeal files to the ASBCA:

Your reference: _____
(Docket No.)

(Name)

Recorder, Armed Services Board of Contract Appeals

Skyline Six
5109 Leesburg Pike
Falls Church, Virginia 22041

Dear (Name):

Transmitted herewith are documents relative to the appeal under Contract No. _____ with the _____
(*Name of contractor*)

in accordance with the procedures under Rule 4. The Government Trial Attorney for this case is

_____

_____

(Insert Division of Business and Administrative Law, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue, SW., Washington, DC 20201).

The request for payment of charges resulting from the processing of this appeal should be addressed to:

_____

(Insert name and address of cognizant finance office.)

_____

Sincerely yours,

Contracting Officer
Enclosures

(b) The following format is suggested for use in notifying the appellant that the appeal file was submitted to the ASBCA:

(Contractor Address)

_____

_____

Dear _____:

An appeal file has been compiled relative to the appeal under Contract No. _____, and has been submitted to the Armed Services Board of Contract Appeals (ASBCA). The enclosed duplicate of the appeal file is identical to that submitted to the Board, except that contract documents which you already have been excluded. You may furnish or suggest any additional information deemed pertinent to the appeal to the Armed Services Board of Contract Appeals according to their rules.

The ASBCA will provide you with further information concerning this appeal.

Sincerely yours,

Contracting Officer
Enclosure

333.213 Obligation to continue performance.

(a) The Disputes clause at FAR 52.233–1 shall be used without the use of Alternate I. However, if the contracting officer determines that the Government's interest would be better served by use of paragraph (i) in Alternate I, he/she must request approval for its use from the chief of the contracting office.

PART 334—MAJOR SYSTEM ACQUISITION

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

334.003 Responsibilities.

The Department's implementation of OMB Circular No. A–109 may be found in Chapter 1–150 of the General Administration Manual.

PART 335—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

335.070 Cost-sharing.
335.070–1 Policy.
335.070–2 Amount of cost-sharing.
335.070–3 Method of cost-sharing.
335.070–4 Contract award.
335.071 Special determinations and findings affecting research and development contracting.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

335.070 Cost-sharing.

335.070–1 Policy.

(a) The use of cost-sharing type contracts should be encouraged to contribute to the cost of performing research where there is a probability that the contractor will receive present or future benefits from participation, such as, increased technical know-how, training to employees, acquisition of equipment, use of background knowledge in future contracts, etc. Cost-sharing is intended to serve the mutual interests of the Government and the performing organization by helping to assure efficient utilization of the resources available for the conduct of research projects and by promoting sound planning and prudent fiscal policies by the performing organization. Encouragement should be given to organizations to contribute to the cost of performing research under contracts unless the contracting officer determines that a request for cost-sharing would not be appropriate because of the following circumstances:

(1) The particular research objective or scope of effort for the project is specified by the Government rather than proposed by the performing organization. This would usually include any formal Government request for proposals for a specific project.

(2) The research effort has only minor relevance to the non-Federal activities of the performing organization, and the organization is proposing to undertake the research primarily as a service to the Government.

(3) The organization has little or no non-Federal sources or funds from which to make a cost contribution. Cost-sharing should generally not be requested if cost-sharing would require the Government to provide funds through some other means (such as fees) to enable the organization to cost-share. It should be recognized that those organizations which are predominantly engaged in research and development and have little or no production or other service activities may not be in a favorable position to make a cost contribution.

(b) The responsibility for negotiating cost-sharing is that of the contracting office. Each research contract file should show whether the contracting officer considered cost-sharing appropriate for that particular contract and in what amount. If cost-sharing was not considered appropriate, the file must indicate the factual basis for that decision, e.g., ''Because the contractor will derive no benefits from this award that can be applied to its commercial activities, cost-sharing is not considered appropriate.'' The contracting officer may wish to coordinate with the project officer before documenting this decision.

(c) If the contracting officer considers cost-sharing to be appropriate for a research contract and the contractor refuses to accept this type of contract, the award may be made without cost-sharing, if the contracting officer concludes that payment of the full cost of the research effort is necessary in order to obtain the services of that particular contractor.

335.070–2 Amount of cost-sharing.

When cost-sharing is determined to be appropriate, the following guidelines shall be utilized in determining the amount of cost participation by the contractor.

(a) The amount of cost participation should depend to a large extent on whether the research effort or results are likely to enhance the performing organization's capability, expertise, or competitive position, and the value of this enhancement to the performing organization. It should be recognized that those organizations which are predominantly engaged in research and development have little or no production or other service activities and may not be in a favorable position to derive a monetary benefit from their research under Federal agreements. Therefore, contractor cost participation could reasonably range from as little as 1 percent or less of the total project cost, to more than 50 percent of the total project cost. Ultimately, the contracting officer should bear in mind that cost-sharing is a negotiable item. As such, the amount of cost-sharing should be proportional to the anticipated value of the contractor's gain.

(b) If the performing organization will not acquire title or the right to use inventions, patents, or technical information resulting from the research project, it would generally be appropriate to obtain less cost-sharing than in cases in which the performer acquires these rights.

(c) A fee or profit will usually not be paid to the performing organization if the organization is to contribute to the cost of the research effort, but the amount of cost-sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit in the research. However, if the research is expected to be of only minor value to the performing organization and if cost-sharing is not required by statute, it may be appropriate for the performer to make a contribution in the form of a reduced fee or profit rather than sharing costs of the project.

(d) The organization's participation may be considered over the total term of the project so that a relatively high contribution in one year may be offset by a relatively low contribution in another.

(e) A relatively low degree of cost-sharing may be appropriate if, in the view of the operating divisions or their subordinate elements, an area of research requires special stimulus in the national interest.

335.070–3 Method of cost-sharing.

Cost-sharing on individual contracts may be accomplished either by a contribution of part or all of one or more elements of allowable cost of the work being performed, or by a fixed amount or stated percentage of the total allowable costs of the project. Costs so contributed may not be charged to the Government under any other grant or contract (including allocations to other grants or contracts as part of any independent research and development program).

335.070–4 Contract award.

In consonance with the Department's objectives of competition and support of the small business program, award of contracts should not be made solely on the basis of ability or willingness to cost-share. Awards should be made primarily on the contractor's competence and only after adequate competition has been obtained among large and small business organizations whenever possible. The offeror's willingness to share costs should not be considered in the technical evaluation process but as a business consideration, which is secondary to selecting the best qualified source.

335.071 Special determinations and findings affecting research and development contracting.

OPDIV heads for health agencies shall sign individual and class determinations and findings for:

(a) Acquisition or construction of equipment or facilities on property not owned by the United States pursuant to 42 U.S.C. 241(a)(7); and

(b) Use of an indemnification provision in a research contract pursuant to 42 U.S.C. 241(a)(7).

PART 342—CONTRACT ADMINISTRATION

Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

Subpart 342.70—Contract Monitoring

Sec.
342.7001 Purpose.
342.7002 Contract monitoring responsibilities.
342.7003 Withholding of contract payments.
342.7003–1 Policy.
342.7003–2 Procedures.
342.7003–3 Withholding payments.

Subpart 342.71—Administrative Actions for Cost Overruns

342.7001 Scope of subpart.
342.7101 Contract administration.
342.7101–1 General.
342.7101–2 Procedures.
342.7102 Contract modifications.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

The Director, Division of Cost Allocation of the Program Support Center within the servicing HHS regional office has been delegated the authority to establish indirect cost rates, research patient care rates, and, as necessary, fringe benefit, computer, and other special costing rates for use in contracts and grants awarded to State and local governments, colleges and universities, hospitals, and other nonprofit organizations.

Subpart 342.70—Contract Monitoring

342.7001 Purpose.

Contract monitoring is an essential element of contract administration and the acquisition process. This subpart describes the Department's operating concepts regarding contract monitoring, performed jointly by the project officer and the contracting officer, to ensure

that the required monitoring is performed, timely remedial action is taken when necessary, and a determination is made that contract objectives have been met.

342.7002 Contract monitoring responsibilities.

(a) Upon execution of the contract, the mutual obligations of the Government and the contractor are established by, and limited to, the written stipulations in the contract. Unless authorized by the contracting officer, HHS personnel shall not direct or request the contractor to assume any obligation or take any actions not specifically required by the contract. Only the contracting officer may impose a requirement which will result in a change to the contract. All contract changes must be directed in writing or confirmed in writing by the contracting officer.

(b) The contracting officer is responsible for assuring compliance with all terms of the contract, especially the statutory, legal, business, and regulatory provisions. Whether or not a postaward conference is held, the contracting officer shall inform the contractor by letter (if not already stipulated by contract provisions) of the authorities and responsibilities of the Government personnel with whom the contractor will be dealing throughout the life of the contract.

(c) The contracting officer must depend on program, technical, and other personnel for assistance and advice in monitoring the contractor's performance, and in other areas of postaward administration. The contracting officer must assure that responsibilities assigned to these personnel are understood and carried out. The individual roles and corresponding responsibilities typically involve, but are not limited to, the following:

(1) The role of program and technical personnel in monitoring the contract to assist or advise the contracting officer (or act as his/her representative when so designated by the contracting officer) in activities such as:

(i) Providing technical monitoring during contract performance, and issuing letters to the contractor and contracting officer relating to delivery, acceptance, or rejection in accordance with the terms of the contract;

(ii) Assessing contractor performance, including inspection and testing of products and evaluation of reports and data;

(iii) Recommending necessary changes to the schedule of work and period of performance in order to accomplish the objectives of the contract. This shall be accomplished by a written request to the contracting officer, together with an appropriate justification and funds availability citation;

(iv) Reviewing invoices/vouchers and recommending approval/disapproval action by the contracting officer, to include comments regarding anything unusual discovered in the review;

(v) Reviewing and recommending approval or disapproval of subcontractors, overtime, travel, and key personnel changes; and

(vi) Participating, as necessary, in various phases of the contract closeout process.

(2) The role of the project officer in performing required aspects of the contract monitoring process. In addition to those applicable activities set forth in paragraph (c)(1) of this section, the project officer shall:

(i) Submit periodic reports to the contracting officer that concisely explain the status of the contract, and include recommended actions for any problems reported. Provide the contracting officer with written notification of evaluation and approval/disapproval of contract deliverables and of completion of tasks or phases. The contracting officer will, in turn, provide the contractor with written notification of approval or disapproval unless the responsibility has been delegated by the contracting officer, in which case the person responsible for such action will notify the contractor and provide a copy to the contracting officer for inclusion in the contract file;

(ii) Monitor the technical aspects of the contractor's business and technical progress, identify existing and potential problems that threaten performance, and immediately inform the contracting officer of deviations from contract objectives, or from any technical or delivery requirements, so that remedial measures may be instituted accordingly;

(iii) Provide immediate notification to the head of the program office responsible for the program whenever it is determined that program objectives are not being met, together with specific recommendations of action to be taken. A copy of the project officer's report and recommendation shall be transmitted to the contracting officer for appropriate action;

(iv) Submit, within 120 days after contract completion, a final assessment report to the contracting officer. The report should include analysis of the contractor's performance, including the contract and program objectives achieved and missed. A copy of the final assessment report shall be forwarded to the head of the program office responsible for the program for management review and follow-up, as necessary; and

(v) Accompany and/or provide, when requested, technical support to the HHS auditor in the conduct of floor checks.

(3) The role of the contract administrator, auditor, cost analyst, and property administrator in assisting or advising the contracting officer in postaward administration activities such as:

(i) Evaluation of contractor systems and procedures, to include accounting policies and procedures, purchasing policies and practices, property accounting and control, wage and salary plans and rate structures, personnel policies and practices, etc.;

(ii) Processing of disputes under the Disputes clause and any resultant appeals;

(iii) Modification or termination of the contract; and

(iv) Determination of the allowability of cost charges to incentive or cost-reimbursement type contracts and progress payments under fixed-price contracts. This is especially important when award is made to new organizations or those with financial weaknesses.

(d) The contracting officer is responsible for assuring that contractor performance and contract monitoring are carried out in conformance with contract provisions. If performance is not satisfactory or if problems are anticipated, it is essential that the contracting officer take immediate action to protect the Government's rights under the contract. The contracting officer shall notify his/her immediate supervisor of problems that cannot be resolved within contract limitations and whenever contract or program objectives are not met. The notification shall include a statement of action being take by the contracting officer.

342.7003 Withholding of contract payments.

342.7003–1 Policy.

(a) All solicitations and resultant contracts shall contain the withholding of contract payments clause at 352.232–9, and an excusable delays clause, or a clause which incorporates the definition of excusable delays. The excusable delays clause at 352.249–14 shall be used when the solicitation and resultant contract (other than purchase orders) does not contain a default or other excusable delays clause.

(b) The transmittal letter used to convey the contract to each contractor shall contain a notice which highlights

the contractor's agreement with the withholding of contract payments clause.

(c) No contract payment shall be made when any report required to be submitted by the contractor is overdue, or the contractor fails to perform or deliver work or services as required by the contract.

(d) The contracting officer shall issue a ten-day cure notice or initiate appropriate termination action for any failure in the contractor's performance as stated in paragraph (c) of this section.

342.7003–2 Procedures.

(a) The contracting officer is responsible for initiating immediate action to protect the Government's rights whenever the contractor fails to comply with either the delivery or reporting provisions of the contract. Compliance with the reporting provisions includes those reports to be submitted directly to the payment office. If such a report is not submitted on time, the contracting officer is to be notified promptly by the payment officer.

(b) When the contract contains a termination for default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a default in performance. In either circumstance, the contracting officer is to immediately issue a formal ten-day cure notice pursuant to the default clause. The cure notice is to follow the format prescribed in FAR 49.607 and is to include a statement to the effect that contract payments will be withheld if the default is not cured or is not determined to be excusable.

(1) If the default is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the default is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for default or other action would be in the best interest of the Government.

(c) When the contract does not contain a termination for default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a failure to perform. In either circumstance, the contracting officer is to immediately issue a written notice to the contractor specifying the failure and providing a period of ten days, or longer period as determined necessary by the contracting officer, in which the contractor is to cure the failure or establish an excusable delay. The contracting officer is to include a statement in the written notice to the effect that contract payments will be withheld if the failure is not cured or is not determined to be excusable.

(1) If the failure is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the failure is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for convenience or other action would be in the best interest of the Government.

(d) The contracting officer should consult FAR subpart 49.4 for further guidance before taking any of the actions described in this section.

342.7003–3 Withholding payments.

(a) When making the determination that contract payments should be withheld in accordance with the Withholding of Contract Payments clause, the contracting officer is to immediately notify the servicing finance office in writing of the determination to suspend payments. The notice of suspension is to contain all elements of information required by the payment office to properly identify the contract and the applicable accounts involved.

(b) The contracting officer is to immediately notify the contractor in writing that payments have been suspended until the default or failure is cured.

(c) When the contractor cures the default or failure, the contracting officer is to immediately notify, in writing, all recipients of the notice of suspension that the suspension is to be lifted and contract payments are to be resumed.

(d) When exercising actions regarding the withholding of payment procedures, the contracting officer must be careful not to waive any of the Government's rights when corresponding with the contractor or when taking any other actions.

Subpart 342.71—Administrative Actions for Cost Overruns

342.7100 Scope of subpart.

This subpart sets forth the procedures to be followed when a cost overrun is anticipated; i.e., the allowable actual cost of performing a cost-reimbursement type contract is expected to exceed the total estimated cost specified in the contract.

342.7101 Contract administration.

342.7101–1 General.

Upon receipt of information that a contractor's accumulated cost and projected expenditures will exceed the limit of funds obligated by the contract, the contracting officer shall coordinate immediately with the appropriate program office to determine whether the contract should be modified or terminated. If the contracting officer receives information from a source other than the contractor that a cost overrun is anticipated, the contracting officer shall verify the information with the contractor, and remind the contractor of the notification requirements of the Limitation of Cost clause.

342.7101–2 Procedures.

(a) Upon notification that a cost overrun is anticipated, the contracting officer shall inform the contractor to submit a request for additional funds which is to include:

(1) Name and address of contractor.

(2) Contract number and expiration date.

(3) Contract item(s) and amount(s) creating overrun.

(4) The elements of cost which changed from the original estimate (i.e., labor, material, travel, overhead, etc.) to be furnished in the following format:

(i) Original estimate,

(ii) Costs incurred to date,

(iii) Estimated cost to completion,

(iv) Revised estimate, and

(v) Amount of adjustment.

(5) The factors responsible for the increase, i.e., error in estimate, changed conditions, etc.

(6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(b) When the contractor submits a notice of an impending overrun, the contracting officer shall:

(1) Immediately advise the appropriate program office and furnish a copy of the notice and any other data received;

(2) Request audit or cost advisory services, and technical support, as necessary, for evaluation of information and data received; and

(3) Maintain continuous follow-up with the program office to obtain a timely decision as to whether the work under the contract should be continued and additional funds provided, or the contract terminated. The decision of the program office must be supported by an appropriate written statement and funding authority, or a formal request for termination, when applicable. After a programming and funding decision is

received from the program office, the contracting officer shall promptly notify the contractor in writing that:

(i) A specified amount of additional funds has been allotted to the contract by a contractual instrument; or

(ii) Work will be discontinued when the funds allotted to the contract have been exhausted, and that any work performed after that date is at the contractor's risk; or

(iii) The Government is considering whether additional funds should be allotted to the contract and will notify the contractor as soon as possible, but that any work performed after the funds then allocated to the contract have been exhausted is at the contractor's risk. Timely, formal notification of the Government's intention is essential in order to preclude loss of contractual rights in the event of dispute, termination, or litigation.

(c) If program requirements permit, contracting officers should refrain from issuing any contractual documents which will require new work or an extension of time, pending resolution of an overrun or additional fund request.

342.7102 Contract modifications.

(a) Modifications to contracts containing the Limitation of Cost clause shall include either:

(1) A provision increasing the estimated or ceiling amount referred to in the Limitation of Cost clause of the contract and stating that the clause will thereafter apply in respect to the increased amount; or

(2) A provision stating that the estimated or ceiling amount referred to in the contract is not changed by the modification and that the Limitation of Cost clause will continue to apply with respect to the amount in effect prior to the modification.

(b) A fixed-fee provided in a contract shall not be changed when funding a cost overrun. Changes in fixed-fee will be made only to reflect changes in the scope of work which justify an increase or decrease in fee.

PART 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 352.2—Texts of Provisions and Clauses

Sec.
352.202–1 Definitions.
352.215–1 Instructions to offerors—Competitive acquisition.
352.215–70 Late proposals and revisions.
352.216–72 Additional cost principles.
352.223–70 Safety and health.
352.224–70 Confidentiality of information.
352.228–7 Insurance—Liability to third persons.
352.232–9 Withholding of contract payments.
352.232–74 Estimated cost and fixed fee—Incrementally funded contract.
352.232–75 Incremental funding.
352.233–70 Litigation and claims.
352.242–71 Final decisions on audit findings.
352.249–14 Excusable delays.
352.270–1 Accessibility of meetings, conferences, and seminars to persons with disabilities.
352.270–2 Indian preference.
352.270–3 Indian preference program.
352.270–4 Pricing of adjustments.
352.270–5 Key personnel.
352.270–6 Publications and publicity.
352.270–7 Paperwork Reduction Act.
352.270–8 Protection of human subjects.
352.270–9 Care of laboratory animals.

Authority: 5 U.S.C. 301, 40 U.S.C. 486(c).

Subpart 352.2—Texts of Provisions and Clauses

352.202–1 Definitions.

As prescribed in 302.201, the FAR Definitions clause at 52.202–1 is to be used as modified:

Definitions (Jan. 2001)

(a) Substitute the following as paragraph (a):

''(a) The term ''Secretary'' or ''Head of the Agency'' (also called ''Agency Head'') means the Secretary, Under Secretary, or any Assistant Secretary, Administrator or Commissioner of the Department of Health and Human Services; and the term ''his/her duly authorized representative'' means any person, persons, or board authorized to act for the Secretary.''

(b) Add the following paragraph (h) or its alternate, as appropriate:

''(h) The term ''Project Officer'' means the person representing the Government for the purpose of technical monitoring of contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the price of this contract or a change in the delivery dates or performance period of this contract.''

or

Alternate:

''(h) The term ''Project Officer'' means the person representing the Government for the purpose of technical monitoring of contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the cost of this contract or a change in performance period of this contract. In addition, the Project Officer is not authorized to receive or act upon the Contractor's notification of a revised cost estimate pursuant to the Limitation of Cost or Limitation of Funds clause of this contract.''

352.215–1 Instructions to offerors—Competitive acquisition.

Insert the following paragraph (e) in place of paragraph (e) of the provision at FAR 52.215–1:

(e) *Restriction on disclosure and use of data.* (1) The proposal submitted in response to this request may contain data (trade secrets; business data, e.g., commercial information, financial information, and cost and pricing data; and technical data) which the offeror, including its prospective subcontractor(s), does not want used or disclosed for any purpose other than for evaluation of the proposal. The use and disclosure of any data may be so restricted; provided, that the Government determines that the data is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, and the offeror marks the cover sheet of the proposal with the following legend, specifying the particular portions of the proposal which are to be restricted in accordance with the conditions of the legend. The Government's determination to withhold or disclose a record will be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act. The legend reads:

Unless disclosure is required by the Freedom of Information Act, 5 U.S.C. 552, as amended, (the Act) as determined by Freedom of Information (FOI) officials of the Department of Health and Human Services, data contained in the portions of this proposal which have been specifically identified by page number, paragraph, etc. by the offeror as containing restricted information shall not be used or disclosed except for evaluation purposes.

The offeror acknowledges that the Department may not be able to withhold a record (data, document, etc.) nor deny access to a record requested pursuant to the Act and that the Department's FOI officials must make that determination. The offeror hereby agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by the Act.

If a contract is awarded to the offeror as a result of, or in connection with, the submission of this proposal, the Government shall have right to use or disclose the data to the extent provided in the contract. Proposals not resulting in a contract remain subject to the Act.

The offeror also agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under the Act. The data subject to this restriction are contained in pages (insert page numbers, paragraph designations, etc. or other identification).

(2) In addition, the offeror should mark each page of data it wishes to restrict with the following statement:

''Use or disclosure of data contained on this page is subject to the restriction on the cover sheet of this proposal or quotation.''

(3) Offerors are cautioned that proposals submitted with restrictive legends or

statements differing in substance from the above legend may not be considered for award. The Government reserves the right to reject any proposal submitted with a nonconforming legend.

352.215–70 Late proposals and revisions.

As prescribed in 315.208, the following provision may be included in the solicitation:

Late Proposals and Revisions (Nov. 1986)

Notwithstanding the procedures contained in FAR 52.215–1(c)(3) of the provision of this solicitation entitled Instructions to Offerors-Competitive Acquisition, a proposal received after the date specified for receipt may be considered if it offers significant cost or technical advantages to the Government; and it was received before proposals were distributed for evaluation, or within five calendar days after the exact time specified for receipt, whichever is earlier.

(End of provision)

352.216–72 Additional cost principles.

As prescribed in 316.307(j), insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Additional Cost Principles (Oct. 1990)

(a) *Bid and proposal costs.* (1) Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal contracts, grants, and agreements, including the development of scientific, cost, and other data needed to support the bids, proposals, and applications.

(2) Bid and proposal costs of the current accounting period are allowable as indirect costs.

(3) Bid and proposal costs of past accounting periods are unallowable in the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable.

(4) Bid and proposal costs do not include independent research and development costs covered by the following paragraph, or preaward costs covered by paragraph 38 of Attachment B to OMB Circular A–122.

(b) *Independent research and development costs.* (1) Independent research and development is research and development conducted by an organization which is not sponsored by Federal or non-Federal contracts, grants, or other agreements.

(2) Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs to sponsored research and development.

(3) The cost of independent research and development, including its proportionate share of indirect costs, are unallowable.

(End of clause)

352.223–70 Safety and health.

The following clause, or one reading substantially the same, shall be used as prescribed in 323.7002:

Safety and Health (Jan. 2001)

(a) To help ensure the protection of the life and health of all persons, and to help prevent damage to property, the Contractor shall comply with all Federal, State and local laws and regulations applicable to the work being performed under this contract. These laws are implemented and/or enforced by the Environmental Protection Agency, Occupational Safety and Health Administration and other agencies at the Federal, State and local levels (Federal, State and local regulatory/enforcement agencies).

(b) Further, the Contractor shall take or cause to be taken additional safety measures as the Contracting Officer, in conjunction with the project or other appropriate officers, determines to be reasonably necessary. If compliance with these additional safety measures results in an increase or decrease in the cost or time required for performance of any part of work under this contract, an equitable adjustment will be made in accordance with the applicable ''Changes'' clause set forth in this contract.

(c) The Contractor shall maintain an accurate record of, and promptly report to the Contracting Officer, all accidents or incidents resulting in the exposure of persons to toxic substances, hazardous materials or hazardous operations; the injury or death of any person; and/or damage to property incidental to work performed under the contract and all violations for which the Contractor has been cited by any Federal, State or local regulatory/enforcement agency. The report shall include a copy of the notice of violation and the findings of any inquiry or inspection, and an analysis addressing the impact these violations may have on the work remaining to be performed. The report shall also state the required action(s), if any, to be taken to correct any violation(s) noted by the Federal, State or local regulatory/enforcement agency and the time frame allowed by the agency to accomplish the necessary corrective action.

(d) If the Contractor fails or refuses to comply with the Federal, State or local regulatory/enforcement agency's directive(s) regarding any violation(s) and prescribed corrective action(s), the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action (as approved by the Federal, State or local regulatory/enforcement agencies) has been taken and documented to the Contracting Officer. No part of the time lost due to any stop work order shall be subject to a claim for extension of time or costs or damages by the Contractor.

(e) The Contractor shall insert the substance of this clause in each subcontract involving toxic substances, hazardous materials, or hazardous operations. Compliance with the provisions of this clause by subcontractors will be the responsibility of the Contractor.

(End of Clause)

352.224–70 Confidentiality of information.

The following clause is covered by the policy set forth in subpart 324.70 and is to be used in accordance with the instructions set forth in 324.7004.

Confidentiality of Information (Apr. 1984)

(a) Confidential information, as used in this clause, means information or data of a personal nature about an individual, or proprietary information or data submitted by or pertaining to an institution or organization.

(b) In addition to the types of confidential information described in paragraph (a) of this clause, information which might require special consideration with regard to the timing of its disclosure may derive from studies or research, during which public disclosure of preliminary unvalidated findings could create erroneous conclusions which might threaten public health or safety if acted upon.

(c) The Contracting Officer and the Contractor may, by mutual consent, identify elsewhere in this contract specific information and/or categories of information which the Government will furnish to the Contractor or that the Contractor is expected to generate which is confidential. Similarly, the Contracting Officer and the Contractor may, by mutual consent, identify such confidential information from time to time during the performance of the contract. Failure to agree will be settled pursuant to the ''Disputes'' clause.

(d) If it is established elsewhere in this contract that information to be utilized under this contract, or a portion thereof, is subject to the Privacy Act, the Contractor will follow the rules and procedures of disclosure set forth in the Privacy Act of 1974, 5 U.S.C. 552a, and implementing regulations and policies, with respect to systems of records determined to be subject to the Privacy Act.

(e) Confidential information, as defined in paragraph (a) of this clause, that is information or data of a personal nature about an individual, or proprietary information or data submitted by or pertaining to an institution or organization, shall not be disclosed without the prior written consent of the individual, institution, or organization.

(f) Written advance notice of at least 45 days will be provided to the Contracting Officer of the Contractor's intent to release findings of studies or research, which have the possibility of adverse effects on the public or the Federal agency, as described in paragraph (b) of this clause. If the Contracting Officer does not pose any objections in writing within the 45-day period, the Contractor may proceed with disclosure. Disagreements not resolved by the Contractor and the Contracting Officer will be settled pursuant to the ''Disputes'' clause.

(g) Whenever the Contractor is uncertain with regard to the proper handling of material under the contract, or if the material in question is subject to the Privacy Act or is confidential information subject to the provisions of this clause, the Contractor should obtain a written determination from the Contracting Officer prior to any release, disclosure, dissemination, or publication.

(h) Contracting Officer determinations will reflect the result of internal coordination with appropriate program and legal officials.

(i) The provisions of paragraph (e) of this clause shall not apply when the information is subject to conflicting or overlapping

provisions in other Federal, State or local laws.

(End of clause)

352.228–7 Insurance—Liability to third persons.

As prescribed in 328.311–2, contracting officers shall include the following clause in all cost-reimbursement contracts, in lieu of the clause at FAR 52.228–7:

Insurance—Liability to Third Persons (Dec. 1991)

(a)(1) Except as provided in paragraph (a)(2) immediately following, or in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall provide and maintain workers' compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) insurance, and such other insurance as the Contracting Officer may require under this contract.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All insurance required by this paragraph shall be in form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection with performance of this contract and for which the Contractor seeks reimbursement.

(c) Except as provided in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall be reimbursed:

(1) For that portion of the reasonable cost of insurance allocable to this contract, and required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise within the funds available under the Limitation of Cost or the Limitation of Funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by the Government. These liabilities are for:

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(ii) Death or bodily injury.

(d) The Government's liability under paragraph (c) of this clause is limited to the amounts reflected in final judgements, or settlements approved in writing by the Government, but in no event to exceed the funds available under the Limitation of Cost or Limitation of Funds clause of this contract. Nothing in this contract shall be construed as implying that, at a later date, the Government will request, or the Congress will appropriate, funds sufficient to meet any deficiencies.

(e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities):

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract:

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction of:

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

(f) The provisions of paragraph (e) of this clause shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; *provided,* that such cost is allowable under the Allowable Cost and Payment clause of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall:

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Government representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when the liability is not insured or covered by the bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

Alternate I (APR 1984). If the successful offeror represents in the offer that the offeror is *partially* immune from tort liability as a State agency, add the following paragraph (h) to the basic clause:

(h) Notwithstanding paragraphs (a) and (c) of this clause—

(1) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract; and

(2) The Contractor need not provide or maintain insurance coverage as required by paragraph (a) of this clause; provided, that the Contractor may obtain any insurance coverage deemed necessary, subject to approval by the Contracting Officer as to form, amount, and duration. The Contractor shall be reimbursed for the cost of such insurance and, to the extent provided in paragraph (c) of this clause, to liabilities to third persons for which the Contractor has obtained insurance coverage as provided in this paragraph, but for which such coverage is insufficient in amount.

(End of clause)

Alternate II (APR 1984). If the successful offeror represents in the offer that the offeror is totally immune from tort liability as a State agency, substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract.

(b) If any suit or action is filed, or if any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, the Contractor shall immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received by the Contractor. The Contractor shall, if required by the Government, authorize Government representatives to settle or defend the claim and to represent the Contractor in or take charge of any litigation. The Contractor may, at its own expense, be associated with the Government representatives in any such claims or litigation

(End of clause)

352.232–9 Withholding of contract payments.

Insert the following clause in all solicitations and contracts other than purchase orders:

Withholding of Contract Payments (Apr. 1984)

Notwithstanding any other payment provisions of this contract, failure of the Contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, will result in the withholding of payments under this contract unless such failure arises out of causes beyond the control, and without the fault or negligence of the Contractor as defined by the clause entitled ''Excusable Delays'' or ''Default'', as applicable. The Government shall promptly notify the Contractor of its intention to withhold payment of any invoice or voucher submitted.

(End of clause)

352.232–74 Estimated cost and fixed fee-Incrementally funded contract.

The following clause, or one reading substantially as it, shall be included in

the Special Provisions of an incrementally funded contract:

Consideration-Estimated Cost and Fixed Fee (Apr. 1984)

(a) It is estimated that the total cost to the Government for full performance of this contract will be $_____, of which the sum of $_____ represents the estimated reimbursable costs and $_____ represents the fixed-fee.

(b) Total funds currently available for payment and allotted to this contract are $_____, of which $_____ represents the estimated reimbursable costs and $_____ represents the fixed-fee. For further provisions on funding, see the Limitation of Funds clause.

(c) It is estimated that the amount currently allotted will cover performance of Phase I which is scheduled to be completed by (date)_____.

(d) The Contracting Officer may allot additional funds to the contract without the concurrence of the Contractor.

(End of clause)

352.232–75 Incremental funding.

The following provision shall be included in all requests for proposals whenever the use of incremental funding is contemplated:

Incremental Funding (Jan. 2001)

(a) It is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause entitled Limitation of Funds. Under the clause, which will be included in the resultant contract, initial funds will be obligated under the contract to cover the first year of performance. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the contract, to accomplish the entire project. While it is the Government's intention to progressively fund this contract over the entire period of performance up to and including the full estimated cost, the Government will not be obligated to reimburse the Contractor for costs incurred in excess of the periodic allotments, nor will the Contractor be obligated to perform in excess of the amount allotted.

(b) The Limitation of Funds clause to be included in the resultant contract shall supersede the Limitation of Cost clause found in the General Provisions.

(End of provision)

352.233–70 Litigation and claims.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Litigation and Claims (Apr. 1984)

The Contractor shall give the Contracting Officer immediate notice in writing of any action, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract, including, but not limited to the performance of any subcontract hereunder; and any claim against the Contractor the cost and expense of which is allowable under the clause entitled ''Allowable Cost and Payment.'' Except as otherwise directed by the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim. If required by the Contracting Officer, the Contractor shall effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractor; and authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or to take charge of, any action. If the settlement or defense of an action or claim is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith. The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the Contractor would have been compensated by insurance which was required by law or regulation or by written direction of the Contracting Officer, but which the Contractor failed to secure through its own fault or negligence. In any event, unless otherwise expressly provided in this contract, the Contractor shall not be reimbursed or indemnified by the Government for any liability loss, cost or expense, which the Contractor may incur or be subject to by reason of any loss, injury or damage, to the person or to real or personal property of any third parties as may accrue during, or arise from, the performance of this contract.

(End of clause)

352.242–71 Final decisions on audit findings.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

Final Decisions on Audit Findings (Apr. 1984)

For the purpose of issuing final decisions under the Disputes clause of this contract concerning monetary audit findings, the Contracting Officer shall be that person with ultimate responsibility for making that decision in accordance with Chapter 1–105, Resolution of Audit Findings, of the Department's Grants Administration Manual.

(End of clause)

352.249–14 Excusable delays.

Insert the following clause in all solicitations and resultant contracts other than purchase orders which do not have either a default or excusable delays clause, as prescribed in 342.7003–1(a):

Excusable Delays (Apr. 1984)

(a) Except with respect to failures of subcontractors, the Contractor shall not be considered to have failed in performance of this contract if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to have failed in performance of the contract, unless: the supplies or services to be furnished by the subcontractor were obtainable from other sources, the Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and the Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting officer shall ascertain the facts and extent of such failure and, if he/she shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the termination clause hereof. (As used in this clause, the terms ''subcontractor'' and ''subcontractors'' mean subcontractor(s) at any tier.)

(End of clause)

352.270–1 Accessibility of meetings, conferences, and seminars to persons with disabilities.

The following clause is to be used in accordance with 370.102:

Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities (Jan. 2001)

The Contractor agrees as follows:

(a) *Planning.* The Contractor will develop a plan to assure that any meeting, conference, or seminar held pursuant to this contract will meet or exceed the minimum accessibility standards set forth in 28 CFR 36.101–36.500 and Appendix A: ADA Accessibility Guidelines (ADAAG). The plan shall be submitted to the project officer for approval prior to initiating action. (A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars may be submitted in lieu of separate plans.)

(b) *Facilities.* Any facility to be utilized for meetings, conferences, or seminars in performance of this contract shall be in compliance with 28 CFR 36.101–36.500 and Appendix A. The Contractor shall determine, by an on-site inspection, that the facility meets these requirements.

(1) *Parking.* Parking shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(2) *Entrances.* Entrances shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(3) *Meeting Rooms.* Meeting rooms, including seating arrangements, shall be in compliance with 28 CFR 36.101–36.500 and Appendix A. In addition, stages, speaker platforms, etc. which are to be used by persons in wheelchairs must be accessible by ramps or lifts. When used, the ramp may not necessarily be independently negotiable if space does not permit. However, any slope over 1:12 must be approved by the Project Officer and the Contractor must provide assistance to negotiate access to the stage or platform.

(4) *Restrooms.* Restrooms shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(5) *Eating Facilities.* Eating facilities in the meeting facility must also comply with 28 CFR 36.101–36.500 and Appendix A.

(6) *Overnight Facilities.* If overnight accommodations are required, the facility providing the overnight accommodations shall also comply with 28 CFR 36.101–36.500 and Appendix A.

(7) *Water Fountains.* Water fountains shall comply with 28 CFR 36.101–36.500 and Appendix A.

(8) *Telephones.* Public telephones shall comply with 28 CFR 36.101–36.500 and Appendix A.

(c) *Provisions of Services for Attendees with Sensory Impairments.*

(1) The Contractor, in planning the meeting, conference, or seminar, shall include in all announcements and other materials pertaining to the meeting, conference, or seminar a notice indicating that services will be made available to persons with sensory impairments attending the meeting, if requested within five (5) days of the date of the meeting, conference, or seminar. The announcement(s) and other material(s) shall indicate that persons with sensory impairments may contact a specific person(s), at a specific address and phone number(s), to make their service requirements known. The phone number(s) shall include a telecommunication device for the deaf (TDD).

(2) The Contractor shall provide, at no additional cost to the individual, those services required by persons with sensory impairments to insure their complete participation in the meeting, conference, or seminar.

(3) As a minimum, when requested in advance, the Contractor shall provide the following services:

(i) For persons with hearing impairments, qualified interpreters. Also, the meeting rooms will be adequately illuminated so signing by interpreters can be easily seen.

(ii) For persons with vision impairments, readers and/or cassette materials, as necessary, to enable full participation. Also, meeting rooms will be adequately illuminated.

(iii) Agenda and other conference material(s) shall be translated into a usable form for persons with sensory impairments. Readers, braille translations, large print text, and/or tape recordings are all acceptable. These materials shall be available to individuals with sensory impairments upon their arrival.

(4) The Contractor is responsible for making a reasonable effort to ascertain the number of individuals with sensory impairments who plan to attend the meeting, conference, or seminar. However, if it can be determined that there will be no person with sensory impairment in attendance, the provision of those services under paragraph (c) of this clause for the nonrepresented group, or groups, is not required.

(End of clause)

352.270–2 Indian preference.

The following clause shall be used as prescribed in 370.202(a):

Indian Preference (Apr. 1984)

(a) The Contractor agrees to give preference in employment opportunities under this contract to Indians who can perform required work, regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. To the extent feasible and consistent with the efficient performance of this contract, the Contractor further agrees to give preference in employment and training opportunities under this contract to Indians who are not fully qualified to perform regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. The Contractor also agrees to give preference to Indian organizations and Indian-owned economic enterprises in the awarding of any subcontracts to the extent feasible and consistent with the efficient performance of this contract. The Contractor shall maintain statistical records as are necessary to indicate compliance with this paragraph.

(b) In connection with the Indian employment preference requirements of this clause, the Contractor shall provide opportunities for training incident to such employment. Such training shall include on-the-job, classroom or apprenticeship training which is designed to increase the vocational effectiveness of an Indian employee.

(c) If the Contractor is unable to fill its employment and training opportunities after giving full consideration to Indians as required by this clause, those needs may be satisfied by selection of persons other than Indians in accordance with the clause of this contract entitled ''Equal Opportunity.''

(d) If no Indian organizations or Indian-owned economic enterprises are available under reasonable terms and conditions, including price, for awarding of subcontracts in connection with the work performed under this contract, the Contractor agrees to comply with the provisions of this contract involving utilization of small business concerns, small disadvantaged business concerns, and women-owned small business concerns.

(e) As used in this clause:

(1) ''Indian'' means a person who is a member of an Indian Tribe. If the Contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of the Tribe.

(2) ''Indian Tribe'' means an Indian Tribe, pueblo, band, nation, or other organized group or community, including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) ''Indian organization'' means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451); and

(4) ''Indian-owned economic enterprise'' means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active operation and control of the enterprise.

(f) The Contractor agrees to include the provisions of this clause, including this paragraph (f) of this clause, in each subcontract awarded at any tier under this contract.

(g) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270–3 Indian preference program.

The following clause shall be used as prescribed in 370.202(b):

Indian Preference Program (Apr. 1984)

(a) In addition to the requirements of the clause of this contract entitled ''Indian Preference,'' the Contractor agrees to establish and conduct an Indian preference program which will expand opportunities for Indians to receive preference for employment and training in connection with the work to be performed under this contract, and which will expand the opportunities for Indian organizations and Indian-owned economic enterprises to receive a preference in the awarding of subcontracts. In this connection, the Contractor shall:

(1) Designate a liaison officer who will maintain liaison with the Government and the Tribe(s) on Indian preference matters; supervise compliance with the provisions of this clause; and administer the Contractor's Indian preference program.

(2) Advise its recruitment sources in writing and include a statement in all advertisements for employment that Indian applicants will be given preference in employment and training incident to such employment.

(3) Not more than twenty (20) calendar days after award of the contract, post a written notice in the Tribal office of any reservations on which or near where the work under this contract is to be performed

that sets forth the Contractor's employment needs and related training opportunities. The notice shall include the approximate numbers and types of employees needed; the approximate dates of employment; the experience or special skills required for employment, if any; training opportunities available; and other pertinent information necessary to advise prospective employees of any other employment requirements. The Contractor shall also request the Tribe(s) on or near whose reservation(s) the work is to be performed to provide assistance to the Contractor in filling its employment needs and training opportunities. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to contact in regard to the posting of notices and requests for Tribal assistance.

(4) Establish and conduct a subcontracting program which gives preference to Indian organizations and Indian-owned economic enterprises as subcontractors and suppliers under this contract. The Contractor shall give public notice of existing subcontracting opportunities and, to the extent feasible and consistent with the efficient performance of this contract, shall solicit bids or proposals only from Indian organizations or Indian-owned economic enterprises. The Contractor shall request assistance and information on Indian firms qualified as suppliers or subcontractors from the Tribe(s) on or near whose reservation(s) the work under the contract is to be performed. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to be contacted in regard to the request for assistance and information. Public notices and solicitations for existing subcontracting opportunities shall provide an equitable opportunity for Indian firms to submit bids or proposals by including: A clear description of the supplies or services required, including quantities, specifications, and delivery schedules which facilitate the participation of Indian firms; A statement indicating that preference will be given to Indian organizations and Indian-owned economic enterprises in accordance with section 7(b) of Public Law 93–638 (88 Stat. 2205; 25 U.S.C. 450e(b)); Definitions for the terms ''Indian organization'' and ''Indian-owned economic enterprise'' as prescribed under the ''Indian Preference'' clause of this contract; A statement to be completed by the bidder or offeror that it is an Indian organization or Indian-owned economic enterprise; and A closing date for receipt of bids or proposals which provides sufficient time for preparation and submission of a bid or proposal. If after soliciting bids or proposals from Indian organizations and Indian-owned economic enterprises, no responsive bid or acceptable proposal is received, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference'' clause of this contract. If one or more responsible bids or acceptable proposals are received, award shall be made to the low responsible bidder or acceptable offeror if the price is determined to be reasonable. If the low responsive bid or acceptable proposal is determined to be unreasonable as to price, the Contractor shall attempt to negotiate a reasonable price and award a subcontract. If a reasonable price cannot be agreed upon, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference'' clause of this contract.

(5) Maintain written records under this contract which indicate: The numbers of Indians seeking employment for each employment position available under this contract; The number and types of positions filled by Indians and non-Indians, and the total number of Indians employed under this contract; For those positions where there are both Indian and non-Indian applicants, and a non-Indian is selected for employment, the reason(s) why the Indian applicant was not selected; Actions taken to give preference to Indian organizations and Indian-owned economic enterprises for subcontracting opportunities which exist under this contract; Reasons why preference was not given to Indian firms as subcontractors or suppliers for each requirement where it was determined by the Contractor that such preference would not be consistent with the efficient performance of the contract; and The number of Indian organizations and Indian-owned economic enterprises contacted, and the number receiving subcontract awards under this contract.

(6) Submit to the Contracting Officer for approval a quarterly report which summarizes the Contractor's Indian preference program and indicates the number and types of available positions filled by Indians and non-Indians, and the dollar amounts of all subcontracts awarded to Indian organizations and Indian-owned economic enterprises, and to all other firms.

(7) Maintain records pursuant to this clause and keep them available for review by the Government until expiration of one (1) year after final payment under this contract, or for such longer period as may be required by any other clause of this contract or by applicable law or regulation.

(b) For purposes of this clause, the following definitions of terms shall apply:

(1) The terms ''Indian,'' ''Indian Tribe,'' ''Indian Organization,'' and ''Indian-owned economic enterprise'' are defined in the clause of this contract entitled ''Indian Preference.''

(2) ''Indian reservation'' includes Indian reservations, public domain Indian Allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 *et seq.*)

(3) ''On or near an Indian Reservation'' means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

(c) Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not conflict with any Federal statutory or regulatory requirement dealing with the award and administration of contracts.

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in each subcontract awarded at any tier under this contract and to notify the Contracting Officer of such subcontracts.

(e) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270–4 Pricing of adjustments.

Insert the following clause in all solicitations and resultant fixed-priced contracts other than purchase orders.

Pricing of Adjustments (Jan. 2001)

When costs are a factor in determination of a contract price adjustment pursuant to the ''Changes'' clause or any provision of this contract, such costs shall be determined in accordance with the applicable cost principles and procedures set forth below:

Principles	Types of organizations
(a) Subpart 31.2 of the Federal Acquisition Regulation.	Commercial.
(b) Subpart 31.3 of the Federal Acquisition Regulation.	Educational.
(c) Subpart 31.6 of the Federal Acquisition Regulation.	State, local, and federally recognized Indian tribal governments.
(d) 45 CFR Part 74 Appendix E.	Hospitals (permforming research and development contracts only.
(e) Subpart 31.7 of the Federal Acquisition Regulation.	Other nonprofit institutions.

(End of clause)

352.270–5 Key personnel.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

Key Personnel (Apr. 1984)

The personnel specified in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the Contractor without the written consent of the Contracting Officer; provided, that the Contracting Officer may ratify in writing such diversion and such ratification shall constitute the consent of the Contracting Officer required by this clause. The contract may be modified from time to time during the course of the contract to either add or delete personnel, as appropriate.

(End of clause)

352.270–6 Publications and Publicity.

Insert the following clause in all solicitations and resultant contracts.

Publications and Publicity (Jul. 1991)

(a) Unless otherwise specified in this contract, the Contractor is encouraged to publish the results of its work under this contract. A copy of each article submitted by the Contractor for publication shall be promptly sent to the Project Officer. The Contractor shall also inform the Project Officer when the article or other publication is published, and furnish a copy of it as finally published.

(b) The Contractor shall include in any publication resulting from work performed under this contract a disclaimer reading as follows:

The content of this publication does not necessarily reflect the views or policies of the Department of Health and Human Services, nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government.''

(End of clause)

352.270–7 Paperwork Reduction Act.

Insert the following clause in all solicitations and contracts.

Paperwork Reduction Act (Jan. 2001)

(a) In the event that it subsequently becomes a contractual requirement to collect or record information calling either for answers to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is outside the scope of their employment, for use by the Federal government or disclosure to third parties, the Paperwork Reduction Act of 1995 (Pub. L. 104–13) shall apply to this contract. No plan, questionnaire, interview guide or other similar device for collecting information (whether repetitive or single-time) may be used without first obtaining clearance from the Office of Management and Budget (OMB). Contractors and Project Officers should be guided by the provisions of 5 CFR Part 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the HHS operating division or Office of the Secretary Reports Clearance Officer to determine the procedures for acquiring OMB clearance.

(b) The Contractor shall obtain the required OMB clearance through the Project Officer before expending any funds or making public contracts for the collection of data. The authority to expend funds and proceed with the collection of information shall be in writing by the Contracting Officer. The Contractor must plan at least 120 days for OMB clearance. Excessive delays caused by the Government which arises out of causes beyond the control and without the fault or negligence of the Contractor will be considered in accordance with the Excusable Delays or Default clause of this contract

(End of clause)

352.270–8 Protection of human subjects.

(a) The following provision shall be included in solicitations expected to involve human subjects:

Notice to Offerors of Requirements of 45 CFR Part 46, Protection of Human Subjects (Jan. 2001)

(a) Copies of the Department of Health and Human Services (Department) regulations for the protection of human subjects, 45 CFR Part 46, are available from the Office for Protection from Research Risks (OPRR), National Institutes of Health, Bethesda, Maryland 20892. The regulations provide a systematic means, based on established ethical principles, to safeguard the rights and welfare of individuals who participate as subjects in research activities supported or conducted by the Department.

(b) The regulations define a human subject as a living individual about whom an investigator (whether professional or student) conducting research obtains data through intervention or interaction with the individual, or identifiable private information. The regulations extend to the use of human organs, tissue, and body fluids from individually identifiable human subjects as well as to graphic, written, or recorded information derived from individually identifiable human subjects. The use of autopsy materials is governed by applicable State and local law and is not directly regulated by 45 CFR Part 46.

(c) Activities in which the only involvement of human subjects will be in one or more of the categories set forth in 45 CFR 46.101(b)(1–6) are exempt from coverage.

(d) Inappropriate designations of the noninvolvement of human subjects or of exempt categories of research in a project may result in delays in the review of a proposal. The National Institutes of Health will make a final determination of whether the proposed activities are covered by the regulations or are in an exempt category, based on the information provided in the proposal. In doubtful cases, prior consultation with OPRR, (telephone: 301–496–7014), is recommended.

(e) In accordance with 45 CFR Part 46, prospective Contractors being considered for award shall be required to file with OPRR an acceptable Assurance of Compliance with the regulations, specifying review procedures and assigning responsibilities for the protection of human subjects. The initial and continuing review of a research project by an institutional review board shall assure that the rights and welfare of the human subjects involved are adequately protected, that the risks to the subjects are reasonable in relation to the potential benefits, if any, to the subjects and the importance of the knowledge to be gained, and that informed consent will be obtained by methods that are adequate and appropriate. Prospective Contractors proposing research that involves human subjects shall be contacted by OPRR and given detailed instructions for establishing an institutional review board and filing an Assurance of Compliance.

(f) It is recommended that OPRR be consulted for advice or guidance concerning either regulatory requirements or ethical issues pertaining to research involving human subjects.

(End of provision)

(b) The following clause shall be included in solicitations and resultant contracts involving human subjects:

Protection of Human Subjects (Jan. 2001)

(a) The Contractor agrees that the rights and welfare of human subjects involved in research under this contract shall be protected in accordance with 45 CFR Part 46 and with the Contractor's current Assurance of Compliance on file with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH). The Contractor further agrees to provide certification at least annually that the Institutional Review Board has reviewed and approved the procedures, which involve human subjects in accordance with 45 CFR Part 46 and the Assurance of Compliance.

(b) The Contractor shall bear full responsibility for the performance of all work and services involving the use of human subjects under this contract in a proper manner and as safely as is feasible. The parties hereto agree that the Contractor retains the right to control and direct the performance of all work under this contract. Nothing in this contract shall be deemed to constitute the Contractor or any subcontractor, agent or employee of the Contractor, or any other person, organization, institution, or group of any kind whatsoever, as the agent or employee of the Government. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto, whether requiring professional judgement or otherwise, as an independent contractor without imputing liability on the part of the Government for the acts of the Contractor or its employees.

(c) If at any time during the performance of this contract, the Contracting officer determines, in consultation with the OPRR, NIH, that the Contractor is not in compliance with any of the requirements and/or standards stated in paragraphs (a) and (b) above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects the noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OPRR, NIH, terminate this contract in a whole or in part, and the Contractor's name may be removed

form the list of those contractors with approved Health and Human Services Human Subject Assurances.

(End of clause)

352.270–9 Care of laboratory animals.

(a) The following provision shall be included in solicitations expected to involve vertebrate animals:

Notice to Offerors of Requirement for Adequate Assurance of Protection of Vertebrate Animal Subjects (Sep. 1985)

The PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions establishes a number of requirements for research activities involving animals. Before award may be made to an applicant organization, the organization shall file, with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), a written Animal Welfare Assurance which commits the organization to comply with the provisions of the PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions, the Animal Welfare Act, and the Guide for the Care and Use of Laboratory Animals prepared by the Institute of Laboratory Animal Resources. In accordance with the PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions, applicant organizations must establish a committee, qualified through the experience and expertise of its members, to oversee the institution's animal program, facilities and procedures. No award involving the use of animals shall be made unless the Animal Welfare Assurance has been approved by OPRR. Prior to award, the Contracting Officer will notify Contractor(s) selected for projects that involve live vertebrate animals that an Animal Welfare Assurance is required. The Contracting Officer will request that OPRR negotiate an acceptable Animal Welfare Assurance with those Contractor(s). For further information, OPRR may be contacted at NIH, Bethesda, Maryland 20892 (301–496–7041).

(End of provision)

(b) The following clause shall be included in all solicitations and resultant contracts involving research on vertebrate animals:

Care of Live Vertebrate Animals (Jan.2001)

(a) Before undertaking performance of any contract involving animal related activities, the Contractor shall register with the Secretary of Agriculture of the United States in accordance with 7 U.S.C. 2136 and 9 CFR sections 2.25 through 2.28. The Contractor shall furnish evidence of the registration to the Contracting Officer.

(b) The Contractor shall acquire vertebrate animals used in research from a dealer licensed by the Secretary of Agriculture under 7 U.S.C. 2133 and 9 CFR Sections 2.1–2.11, or from a source that is exempt from licensing under those sections.

(c) The Contractor agrees that the care and use of any live vertebrate animals used or intended for use in the performance of this contract will conform with the PHS Policy on Humane Care of Use of Laboratory Animals, the current Animal Welfare Assurance, the Guide for the Care and Use of Laboratory Animals prepared by the Institute of Laboratory Animal Resources and the pertinent laws and regulations of the United States Department of Agriculture (see 7 U.S.C. 2131 *et seq.* and 9 CFR Subchapter A, Parts 1–4). In case of conflict between standards, the more stringent standard shall be used.

(d) If at any time during performance of this contract, the Contracting Officer determines, in consultation with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), that the Contractor is not in compliance with any of the requirements and/or standards stated in paragraphs (a) through (c) above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects the noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OPRR, NIH, terminate this contract in whole or in part, and the Contractor's name may be removed from the list of those contractors with approved PHS Animal Welfare Assurances.

Note: Note: The Contractor may request registration of its facility and a current listing of licensed dealers from the Regional Office of the Animal and Plant Health Inspection Service (APHIS), USDA, for the region in which its research facility is located. The location of the appropriate APHIS Regional Office, as well as information concerning this program may be obtained by contacting the Animal Care Staff, USDA/APHIS, 4700 River Road, Riverdale, Maryland 20737.

(End of Clause)

PART 353—FORMS

Subpart 353.3—Illustrations of Forms

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 353.3—Illustrations of Forms

353.370–674 Form HHS 674, Structured Approach Profit/Fee Objective.

This form is available from local cost advisory personnel. For copies of the form, contact the Program Support Center at (301) 443–6740.

PART 370—SPECIAL PROGRAMS AFFECTING ACQUISITION

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Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 370.1—Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities

370.101 Policy.

(a) It is the policy of HHS that all meetings, conferences, and seminars be accessible to persons with disabilities. For the purpose of this policy, accessibility is defined as both physical access to meeting, conference, and seminar sites, and aids and services to enable individuals with sensory disabilities to fully participate in meetings, conferences, and seminars.

(b) In regard to acquisition, the policy is applicable to all contracts where the statement of work requires the contractor to conduct meetings, conferences, or seminars that are open to the public or involve HHS personnel, but not to ad hoc meetings that may be necessary or incidental to contract performance.

370.102 Responsibilities.

(a) The contracting officer shall include the clause in 352.270–1 in every solicitation and resulting contract when the statement of work requires the contractor to conduct meetings, conferences, or seminars in accordance with 370.101(b).

(b) The project officer shall be responsible for obtaining, reviewing, and approving the contractor's plan, which is to be submitted in response to

paragraph (a) of the contract clause in 352.270–1. A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars will be acceptable. The project officer, prior to approving the plan, should consult with the Office of Engineering Services serving the region where the meeting, conference, or seminar is to be held, to assure that the contractor's plan meets the accessibility requirements of the contract clause. The Office of Engineering Services should determine the adequacy of the contractor's plan, and notify the project officer, in writing, within ten (10) working days of receiving the request from the project officer.

Subpart 370.2—Indian Preference in Employment, Training, and Subcontracting Opportunities

370.201 Statutory requirements.

Section 7(b) of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, 88 Stat. 2205, 25 U.S.C. 450e(b), requires:

''Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible:

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(b) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77).''

370.202 Applicability.

The Indian Preference clause set forth in 352.270–2 and the Indian Preference Program clause set forth in 352.270–3 have been developed to implement section 7 (b) of Public Law 93–638 for all activities of the Department. The clauses shall be used by any affected departmental contracting activity as follows, except solicitations issued and contracts awarded pursuant to Title I of Public Law 93–638 (25 U.S.C. 450 et seq.) are exempted:

(a) The Indian Preference clause (352.270–2) shall be included in each solicitation and resultant contract, regardless of dollar amount:

(1) When the contract is to be awarded pursuant to an act specifically authorizing contracts with Indian organizations; or

(2) Where the work to be performed under the contract is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public.

(b) The Indian Preference Program clause (352.270–3) shall be included in each solicitation and resultant contract when:

(1) The dollar amount of the acquisition is expected to equal or exceed $50,000 for nonconstruction work or $100,000 for construction work;

(2) The Indian Preference clause is to be included in the solicitation and resultant contract; and

(3) The determination is made, prior to solicitation, that the work to be performed under the resultant contract will take place in whole or in substantial part on or near an Indian reservation(s). In addition, the Indian Preference Program clause may be included in any solicitation and resultant contract below the $50,000 or $100,000 level for nonconstruction or construction contracts, respectively, but which meet the requirements of paragraphs (b)(2) and (3) of this section 370.202, and, in the opinion of the contracting activity, offer substantial opportunities for Indian employment, training, and subcontracting.

370.203 Definitions.

For purposes of this subpart 370.2, the following definitions shall apply:

(a) *Indian* means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of the Tribe.

(b) *Indian Tribe* means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(c) *Indian organization* means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77, 25 U.S.C. 1451).

(d) *Indian-owned economic enterprise* means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and the ownership shall encompass active operation and control of the enterprise.

(e) *Indian reservation* includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 *et seq.*)

(f) *On or near an Indian Reservation* means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

370.204 Compliance enforcement.

(a) The concerned contracting activity shall be responsible for conducting periodic reviews to insure contractor compliance with the requirements of the clauses set forth in 352.270–2 and 352.270–3. These reviews may be conducted with the assistance of the Indian Tribe(s) concerned.

(b) Complaints of noncomplaince with the requirements of the clauses set forth in 352.270–2 and 352.270–3 which are filed in writing with the contracting activity shall be promptly investigated and resolved by the contracting officer.

370.205 Tribal preference requirements.

(a) Where the work under a contract is to be performed on an Indian reservation, the contracting activity may supplement the clause set forth in 352.270–3 by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed. The supplemental requirements shall be jointly developed for the contract by the contracting activity and the Tribe. Supplemental preference requirements must represent a further implementation of the requirements of section 7(b) of Public Law 93–638 and must be approved by the affected program director and approved for legal sufficiency by the Business and Administrative Law Division, OGC, or a regional attorney before being added to a solicitation and resultant contract. Any supplemental preference requirements to be added to the clause in 352.270–3 shall be included in the solicitation and clearly identified in order to insure uniform understanding of the additional requirements by all prospective bidders or offerors.

(b) Nothing in this part shall be interpreted to preclude Tribes from independently developing and enforcing their own tribal preference requirements. Such independently

developed tribal preference requirements shall not, except as provided in paragraph (a) of this section, become a requirement in contracts covered under this subpart 370.2, and must not conflict with any Federal statutory or regulatory requirement concerning the award and administration of contracts.

Subpart 370.3—Acquisitions Involving Human Subjects

370.300 Scope of subpart.

This subpart applies to all research and development activities involving human subjects conducted under contract (see 45 CFR 46.102(d) and (f)).

370.301 Policy.

It is the policy of the Department of Health and Human Services (DHHS) that no contract involving human subjects shall be awarded until acceptable assurance has been given that the activity will be subject to initial and continuing review by an appropriate Institutional Review Board (IRB) as described in DHHS regulations at 45 CFR 46.103. An applicable Multiple Project Assurance (MPA) or Single Project Assurance (SPA), approved by the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), shall be required of each contractor, subcontractor, or cooperating institution having responsibility for human subjects involved in performance of the contract. The OPRR, NIH, is responsible for negotiating assurances covering all DHHS-supported or DHHS-conducted activities involving human subjects. Contracting officers shall be guided by OPRR regarding nonaward or termination of a contract due to inadequate assurance or breach of assurance for protection of human subjects.

370.302 Types of assurances.

Assurances may be one of two types:

(a) *Multiple Project Assurance (MPA).* An MPA describes the oversight procedures applicable to all DHHS-supported human subjects activities within an institution having a significant number of concurrent projects. An MPA listed in OPRR's current ''List of Institutions Which Have an Approved MPA'' will be considered acceptable for purposes of this policy.

(b) *Single Project Assurance (SPA).* An SPA describes the oversight procedures applicable to a single DHHS-supported human subjects activity. SPAs may be approved in modified form to meet unusual requirements. SPAs are not solicited from institutions with OPRR approved MPAs. Copies of proposals selected for negotiation and requiring one or more SPAs shall be forwarded to the Human Subjects Assurance Branch, OPRR, NIH MSC 7507, 6100 Executive Blvd., Room 3B01, Rockville, Maryland 20892, as early as possible so that timely action may be taken to secure the SPA(s).

370.303 Notice to offerors.

(a) Solicitations shall contain the notice to offerors in 352.270–8(a) whenever contract performance is expected to involve human subjects.

(b) IRB approval of proposals submitted by institutions having an OPRR-approved MPA should be certified in the manner required by instructions for completion of the contract proposal; or by completion of a DHHS Form 310, Protection of Human Subjects Assurance Identification/Certification/Declaration; or by letter indicating the institution's OPRR-assigned MPA number, the date of IRB review and approval, and the type of review (convened or expedited). The date of IRB approval must not be more than 12 months prior to the deadline for proposal submission.

(c) SPAs for contractors, subcontractors, or cooperating institutions generally will not be requested prior to determination that a contract proposal has been selected for negotiation. When an SPA is submitted, it provides certification for the initial contract period. No additional documentation is required. If the contract provides for additional years to complete the project, the noncompetitive renewal proposal shall be certified in the manner described in the preceding paragraph.

370.304 Contract clause.

The clause set forth in 352.270–8(b) shall be inserted in all solicitations and resultant contracts involving human subjects.

Subpart 370.4—Acquisitions Involving the Use of Laboratory Animals

370.400 Scope of subpart.

This subpart applies to all research, research training and biological testing activities involving live vertebrate animals conducted under contract (see Public Health Service Policy on Humane Care and Use of Laboratory Animals (PHS Policy), Rev. 1986, Repr. 1996).

370.401 Policy.

(a) It is the policy of the Department of Health and Human Services (DHHS) and the Public Health Service agencies that no contract involving live vertebrate animals shall be awarded until acceptable assurance has been given that the activity will be subject to initial and continuing review by an appropriate Institutional Animal Care and Use Committee (IACUC) as described in the PHS Policy at IV. B. 6. and 7. An applicable Full Animal Welfare Assurance or Interinstitutional Agreement/Assurance, approved by the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), shall be required of each contractor, subcontractor, or cooperating institution having responsibility for animal care and use involved in performance of the contract (see PHS Policy II., IV. A., and V. B.).

(b) The OPRR, NIH, is responsible for negotiating assurances covering all DHHS/PHS-supported or DHHS/PHS-conducted activities involving the care and use of live vertebrate animals. Contracting officers shall be guided by OPRR regarding adequate animal care, and use, approval, disapproval, restriction, or withdrawal of approval of assurances (see PHS Policy V. A.).

370.402 Assurances.

(a) Assurances may be one of two types:

(1) *Full Animal Welfare Assurance (AWA).* An AWA describes the institution's complete program for the care and use of animals, including but not limited to the facilities, occupational health, training, veterinary care, IACUC procedures and lines of authority and responsibility. An AWA listed in OPRR's list of institutions which have an approved full AWA will be considered acceptable for purposes of this policy.

(2) *Interinstitutional Agreement/Assurance (IAA).* An IAA describes the arrangements between an offeror and usually a subcontractor where animal activities will occur. An IAA is limited to the specific award or single project.

(b) Copies of proposals selected for negotiation and requiring an assurance shall be forwarded to the Assurance Branch, Division of Animal Welfare, OPRR, NIH MSC 7507, 6100 Executive Blvd., Room 3B01, Rockville, Maryland 20892, as early as possible in order that timely action may be taken to secure the necessary assurances.

(c) A contractor providing animal care services at an assured entity, such as a Government-owned, contractor-operated (GOCO) site, does not need a separate assurance because the GOCO site normally covers the contractor services in the GOCO site assurance.

370.403 Notice to offerors.

Solicitations shall contain the notice to offerors in 352.270–9(a) whenever contract performance is expected to involve the use of live vertebrate animals.

(a) For offerors having a full AWA on file with OPRR, IACUC approval of the use of animals shall be submitted in the manner required by instructions for completion of the contract proposal, but prior to the technical review of the proposal. The date of IACUC review and approval must not be more than 36 months prior to the deadline for proposal submission.]

(b) Non-assured offerors are not required to submit assurances or IACUC approval with proposals. OPRR will contact contractors, subcontractors and cooperating institutions to negotiate necessary assurances and verify IACUC approvals when requested by appropriate DHHS/PHS staff.

370.404 Contract clause.

The clause set forth in 352.270–9(b) shall be included in all solicitations and resultant contracts involving the care and use of live vertebrate animals.

Subpart 370.5—Acquisitions Under the Buy Indian Act

370.500 Scope of subpart.

This subpart sets forth the policy on preferential acquisition from Indians under the negotiation authority of the Buy Indian Act. Applicability of this subpart is limited to acquisitions made by or on behalf of the Indian Health Service of the Public Health Service.

370.501 Policy.

(a) The Indian Health Service will utilize the negotiation authority of the Buy Indian Act to give preference to Indians whenever the use of that authority is authorized and is practicable. The Buy Indian Act, 25 U.S.C. 47, prescribes the application of the advertising requirements of section 3709 of the Revised Statutes to the acquisition of Indian supplies. As set out in 25 U.S.C. 47, the Buy Indian Act provides as follows:

> So far as may be practicable Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

(b) The functions, responsibilities, authorities, and duties of the Secretary of the Interior for maintenance and operation of hospital and health facilities for Indians and for the conservation of the health of Indians are transferred to the Surgeon General of the United States under the supervision of the Secretary of Health and Human Services, 42 U.S.C. 2001 (a). Accordingly, the Secretary of Health and Human Services is authorized to use the Buy Indian Act in the acquisition of products of Indian industry in connection with the maintenance and operation of hospital and health facilities for Indians and for the conservation of the health of Indians. This authority has been delegated exclusively to the Indian Health Service and is not available for use by any other HHS component (unless that component is making an acquisition on behalf of the Indian Health Service).

(c) Use of the Buy Indian Act negotiation authority has been emphasized in subsequent legislation, particularly Public Law 94–437 and Public Law 96–537.

370.502 Definitions.

Buy Indian contract means any contract involving activities covered by the Buy Indian Act that is negotiated under the provisions of 41 U.S.C. 252(c) and 25 U.S.C. 47 between an Indian firm and a contracting officer representing the Indian Health Service.

Indian means a member of any tribe, pueblo, band, group, village or community that is recognized by the Secretary of the Interior as being Indian or any individual or group of individuals that is recognized by the Secretary of the Interior or the Secretary of Health and Human Services. The Secretary of Health and Human Services in making determinations may take into account the determination of the tribe with which affiliation is claimed.

Indian firm means a sole enterprise, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians (including, for the purpose of sections 301 and 302 of Public Law 94–437, former or currently federally recognized Indian tribes in the State of New York) or by an Indian firm; or a nonprofit firm organized for the benefit of Indians and controlled by Indians (see 370.503(a)).

Product of Indian industry means anything produced by Indians through physical labor or by intellectual effort involving the use and application of skills by them.

370.503 Requirements.

(a) *Indian ownership.* The degree of Indian ownership of an Indian firm shall be at least 51 percent during the period covered by a Buy Indian contract.

(b) *Joint ventures.* An Indian firm may enter into a joint venture with other entities for specific projects as long as the Indian firm is the managing partner. However, the joint venture must be approved by the contracting officer prior to the award of a contract under the Buy Indian Act.

(c) *Bonds.* In the case of contracts for the construction, alteration, or repair of public buildings or public works, performance and payment bonds are required by the Miller Act (40 U.S.C. 270a–270f) and FAR part 28. In the case of contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian tribe, bonds are not required. However, bonds are required when dealing with private business entities which are owned by an Indian tribe or members of an Indian tribe. Bonds may be required of private business entities which are joint ventures with, or subcontractors of, an Indian tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian tribe. A bid guarantee or bid bond is required only when a performance or payment bond is required.

(d) *Indian preference in employment, training and subcontracting.* Contracts awarded under the Buy Indian Act are subject to the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act 25 U.S.C. 450e, which requires that preference be given to Indians in employment, training, and subcontracting. The Indian Preference clause set forth in 352.270–2 shall be included in all Buy Indian solicitations and resultant contracts. The Indian Preference Program clause set forth in 352.270–3 shall be used as specified in 370.202(b). All requirements set forth in subpart 370.2 which are applicable to the instant Buy Indian acquisition shall be followed by the contracting officer, e.g., sections 370.204 and 370.205.

(e) *Subcontracting.* Not more than 50 percent of the work to be performed under a prime contract awarded pursuant to the Buy Indian Act shall be subcontracted to other than Indian firms. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment.

(f) *Wage rates.* A determination of the minimum wage rates by the Secretary of Labor as required by the Davis-Bacon Act (40 U.S.C. 276a) shall be included in all contracts awarded under the Buy Indian Act for over $2,000 for construction, alteration, or repair, including painting and decorating, of public buildings and public works,

except contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian tribe. The wage rate determination is to be included in contracts with private business entities even if they are owned by an Indian tribe or a member of an Indian tribe and in connection with joint ventures with, or subcontractors of, an Indian tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian tribe.

370.504 Competition.

(a) Contracts to be awarded under the Buy Indian Act shall be subject to competition among Indians or Indian concerns to the maximum extent that competition is determined by the contracting officer to be practicable. When competition is determined not to be practicable, a Justification for Other than Full and Open Competition shall be prepared in accordance with 306.303 and subsequently retained in the contract file.

(b) Solicitations must be synopsized and publicized in the Commerce Business Daily and copies of the synopses sent to the tribal office of the Indian tribal government directly concerned with the proposed acquisition as well as to Indian concerns and others having a legitimate interest. The synopsis should state that the acquisition is restricted to Indian firms under the Buy Indian Act.

370.505 Responsibility determinations.

(a) A contract may be awarded under the Buy Indian Act only if it is first determined that the project or function to be contracted for is likely to be satisfactorily performed under that contract and the project or function is likely to be properly completed or maintained under that contract.

(b) The determination called for by paragraph (a) of this section, to be made prior to the award of a contract, will be made in writing by the contracting officer reflecting an analysis of the standards set forth in FAR 9.104–1.

[FR Doc. 01–21 Filed 1–16–01; 8:45 am]

BILLING CODE 4150–24–P

CIRCULAR A-102 (REVISED 10/7/94, As Further Amended 8/29/97)

OMB Circulars: State and Local Governments

What is the Grants Management Common Rule?

The "Common Rule" is the "Uniform Administrative Requirements for Grants And Cooperative Agreements to State and Local Governments". For the Department of Health and Human Services, the Common Rule is at 45 CFR 92.

On March 12, 1987, the President directed the Federal grantmaking agencies to issue a grants management common rule to adopt governmentwide terms and conditions for grants to States and local governments. In 1988, OMB revised Circular A-102 to include guidance to Federal agencies on matters not covered by the grants management common rule. The attachments to Circular A-102 were replaced by the grants management common rule.

It is important for a grantee to review the regulations of their Federal awarding agency.

How are cognizant agencies determined for indirect costs?

The Department of the Interior is the cognizant agency for all Indian tribal governments.

To simplify relations between Federal grantees and awarding agencies, OMB established the cognizant agency concept, under which a single agency represents all others in dealing with grantees in common areas. In this case, the cognizant agency reviews and approves grantees' indirect cost rates. Approved rates must be accepted by other agencies, unless specific program regulations restrict the recovery of indirect costs.

OMB published a list of cognizant agency assignments for some State agencies, cities and counties on January 6, 1986 (51 FR 552). The cognizant agency for governmental units not on that list is the one that provides the most grant funds to the entity. The Department of Health and Human Services (HHS) is the cognizant agency for all States and most cities.

The cognizant agency for non-profit organizations is determined by calculating which Federal agency provides the most grant funding. For hospitals, HHS serves as the main cognizant agency.

Which Circulars must a Grantee Follow?

Although there are six grant circulars, only three are needed, depending on type of entity. States, local governments, and Indian Tribes follow:

- A-87 for cost principles
- A-102 for administrative requirements, and
- A-133 for audit requirements

OMB Circular A-102
August 29, 1997

MEMORANDUM FOR THE RECORD
FROM: Norwood J. Jackson
Deputy Controller
Office of Federal Financial Management
SUBJECT: Recompilation of OMB Circular A-102
I certify that the attached document constitutes a recompilation of Office of Management and Budget Circular A-102, "Grants and Cooperative Agreements with State and Local Governments." The recompilation consists of the last complete revision of the Circular published at 59 FR 52224 (dated October 7, 1994, published October 14, 1994), as further amended at 62 FR 45934 (August 29, 1997).

CIRCULAR A-102 (REVISED 10/7/94, As Further Amended 8/29/97)

CIRCULAR NO. A-102
Revised

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Grants and Cooperative Agreements with State and Local Governments

1. **Purpose**. This Circular establishes consistency and uniformity among Federal agencies in the management of grants and cooperative agreements with State, local, and federally- recognized Indian tribal governments. This revision supersedes Office of Management and Budget (OMB) Circular No. A-102, dated March 3, 1988.

2. **Authority**. This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; Reorganization Plan No. 2 of 1970; Executive Order 11541 and the Chief Financial Officers Act, 31 U.S.C. 503. Also included in the Circular are standards to ensure consistent implementation of sections 202, 203, and 204 of the Intergovernmental Cooperation Act of 1968, the Office of Federal Procurement Policy Act Amendments of 1983, and sections 6301-08, title 31, United States Code.

3. **Background**. On March 12, 1987, the President directed all affected agencies to issue a grants management common rule to adopt government-wide terms and conditions for grants to State and local governments, and they did so. In 1988, OMB revised the Circular to provide guidance to Federal agencies on other matters not covered in the common rule.

4. **Required Action**. Consistent with their legal obligations, all Federal agencies administering programs that involve grants and cooperative agreements with State, local and Indian tribal governments (grantees) shall follow the policies in this Circular. If the enabling legislation for a specific grant program prescribes policies or requirements that differ from those in this Circular, the provisions of the enabling legislation shall govern.

5. **OMB Responsibilities**. OMB may grant deviations from the requirements of this Circular when permissible under existing law. However, in the interest of uniformity and consistency, deviations will be permitted only in exceptional circumstances.

6. **Information Contact.** Further information concerning this Circular may be obtained from:

Office of Federal Financial Management
Office of Management and Budget
Room 6025
New Executive Office Building
Washington, DC 20503
(202) 395-3993

7. **Termination Review Date.** The Circular will have a policy review three years from the date of issuance.

8. **Effective Date.** The Circular is effective on publication.

Attachment

GRANTS AND COOPERATIVE AGREEMENTS
WITH STATE AND LOCAL GOVERNMENTS

1. **Pre-Award Policies**.

a. **Use of grants and cooperative agreements**. Sections 6301-08, title 31, United States Code govern the use of grants, contracts and cooperative agreements. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement."

b. **Advance Public Notice and Priority Setting**.

(1) Federal agencies shall provide the public with an advance notice in the **Federal Register**, or by other appropriate means, of intended funding priorities for discretionary assistance programs, unless funding priorities are established by Federal statute. These priorities shall be approved by a policy level official.

(2) Whenever time permits, agencies shall provide the public an opportunity to comment on intended funding priorities.

(3) All discretionary grant awards in excess of $25,000 shall be reviewed for consistency with agency priorities by a policy level official.

c. **Standard Forms for Applying for Grants and Cooperative Agreements**.

(1) Agencies shall use the following standard application forms unless they obtain Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 35) and the 5 CFR Part 1320, "Controlling Paperwork Burdens on the Public":

SF-424 Facesheet
SF-424a Budget Information (Non-Construction)
SF-424b Standard Assurances (Non-Construction)
SF-424c Budget Information (Construction)
SF-424d Standard Assurances (Construction)

When different or additional information is needed to comply with legislative requirements or to meet specific program needs, agencies shall also obtain prior OMB approval.

(2) A preapplication shall be used for all construction, land acquisition and land development projects or programs when the need for Federal funding exceeds $100,000, unless the Federal agency determines that a preapplication is not needed. A preapplication is used to:

(a) Establish communication between the agency and the applicant,
(b) Determine the applicant's eligibility,
(c) Determine how well the project can compete with similar projects from others, and
(d) Discourage any proposals that have little or no chance for Federal funding before applicants incur significant costs in preparing detailed applications.

(3) Agencies shall use the Budget Information (Construction) and Standard Assurances (Construction) when the major purpose of the project or program is construction, land acquisition or land development.

(4) Agencies may specify how and whether budgets shall be shown by functions or activities within the program or project.

(5) Agencies should generally include a request for a program narrative statement which is based on the following instructions:

(a) Objectives and need for assistance. Pinpoint any relevant physical, economic, social, financial, institutional, or other problems requiring a solution. Demonstrate the need for the assistance and state the principal and subordinate objectives of the project. Supporting documentation or other testimonies from concerned interests other than the applicant may be used. Any relevant data based on planning studies should be included or footnoted.

(b) Results or Benefits Expected. Identify costs and benefits to be derived. For example, show how the facility

will be used. For land acquisition or development projects, explain how the project will benefit the public.

(c) Approach. Outline a plan of action pertaining to the scope and detail how the proposed work will be accomplished for each assistance program. Cite factors which might accelerate or decelerate the work and reasons for taking this approach as opposed to others. Describe any unusual features of the project, such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvements. Provide for each assistance program quantitative projections of the accomplishments to be achieved, if possible. When accomplishments cannot be quantified, list the activities in chronological order to show the schedule of accomplishments and target expected completion dates. Identify the kinds of data to be collected and maintained, and discuss the criteria to be used to evaluate the results and success of the project. Explain the methodology that will be used to determine if the needs identified and discussed are being met and if the results and benefits identified are being achieved. List each organization, cooperator, consultant, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

(d) Geographic location. Give a precise location of the project and area to be served by the proposed project. Maps or other graphic aids may be attached.

(e) If applicable, provide the following information: for research and demonstration assistance requests, present a biographical sketch of the program director with the following information: name, address, telephone number, background, and other qualifying experience for the project. Also, list the name, training and background for other key personnel engaged in the project. Describe the relationship between this project and other work planned, anticipated, or underway under Federal assistance. Explain the reason for all requests for supplemental assistance and justify the need for additional funding. Discuss accomplishments to date and list in chronological order a schedule of accomplishments, progress or milestones anticipated with the new funding request. If there have been significant changes in the project objectives, location, approach or time delays, explain and justify. For other requests for changes, or amendments, explain the reason for the change(s). If the scope or objectives have changed or an extension of time is necessary, explain the circumstances and justify. If the total budget has been exceeded or if the individual budget items have changes more than the prescribed limits, explain and justify the change and its effect on the project.

(6) Additional assurances shall not be added to those contained on the standard forms, unless specifically required by statute.

d. **Debarment and Suspension.** Federal agencies shall not award assistance to applicants that are debarred or suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549. Agencies shall establish procedures for the effective use of the List of Parties Excluded from Federal Procurement or Nonprocurement programs to assure that they do not award assistance to listed parties in violation of the Executive Order. Agencies shall also establish procedures to provide for effective use and/or dissemination of the list to assure that their grantees and subgrantees (including contractors) at any tier do not make awards in violation of the nonprocurement debarment and suspension common rule.

e. **Awards and Adjustments.**

(1) Ordinarily awards shall be made at least ten days prior to the beginning of the grant period.

(2) Agencies shall notify grantees immediately of any anticipated adjustments in the amount of an award. This notice shall be provided as early as possible in the funding period. Reductions in funding shall apply only to periods after notice is provided. Whenever an agency adjusts the amount of an award, it shall also make an appropriate adjustment to the amount of any required matching or cost sharing.

f. **Carryover Balances.** Agencies shall be prepared to identify to OMB the amounts of carryover balances (e.g., the amounts of estimated grantee unobligated balances available for carryover into subsequent grant periods). This presentation shall detail the fiscal and programmatic (level of effort) impact in the following period.

g. **Special Conditions or Restrictions.** Agencies may impose special conditions or restrictions on awards to "high risk" applicants/grantees in accordance with section __.12 of the grants management common rule. Agencies shall document use of the "Exception" provisions of section __.6 and "High-risk" provisions of section __.12 of the grants management common rule.

h. **Waiver of Single State Agency Requirements.**

(1) Requests to agencies from the Governors, or other duly constituted State authorities, for waiver of "single" State agency requirements in accordance with section 31 U.S.C. 6504, "Use of existing State or multi-member agency to administer grant programs," shall be given expeditious handling and, whenever possible, an affirmative response.

(2) When it is necessary to refuse a request for waiver of "single" State agency requirements under section

204 of the Intergovernmental Corporation Act, the Federal grantor agency shall advise OMB prior to informing the State that the request cannot be granted. The agency shall indicate to OMB the reasons for the denial of the request.

(3) Legislative proposals embracing grant-in-aid programs shall avoid inclusion of proposals for "single" State agencies in the absence of compelling reasons to do otherwise. In addition, existing requirements in present grant-in-aid programs shall be reviewed and legislative proposals developed for the removal of these restrictive provisions.

i. **Patent Rights.** Agencies shall use the standard patent rights clause specified in "Rights to Inventions made by Non-profit Organizations and Small Business Firms" (37 CFR Part 401), when providing support for research and development.

j. **Metric System of Measurement.** The Metric Conversion Act of 1975, as amended, declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date(s), in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurement, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. Heads of departments and agencies shall establish a process for a policy level and program level review of proposed exceptions to metric usage in grants programs. Executive Order 12770 ("Metric Usage in Federal Government Programs") elaborates on implementation of the Act.

2. **Post-award Policies.**

a. **Cash Management.** Agency methods and procedures for transferring funds shall minimize the time elapsing between the transfer to recipients of grants and cooperative agreements and the recipient's need for the funds.

(1) Such transfers shall be made consistent with program purposes, applicable law and Treasury regulations contained in 31 CFR Part 205, Federal Funds Transfer Procedures.

(2) Where letters-of-credit are used to provide funds, they shall be in the same amount as the award.

b. **Grantee Financial Management Systems.** In assessing the adequacy of an applicant's financial management system, the awarding agency shall rely on readily available sources of information, such as audit reports, to the maximum extent possible. If additional information is necessary to assure prudent management of agency funds, it shall be obtained from the applicant or from an on-site review.

c. **Financial Status Reports.**

(1) Federal agencies shall require grantees to use the SF-269, Financial Status Report-Long Form, or SF-269a, Financial Status Report-Short Form, to report the status of funds for all non-construction projects or programs. Federal agencies need not require the Financial Status Report when the SF-270, Request for Advance or Reimbursement, or SF-272, Report of Federal Cash Transactions, is determined to provide adequate information.

(2) Federal agencies shall not require grantees to report on the status of funds by object class category of expenditure (e.g., personnel, travel, equipment).

(3) If reporting on the status of funds by programs, functions or activities within the project or program is required by statute or regulation, Federal agencies shall instruct grantees to use block 12, Remarks, on the SF-269, or a supplementary form approved by the OMB under the Paperwork Reduction Act of 1980.

(4) Federal agencies shall prescribe whether the reporting shall be on a cash or an accrual basis. If the Federal agency requires accrual information and the grantees's accounting records are not normally kept on an accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through an analysis of the documentation on hand.

d. **Contracting With Small and Minority Firms, Women's Business Enterprises and Labor Surplus Area Firms.** It is national policy to award a fair share of contracts to small and minority business firms. Grantees shall take similar appropriate affirmative action to support of women's enterprises and are encouraged to procure goods and services from labor surplus areas.

e. **Program Income.**

(1) Agencies shall encourage grantees to generate program income to help defray program costs. However, Federal agencies shall not permit grantees to use grant-acquired assets to compete unfairly with the private sector.

(2) Federal agencies shall instruct grantees to deduct program income from total program costs as specified in the grants management common rule at paragraph __.25 (g)(1), unless agency regulations or the terms of the grant award state otherwise. Authorization for recipients to follow the other alternatives in paragraph __.25 (g) (2) and (3) shall be granted sparingly.

f. **Site Visits and Technical Assistance.** Agencies shall conduct site visits only as warranted by program or project needs. Technical assistance site visits shall be provided only (1) in response to requests from grantees, (2) based on demonstrated program need, or (3) when recipients are designated "high risk" under section __.12 of the grants management common rule.

g. **Infrastructure Investment.** Agencies shall encourage grantees to consider the provisions of the common rule at Section __. 31 and Executive Order 12803 ("Infrastructure Privatization"). This includes reviewing and modifying procedures affecting the management and disposition of federally-financed infrastructure owned by State and local governments, with their requests to sell or lease infrastructure assets, consistent with the criteria in Section 4 of the Order. Related guidance contained in Executive Order 12893 ("Principles for Federal Infrastructure Investments") requiring economic analysis and the development of investment options, including public-private partnership, shall also be applied. On March 7, 1994, OMB issued guidance on Executive Order 12893 in OMB Bulletin No. 94-16.

h. **Resource Conservation and Recovery Act.** Agencies shall implement the Resource Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C. 6962). Any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with Section 6002 of RCRA. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA). Current guidelines are contained in 40 CFR Parts 247-253. State and local recipients of grants, loans, cooperative agreements or other instruments funded by appropriated Federal funds shall give preference in procurement programs to the purchase of recycled products pursuant to the EPA guidelines.

i. **Procurement of Goods and Services.** Agencies should be aware of and comply with the requirement enacted in Section 623 of the Treasury, Postal Service and General Government Appropriations Act, 1993, and reenacted in Section 621 of the fiscal year 1994 Appropriations Act. This Section requires grantees to specify in any announcement of the awarding of contracts with an aggregate value of $500,000 or more, the amount of Federal funds that will be used to finance the acquisitions.

j. **Conditional exemptions**.

(1) OMB authorizes conditional exemption from OMB administrative requirements and cost principles circulars for certain Federal programs with statutorily-authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment. A Federal agency shall consult with OMB during its consideration of whether to grant such an exemption.

(2) To promote efficiency in State and local program administration, when Federal non-entitlement programs with common purposes have specific statutorily-authorized consolidated planning and consolidated administrative funding and where most of the State agency's resources come from non-Federal sources, Federal agencies may exempt these covered State-administered, non-entitlement grant programs from certain OMB grants management requirements. The exemptions would be from all but the allocability of costs provisions of OMB Circulars A-87 (Attachment A, subsection C.3), "Cost Principles for State, Local, and Indian Tribal Governments," A-21 (Section C, subpart 4), "Cost Principles for Educational Institutions," and A-122 (Attachment A, subsection A.4), "Cost Principles for Non-Profit Organizations," and from all of the administrative requirements provisions of OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and the agencies' grants management common rule.

(3) When a Federal agency provides this flexibility, as a prerequisite to a State's exercising this option, a State must adopt its own written fiscal and administrative requirements for expending and accounting for all funds, which are consistent with the provisions of OMB Circular A-87, and extend such policies to all subrecipients. These fiscal and administrative requirements must be sufficiently specific to ensure that: funds are used in compliance with all applicable Federal statutory and regulatory provisions, costs are reasonable and necessary for operating these programs, and funds are not be used for general expenses required to carry out other responsibilities of a State or its subrecipients.

3. **After-the-grant Policies.**

a. **Closeout.** Federal agencies shall notify grantees in writing before the end of the grant period of final reports that shall be due, the dates by which they must be received, and where they must be submitted. Copies of any required forms and instructions for their completion shall be included with this notification. The Federal actions that must precede closeout are:

(1) Receipt of all required reports,

(2) Disposition or recovery of federally-owned assets (as distinct from property acquired under the grant), and
(3) Adjustment of the award amount and the amount of Federal cash paid the recipient.

b. **Annual Reconciliation of Continuing Assistance Awards.** Federal agencies shall reconcile continuing awards at least annually and evaluate program performance and financial reports.

Items to be reviewed include:

(1) A comparison of the recipient's work plan to its progress reports and project outputs,
(2) the Financial Status Report (SF-269),
(3) Request(s) for payment,
(4) Compliance with any matching, level of effort or maintenance of effort requirement, and
(5) A review of federally-owned property (as distinct from property acquired under the grant).

APPENDIX G

U.S. Federal Legal Materials

Glossary of Terms in the Federal Budget Process

U.S. Federal Legal Materials

Since this document contains several citations of the authorities that support the policies of the Sanitation Facilities Construction Program, a brief explanation of the vocabulary those authorities is in order.

Statutes (Stat.). After a bill introduced in either the Senate or House of Representatives is passed by that chamber of origin, it is engrossed and forwarded as An Act to the other chamber for consideration. If the Act is passed by the other chamber, it is enrolled and forwarded to the President. To become law, the Act must be approved by the President or, if vetoed, by two-thirds of the Senate and House of Representatives, respectively, despite the President's veto. It becomes a Public Law with generally broad applicability. (In modern usage, the terms Act, Law, and Statute have tended to become interchangeable.) The newly enacted laws are published in collected form as a new Volume of the United States Statutes at Large. The Statutes include Public Laws and Resolutions, Reorganization Plans, Private Laws and Resolutions, Concurrent Resolutions, Presidential Proclamations, Indian Treaties, Foreign Treaties, Declaration of Independence, Constitution, Articles of Confederation, The Constitution of the United States, and Amendments to the Constitution, as they were originally written and enacted.
[Example: P.L. 86-121 is at 73 Stat. 267.]

United States Code (U.S. Code or U.S.C.). The U.S.C. does not contain all laws, but is limited to "a consolidation and codification of all the general and permanent laws of the United States." The U.S.C. is revised, title by title, correcting errors and inconsistencies in preparation for "enactment into positive law," making such titles "legal evidence" of the laws. So far, 22 of the 50 titles have been revised. Each title requires several years of effort to revise, so there is understandable interest in protecting the accuracy of the corrected titles that have been revised to date. This explains in part why certain Bills in Congress (later to become Acts) would amend the U.S.C., while others would amend an existing Act; i.e., a Public Law is amended because it has not been codified in the U.S.C. at the time the amendment was enacted.
[Example: P.L. 86-121 is at 42 U.S.C. 2004a.]

Code of Federal Regulations (CFR). The Code of Federal Regulations (CFR) is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The CFR is divided into 50 titles which represent broad areas subject to Federal regulation. Federal statutes (U.S. Code) furnish the authority and the limits for regulations that appear in the CFR. This means that the regulations on a subject should be read together with any pertinent portions of the U.S. Code. It also means that courts will, upon occasion, hold that regulations which appear in the Code of Federal Regulations are invalid because they conflict with a Federal statute.
[Example: Regulations for P.L. 93-683 are at 25 CFR Part 900.]

The regulations appearing in the CFR may be incomplete or even obsolete because of amendments issued after the date the particular title was last revised. This makes it important to note the revision date of the portion of the CFR you are using and, when being sure you have the up-to-date regulations is critical, checking for amendments. Amendments appear, as they are issued by the government, in the Federal Register.

Example:

The Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended, is codified in the U.S. Code at 25 U.S.C. 450. The regulations to implement that statute is in the Code of Federal Regulations at 25 CFR Part 900. The final version of 25 CFR Part 900 was published in the Federal Register in 1996 in Volume 61 on page 32482, or at 61 FR 32482.

PARLIAMENTARY OUTREACH PROGRAM

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON RULES
MAJORITY OFFICE

H-312 U.S. CAPITOL, WASHINGTON, D.C. 20515
(202) 225-9191 | www.house.gov/rules

Glossary of Terms in the Federal Budget Process

Account - Organizational units used in the federal budget primarily for recording spending and revenue transactions. With regard to spending, the Budget Enforcement Act of 1990 defines "account" as an item for which appropriations are made in any appropriation acts; for items not provided for in appropriations acts, "accounts" means an item for which there is a designated budget account identification code number in the President's budget. All budgetary transactions are recorded in accounts, but not all accounts are budgetary in nature; that is, some accounts (such as deposit fund and credit financing accounts) do not directly affect budget amounts and are used solely for accounting purposes.

Advance Appropriation - In an appropriation act for a particular fiscal year, an appropriation that does not become available for spending or obligation until a subsequent fiscal year. The amount of the advance appropriation is counted as part of the budget for the fiscal year in which it becomes available for obligation.

Allowances - Amounts in the budget to cover possible additional expenses for statutory pay increases, contingencies, and other requirements. In congressional budget resolutions, allowances are a special functional classification. In the President's budget, they also include amounts for possible additional proposals and for contingencies related to relatively uncontrollable programs.

Annual Authorization - Legislation that authorizes appropriations for a single fiscal year and usually for a specific amount. Under the rules of the authorization- appropriation process, an annually authorized agency or program must be reauthorized each year if it is to receive appropriations for that year. Sometimes Congress fails to enact the reauthorization but nevertheless provides appropriations to continue the program, circumventing the rules by one means or another.

Appropriated Entitlement - An entitlement program, such as veterans' pensions, that is funded through annual appropriations rather than by a permanent appropriation. Because such an entitlement law requires the government to provide eligible recipients the benefits to which they are entitled, whatever the cost, Congress must appropriate the necessary funds. If the amount Congress provides in the annual appropriations act is not enough, it must make up the difference in a supplemental appropriation.

Appropriation - (1) Legislative language that permits a federal agency to incur obligations and make payments from the Treasury for specified purposes, usually during a specified period of time. (2) The specific amount of money made available by such language. The Constitution prohibits payments from the Treasury except "in Consequence of Appropriations made by Law." With some exceptions, the rules of both houses forbid consideration of appropriations for purposes that are unauthorized in law or of appropriation amounts larger than those authorized in law. The House of Representatives claims the exclusive right to originate appropriation bills--a claim the Senate denies in theory but accepts in practice. Consequently, the Senate Appropriations Committee usually waits for the arrival of a bill passed by the House and then reports it with whatever amendments it chooses. Furthermore, under Senate precedents, a point of order will not lie against House language in the bill even though such language may violate a Senate rule.

Appropriation Account - A single unnumbered paragraph in an appropriation measure. Most appropriation accounts include a number of activities or projects of a federal agency with a separate appropriation for each.

Appropriation Limitation - In budgetary parlance, a provision in an appropriations act establishing the maximum amount that may be obligated or spent for specified purposes. It may apply to the amount of direct loan obligations, guaranteed loan commitments, administrative expenses financed out of trust funds, or other purposes.

Authorization - (1) A statutory provision that establishes or continues a federal agency, activity, or program

for a fixed or indefinite period of time. It may also establish policies and restrictions and deal with organizational and administrative matters. (2) A statutory provision that authorizes appropriations for an agency, activity, or program. The appropriations may be authorized for one year, several years, or an indefinite period of time, and the authorization may be for a specific amount of money or an indefinite amount ("such sums as may be necessary"). Authorizations of specific amounts are construed as ceilings on the amounts that subsequently may be appropriated in an appropriation bill, but not as minimums; either house may appropriate lesser amounts or nothing at all.

Authorization-Appropriation Process - The two-stage procedural system that the rules of each house require for establishing and funding federal agencies and programs: first, enactment of authorizing legislation that creates or continues an agency or program; second, enactment of appropriations legislation that provides funds for the authorized agency or program. The rules and precedents of the House establish four basic prohibitions: (1) no appropriation without an authorization in law, (2) no authorizing language in a general appropriation bill, (3) no appropriation in an authorizing measure, and (4) no appropriation larger than the amount, if any, specified in the authorization. The Senate's rules differ from those of the House in several ways. They permit appropriations for authorizations the Senate has previously passed in the same session of Congress, not only for those enacted into law as the House requires. Furthermore, the Senate permits appropriations for unauthorized purposes if proposed by its Appropriations Committee, by any committee with jurisdiction over that purpose, or by any senator if the appropriation appears in the President's budget estimates. The Senate also allows appropriations in authorizing measures. In all other respects, the Senate's prohibitions are the same as those in the House. And both houses agree that Congress may appropriate less than the authorized amount or no amount at all. To protect itself from the Senate's more liberal interpretation of the process, the House prohibits its conference managers from agreeing to (1) Senate amendments that violate the House's interpretation of authorized appropriations, or (2) appropriations in measures other than general appropriation bills. Although the conferees may agree to such provisions with the prior permission of the House, they ordinarily circumvent the rule by reporting the provisions as amendments in technical disagreement. The rules of this process are enforced only when members raise points of order against potential violations. Moreover, one or more of the prohibitions may be waived, and often are, by unanimous consent, suspension of the rules, or, in the House, by a special rule. The historical rationale for the process has been to prevent the delay of appropriation bills caused by disputes over substantive policy. However, such disputes still arise because the houses often circumvent the rules of the process.

Backdoor Spending Authority - Authority to incur obligations that evades the normal congressional appropriations process because it is provided in legislation other than appropriation acts. The most common forms are borrowing authority, contract authority, and entitlement authority. From the perspective of the appropriations committees, funding by these forms of spending authority slips away from their control through legislative back doors. However, the Congressional Budget Act of 1974 gave those committees some control over new borrowing and contract authority.

Balanced Budget - Loosely, a budget with a surplus rather than a deficit. In governmental accounting terms, a budget in which anticipated or actual total revenues equal anticipated or actual total expenditures. Conversely, an unbalanced budget is one in which expenditures exceed revenues, or vice versa. The President's budget and the one Congress agrees to each year are anticipatory budgets, consisting of estimates and assumptions about future economic conditions, demographic developments, and workload. Even using the most sophisticated and rigorously objective techniques, those estimates and assumptions are subject to error. A one percent mistake in the assumption about the number of unemployed in an upcoming fiscal year, for instance, may change expected revenues and expenditures by billions of dollars. Moreover, the estimates and assumptions made by both the president and Congress are often influenced by political considerations and therefore subject to further error. Consequently, a nominally "balanced" budget on paper may turn out to be unbalanced when government auditors add up actual expenditures and revenue collections after a fiscal year has ended.

Balanced Budget Act of 1997 (BBA; P.L. 105-33) - Enacted by the 105th Congress, the BBA produced the first balanced budget in 30 years, four years ahead of schedule. The budget agreement implemented the framework to balance the budget by FY 2002 by cutting taxes for the first time in 16 years, reforming Medicare to prevent it from going bankrupt by as early as 2001, producing more than $600 billion in entitlement savings over the next 10 years, and slowing the growth of total federal spending by nearly $1 trillion over 10 years.

Balanced Budget Amendment - A proposal for a constitutional amendment mandating that federal

expenditures not exceed federal revenues in any fiscal year. Several versions have been offered. Most permit exceptions when both houses of Congress agree by votes larger than a simple majority; most also require the President to submit balanced budgets each year.

Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 - A law that amended the Gramm-Rudman-Hollings Act of 1985 by extending the goal of a balanced budget until fiscal year 1993, revising the sequestration process, and requiring the Director of the Office of Management and Budget to determine whether a sequester is necessary.

Baseline - A projection of the levels of federal spending, revenues, and the resulting budgetary surpluses or deficits for the upcoming and subsequent fiscal years, taking into account laws enacted to date and assuming no new policy decisions. It provides a benchmark for measuring the budgetary effects of proposed changes in federal revenues or spending, assuming certain economic conditions. Baseline projections are prepared by the Congressional Budget Office and used by the Budget Committees to develop of the annual budget resolution and reconciliation instructions.

Biennial Budgeting - Budgeting for a two-year period. Under a biennial budgeting approach, the fiscal period would cover two calendar years rather than one. Although the federal government uses an annual budget, some have proposed switching to a biennial budget to free up more time for congressional oversight activities and for other reasons.

Borrowing Authority - Statutory authority permitting a federal agency, such as the Export-Import Bank, to borrow money from the public or the Treasury to finance its operations. It is a form of backdoor spending. To bring such spending under the control of the congressional appropriation process, the Congressional Budget Act requires that new borrowing authority shall be effective only to the extent and in such amounts as are provided in appropriations acts.

Breach - The amount above the discretionary spending limits or caps set by the Budget Enforcement Act of 1990. The act requires that the breach be eliminated by sequestering budgetary resources.

Budget - A detailed statement of actual or anticipated revenues and expenditures during an accounting period. For the national government, the period is the federal fiscal year (October 1-September 30). The budget usually refers to the president's budget submission to Congress early each calendar year. The president's budget estimates federal government income and spending for the upcoming fiscal year and contains detailed recommendations for appropriation, revenue, and other legislation. Congress is not required to accept or even vote directly on the President's proposals, and it often revises the President's budget extensively.

Budget Act - Common name for the Congressional Budget and Impoundment Control Act of 1974, which established the basic procedures of the current congressional budget process; created the House and Senate budget committees; and enacted procedures for reconciliation, deferrals, and rescissions.

Budget Allocation - (1) In congressional budgeting usage, the portion of budget authority, outlays, and other resources from a budget resolution that is assigned to a committee that has jurisdiction over such resources. The Congressional Budget Act of 1974 requires the distribution of allocations to all appropriate committees in each house, and it also directs each committee to subdivide its allocation among its programs or subcommittees. The allocations appear in the statement of the managers that accompanies the conference report on a budget resolution. (2) In executive branch budgeting parlance, the budget authority and other resources transferred from one agency's account to another agency to carry out the purposes of the parent account.

Budget Amendment - A formal revision of the President's annual budget submitted to Congress before it has completed action on appropriations.

Budget and Accounting Act of 1921 - The law that, for the first time, authorized the president to submit to Congress annual budget for the entire federal government. Prior to the act, most federal agencies sent their budget requests to the appropriate congressional committees without review by the president. The act also established a Bureau of the Budget (renamed the Office of Management and Budget [OMB] in 1970) to assist the President in preparing a budget and the General Accounting Office (GAO), headed by the comptroller general of the United States, to act as the principal auditing agency of the federal government.

Budget Authority - Generally, the amount of money that may be spent or obligated by a government agency

or for a government program or activity. Technically, it is statutory authority to enter into obligations that normally result in outlays. The main forms of budget authority are appropriations, borrowing authority, and contract authority. It also includes authority to obligate and expend the proceeds of offsetting receipts and collections. Congress may make budget authority available for only one year, several years, or an indefinite period, and it may specify definite or indefinite amounts.

Budget Authority Balances - The amount of budget authority provided in previous fiscal years that had not been spent by the start of the current fiscal year. Obligated balances are amounts that were obligated but not paid before that date; usually these amounts remain available in succeeding fiscal years until they are used to pay for the obligation. Unobligated balances of budget authority that Congress made available for only one fiscal year lapse at the end of that year; the agency to which the budget authority was granted loses it. The balances of multiyear or no-year budget authority may be obligated, respectively, during the years for which they have been made available or for an indefinite period.

Budget Crosswalk - Another term for the allocation of budget authority and outlay amounts in a budget resolution to congressional committees according to their jurisdictions and the committees' subdivision of those amounts among their programs or subcommittees.

Budget Enforcement Act of 1990 - An act that revised the sequestration process of the Gramm- Rudman-Hollings Act of 1985, replaced its fixed deficit targets with adjustable ones, established discretionary spending limits for fiscal years 1991 through 1995, instituted pay-as-you-go rules to enforce deficit neutrality on revenue and mandatory spending legislation, and reformed the budget and accounting rules for federal credit activities. Unlike Gramm-Rudman- Hollings, the 1990 act emphasized restraints on legislated changes in taxes and spending instead of fixed deficit limits.

Budget Estimate Pursuant to Law - A dollar amount requested in the President's budget or in his revision of it. Although a Senate rule bans amendments that increase an appropriation in a general appropriation bill or that add unauthorized appropriations to it, an exception is made for amendments "proposed in pursuance of an estimate submitted in accordance with law." This is interpreted to mean that an amendment to appropriate funds for an unauthorized purpose is allowed if the President's estimate does not mention the need for an authorization and if the amount in the amendment does not exceed the estimate.

Budget Process - (1) In Congress, the procedural system it uses (a) to approve an annual concurrent resolution on the budget that sets goals for aggregate and functional categories of federal expenditures, revenues, and the surplus or deficit for an upcoming fiscal year; and (b) to implement those goals in spending, revenue, and, if necessary, reconciliation and debt-limit legislation.(2) In the executive branch, the process of formulating the President's annual budget, submitting it to Congress, defending it before congressional committees, implementing subsequent budget-related legislation, impounding or sequestering expenditures as permitted by law, auditing and evaluating programs, and compiling final budget data. The Budget and Accounting Act of 1921 and the Congressional Budget and Impoundment Control Act of 1974 established the basic elements of the current budget process. Major revisions were enacted in the Gramm- Rudman-Hollings Act of 1985 and the Budget Enforcement Act of 1990. In Congress, the Budget Committee of each house prepares and reports a budget resolution after reviewing the President's budget, the views of other committees, and analyses and baseline data prepared by the Congressional Budget Office. The two houses are supposed to approve their respective versions of the resolution and settle the differences between them by April15. Each budget committee then allocates spending amounts set in the resolution among the appropriate committees in its house. Congress implements the budget resolution through its annual appropriation bills and, if necessary, revenue and other legislation, including reconciliation bills. All of this is supposed to occur before October 1, the beginning of the new federal fiscal year. The laws provide a variety of points of order to enforce compliance with the process and with the provisions of the budget resolution. One bars consideration of any revenue, spending, entitlement, or debt-limit measure for a fiscal year before Congress has agreed to the resolution for that year. Other points of order can be raised against consideration of legislation or amendments that (1) violate the aggregate spending ceiling or revenue floor in a budget resolution, (2) exceed a committee's allocations or subdivisions, (3) violate the deficit neutrality rules that apply to reconciliation bills, or (4) add extraneous matters to a reconciliation bill. However, points of order may be waived in each house by various means. Because the houses often miss the April 15 deadline, the regular annual appropriation bills are allowed to come before the House beginning May 15 even if the budget resolution has not yet been approved. In any event, the House Appropriations Committee is required to report all annual appropriation bills no later than June 10 of each year.

Budget Receipts - Funds collected by the government from the public generally and from premium payments by participants in certain social insurance programs. Collections from the general public consist primarily of taxes, but they also include court fines, certain license fees, deposits of earnings by the Federal Reserve System, and gifts. Budget receipts do not include various offsetting receipts; under federal government accounting practices, these are deducted from outlays. The budget surplus or deficit is calculated by comparing total budget receipts with total outlays.

Budget Resolution - A concurrent resolution in which Congress establishes or revises its version of the federal budget's broad financial features for the upcoming fiscal year and several additional fiscal years. Like other concurrent resolutions, it does not have the force of law, but it provides the framework within which Congress subsequently considers revenue, spending, and other budget-implementing legislation. The framework consists of two basic elements: (1) aggregate budget amounts (total revenues, new budget authority, outlays, loan obligations and loan guarantee commitments, deficit or surplus, and debt limit); and (2) subdivisions of the relevant aggregate amounts among the functional categories of the budget. The resolution also may contain reconciliation instructions to various committees. Although it does not allocate funds to specific programs or accounts, the Budget Committees' reports accompany accompanying the resolution often discuss the major program assumptions underlying its functional amounts. Unlike those amounts, however, the assumptions are not binding on Congress. The Congressional Budget Act requires only one budget resolution each year but permits additional ones as necessary. Congress should complete action on the first resolution by April 15 of each year. Under current requirements, the budget resolution must cover the upcoming and four subsequent fiscal years. In both houses, budget resolutions are privileged and debate time on them is limited. One Budget Act rule permits amendments that change numbers in the resolution to achieve internal mathematical consistency, even when the amendment alters numbers previously amended.

Budget Totals - Totals for budget authority, outlays, and receipts. The on-budget and off-budget totals are combined to derive a total for federal activity.

Budgetary Resources - (1) In general budgeting parlance, amounts available for obligation in a fiscal year, including new budget authority, unobligated balances of budget authority, direct spending authority, and obligation limitations. (2) Resources that are subject to sequestration under the terms of the Gramm-Rudman-Hollings-Act.

Byrd Rule - Popular name of an amendment to the Congressional Budget Act that bars the inclusion of extraneous matter in any reconciliation legislation considered in the Senate. Enforcement of the ban requires a point of order sustained by the chair. The provision defines different categories of extraneous matter, but it also permits certain exceptions. Its chief sponsor was Sen. Robert C. Byrd (D-W.Va.).

Cap - The statutory limit for a fiscal year on the amount of new budget authority and outlays allowed for discretionary spending. The Budget Enforcement Act of 1990 requires a sequester in a category if a cap is exceeded.

Changing Existing Law - In House terminology, a reference to language changing existing substantive or authorizing law that appears in, or is offered as an amendment to, a general appropriation bill. A House rule prohibits such changes except to retrench expenditures or rescind appropriations.

Congressional Budget and Impoundment Control Act of 1974 - The law that established the basic elements of the congressional budget process, the House and Senate Budget Committees, the Congressional Budget Office, and the procedures for congressional review of impoundments in the form of rescissions and deferrals proposed by the President. The budget process consists of procedures for coordinating congressional revenue and spending decisions made in separate tax, appropriations, and legislative measures. The impoundment provisions were intended to give Congress greater control over executive branch actions that delay or prevent the spending of funds provided by Congress.

Congressional Budget Office (CBO) - A congressional support agency created by the Congressional Budget and Impoundment Control Act of 1974 to provide nonpartisan budgetary information and analysis to Congress and its committees. The statute requires CBO to give priority for its services to the budget committees, to the appropriations and revenue committees in each house, and to all other committees, in that order. The office produces five-year economic projections, budget baseline projections, spending and revenue options for reducing the budget deficit, and analysis of the President's budget. It also provides budget scorekeeping reports, cost estimates on pending legislation, and a variety of special studies. Under the original

version of the Gramm-Rudman-Hollings Act, CBO played an equal role with the Office of Management and Budget in calculating sequestration data. After the Supreme Court struck down a related part of that act as unconstitutional in 1986, CBO's role was limited to providing advisory sequestration reports.

Contingency Appropriation - An appropriation that becomes available only if some specified future action occurs. Such an action might be submission of a report by a federal official, settlement of litigation, enactment of an authorization, or enactment of some other specified law. Contingency appropriations in general appropriation bills are not in order in either house if points of order are raised against them, although their frequency has increased in recent years in contentious policy areas.

Contingent Fund - A Senate appropriations account that authorizes and appropriates funds for certain Senate activities. The account includes appropriations for committee investigations, the Senate Caucus on International Narcotics Control, office of the Secretary of the Senate, office of the Senate Sergeant at Arms and Doorkeeper, the Senator's Official Personnel and Office Expense Account, stationery for Senate offices, official mail costs, and other specified Senate activities. All appropriations in the Contingent Fund account are made for specific purposes and periods of time. One appropriation within the account is made for unanticipated costs of activities authorized in Senate resolutions and public laws but for which specific appropriations are not made. Usually, resolutions and laws will direct that appropriations for new activities authorized in them be paid for from the Contingent Fund account. There is an accounting of expenditures of appropriations in the account. Prior to FY1993, there was a House appropriations heading titled, Contingent Expenses of the House, under the House account titled, "Salaries and Expenses." Within the heading were appropriations made for specific purposes and also for specific time availability.

Contingent Liability - A conditional commitment by the government, such as a loan guarantee, price guarantee, or bank deposit insurance, that may become an actual liability in the future and require the expenditure of federal funds because of an event beyond the government's control, such as a bank failure.

Continuing Resolution (CR) - A joint resolution that provides funds to continue the operation of federal agencies and programs at the beginning of a new fiscal year if their annual appropriation bills have not yet been enacted; also called continuing appropriations. Enacted shortly before or after the new fiscal year begins, the first continuing resolution usually makes funds available for a specified period; additional resolutions are often needed after the first expires. Some CRs have provided appropriations for an entire fiscal year. Continuing resolutions for specific periods customarily fix a rate at which agencies may incur obligations based either on the prior year's appropriations, the President's budget request, or the amount in the agency's regular annual appropriation bill that has already been passed by one or both houses. In the House, continuing resolutions are privileged after September 15.

Contract Authority - Statutory authority permitting an agency to enter into contracts or incur other obligations even though it has not received an appropriation to pay for them. Congress must eventually fund them because the government is legally liable for such payments. The Congressional Budget Act of 1974 requires that new contract authority may not be used unless provided for in advance by an appropriation act, but it permits a few exceptions.

Controllable Expenditures - Federal spending that is permitted but not mandated by existing authorization law and therefore may be adjusted by congressional action in appropriation bills.

Cost Estimates - Estimates of the outlays and other budgetary impacts, including unfunded mandates, that would ensue under legislation. In both houses, a committee's report on a measure must include an estimate of its cost "in the fiscal year in which it is reported and in each of the five fiscal years following" or for the authorized duration of any program in the measure, if less than five years. These estimates are usually provided by the Congressional Budget Office. If appropriate, the report must also present five-year estimates of revenue changes, prepared by the Joint Committee on Taxation. Both houses permit points of order to prevent floor consideration of measures if the committee reports on them do not contain such estimates. However, the Senate rule waives the point of order if the report declares that compliance is impracticable. In addition, the Office of Management and Budget must provide cost estimates of budgetary legislation within five days of its enactment to assist Congress in complying with discretionary spending limits and PAYGO requirements.

Credit Authority - Authority granted to an agency to incur direct loan obligations or to make loan guarantee commitments. The Congressional Budget Act of 1974 bans congressional consideration of credit authority

legislation unless the extent of that authority is made subject to provisions in appropriation acts.

Credit Budget - The levels of new federal direct loan obligations and new loan guarantee commitments that appear in a budget resolution. They are the basis for limitations on direct and guaranteed loans in appropriations acts. Procedures established in the Federal Credit Reform Act of 1990 have largely superseded the credit budget.

Credit Subsidy Cost - The estimated long-term cost of a direct loan or loan guarantee to the federal government. The cost is calculated on the basis of the net present value of the cash flows of the loan or guarantee, excluding administrative costs and any incidental effects on governmental receipts or outlays.

Current Services Estimates - Executive branch estimates of the anticipated costs of federal programs and operations for the next and future fiscal years at existing levels of service and assuming no new initiatives or changes in existing law. The president submits these estimates to Congress with his annual budget and includes an explanation of the underlying economic and policy assumptions on which they are based, such as anticipated rates of inflation, real economic growth, and unemployment, plus program caseloads and pay increases.

Debt Limit - The maximum amount of outstanding federal public debt permitted by law. The limit (or ceiling) covers virtually all debt incurred by the government except agency debt. Each congressional budget resolution sets forth the new debt limit that may be required under its provisions.

Deferral - An impoundment of funds for a specific period of time that may not extend beyond the fiscal year in which it is proposed. Under the Impoundment Control Act of 1974, the President must notify Congress that he is deferring the spending or obligation of funds provided by law for a project or activity. Congress can disapprove the deferral by legislation. The President may defer funds to provide for contingencies when savings have been made through greater operational efficiency or for similar reasons, but not because of opposition to a program, or to reduce federal spending, or for any other policy reason. The comptroller general of the United States reviews all deferrals and advises Congress about their legality and possible effects.

Deficit - The amount by which the government's outlays exceed its budget receipts for a given fiscal year. Both the President's budget and the annual congressional budget resolution provide estimates of the deficit or surplus for the upcoming and several future fiscal years.

Deficit Neutrality - A requirement that certain proposals to increase spending or reduce revenues be offset by at least equivalent reductions in other spending or increases in other revenue sources so that they do not increase the deficit. The Congressional Budget Act of 1974 applies the requirement to amendments offered to a reconciliation bill.

Direct Loan - Defined by the Budget Enforcement Act of 1990 as a disbursement of funds by the government to a nonfederal borrower under a contract that requires the repayment of such funds with or without interest. It may also be a loan made by another lender in which the government participates or that it purchases. The definition excludes federally guaranteed loans acquired in satisfaction of default claims and the price support loans of the Commodity Credit Corporation.

Direct Spending - Under the Budget Enforcement Act of 1990, direct spending consists of budget authority and resulting outlays provided in laws other than appropriation acts; entitlement authority including appropriated entitlements; and the Food Stamp Program.

Discretionary Appropriations - Appropriations not mandated by existing law and therefore made available annually in appropriation bills in such amounts as Congress chooses. The Budget Enforcement Act of 1990 defines discretionary appropriations as budget authority provided in annual appropriation acts, and the outlays derived from that authority, but it excludes appropriations for entitlements. Under present law, the act sets limits on total discretionary spending through fiscal year 1998. Excess amounts are subject to presidential sequestration if Congress fails to enforce the limits.

Discretionary Spending - Spending controlled by the Appropriations Committee and appropriated through the 13 annual appropriations bills. Discretionary spending is often divided into three categories: defense (which funds the military activities of the Department of Defense and the defense-related functions of other agencies), international (which encompasses spending for foreign economic and military aid, the Department

of State and international finance programs) and domestic (which includes, among other things, the government's science, transportation, law enforcement, education, health, and housing activities).

Discretionary Spending Caps - Ceilings on budget authority and outlays for discretionary programs as defined by the Budget Enforcement Act of 1990. For FY 1991-93, the caps were divided among the three categories of discretionary spending - defense, international, and domestic. Discretionary spending caps are enforced through congressional rules and sequestration procedures.

Earmark - To set aside funds for a specific purpose, use, or recipient. Generally speaking, virtually every appropriation is earmarked, and so are certain revenue sources credited to trust funds. In common usage, however, the term is often applied as an epithet for funds set aside for such purposes as research projects, demonstration projects, parks, laboratories, academic grants, and contracts in particular congressional districts or states or for certain specified universities or other organizations.

Emergency Appropriation - Under the Budget Enforcement Act of 1990, a discretionary appropriation designated as an emergency requirement by the president and, in a statute, by Congress. An emergency appropriation results in an increase in the caps.

Entitlement Program - A federal program under which individuals, businesses, or units of government that meet the requirements or qualifications established by law are entitled to receive certain payments if they seek such payments. Major examples include Social Security, Medicare, Medicaid, unemployment insurance, and military and federal civilian pensions. Some entitlements are funded by permanent appropriations, others by annual appropriations. In either case, they are a form of backdoor and mandatory spending. Congress cannot control their expenditures by refusing to appropriate the sums necessary to fund them because the government is legally obligated to pay eligible recipients the amounts to which the law entitles them, and recipients can take legal action if the government fails to do so. Under many entitlement programs, spending automatically increases or decreases over time as the number of recipients eligible for benefits varies. Some entitlement benefits are indexed for inflation; that is, the amount of the benefit is automatically increased by a specified percentage if the national cost-of-living index rises by a specified percentage. The increases are commonly called COLAs, an acronym for cost-of-living allowances.

Expedited Procedures - Statutory rules that provide procedures for relatively speedy consideration of certain measures. Usually, these include a deadline for committee consideration, a privileged motion to discharge if the committee fails to meet the deadline, immediate floor consideration under limited debate, and a ban on amendments. Examples include procedures for acting on rescission measures and for joint resolutions repealing legislation passed by the government of the District of Columbia.

Expired Account - An appropriation or fund account with an unobligated balance that may not be spent or obligated because the time limit for such actions has expired.

Federal Credit Reform Act of 1990 - A law that established a system of budgeting for the subsidized cost of federal direct loans and loan guarantees. Under this system, Congress appropriates budget authority or provides indefinite authority equal to the subsidy cost. The budget authority is placed in a program account from which funds are disbursed to a financing account. The Credit Reform Act appears as Title V of the Congressional Budget Act of 1974 where it was inserted by the Budget Enforcement Act of 1990. The reform act also established new budgetary and accounting rules for federal loans. It put direct and guaranteed loans on an equal footing; provided a means for recognizing a change in the status of loans in the budget and for controlling guaranteed loans at the time the commitments are made; and provided a basis for comparing direct and guaranteed loans with other uses of budgetary resources.

Federal Debt - The total amount of funds borrowed and not yet repaid by the federal government. Federal debt consists of public debt and agency debt. Public debt is the portion of the federal debt borrowed by the Treasury or the Federal Financing Bank directly from the public or from another federal fund or account. For example, the Treasury regularly borrows money from the Social Security trust fund. Public debt accounts for about 99 percent of the federal debt. Agency debt refers to the debt incurred by federal agencies like the Export-Import Bank, but excluding the Treasury and the Federal Financing Bank, which are authorized by law to borrow funds from the public or from another government fund or account.

Financing Account - An account that receives payments from a credit program account established under the terms of the Federal Credit Reform Act of 1990. The account includes cash flows to and from the government

resulting from direct loan obligations or loan guarantee commitments. At least one financing account is established for each credit program account. Financing accounts are excluded from budget totals, however, because they are used to finance only the nonsubsidized portion of federal credit activities.

Fiscal Year - The federal government's annual accounting period. It begins October 1 and ends on the following September 30. A fiscal year is designated by the calendar year in which it ends and is often referred to as FY. Thus, fiscal year 1998 began October 1, 1997, ended September 30, 1998, and is called FY98. In theory, Congress is supposed to complete action on all budgetary measures applying to a fiscal year before that year begins. It rarely does so. From 1884 to 1976, the fiscal year ran from July 1 to June 30 of the following year. The Congressional Budget Act of 1974 changed the dates to accommodate the timetable it established for the new congressional budget process.

Forward Funding - A type of multiyear appropriation that is made available in the middle or toward the end of a fiscal year and remains available through the next fiscal year: for example, from July 1 of one year through September 30 of the next. The amount is charged against the budget for the fiscal year in which the appropriation becomes available, not against the budget of the succeeding fiscal year.

Full Funding - (1) An appropriation that finances the full estimated cost of a project or activity that will take several years to complete and that requires periodic or intermittent expenditures over that period of time: for example, a construction project or a procurement program. In contrast, incremental funding refers to instances in which Congress provides funds in each fiscal year for only that year's portion of the estimated total cost of the project or activity. (2) Sometimes refers to an appropriation that provides the full amount authorized in law for a project or activity for an upcoming fiscal year.

Function or Functional Category - A broad category of national need and spending of budgetary significance. A category provides an accounting method for allocating and keeping track of budgetary resources and expenditures for that function because it includes all budget accounts related to the function's subject or purpose. A congressional budget resolution lists all the functional categories and the portion of aggregate budget amounts allocated to each. As of 1998 there were twenty functional categories, each divided into a number of subfunctions. They included such national-need categories as agriculture, administration of justice, commerce and housing credit, energy, income security, transportation, and national defense. Those not assigned to national needs were net interest and undistributed offsetting receipts. Accounts are placed in the function that best represents their major purpose; consequently, functions do not necessarily correspond with appropriations acts or with the budgets of individual agencies.

Funding Gap - A term sometimes applied to a period when federal agencies lack authority to obligate or spend funds because their appropriations for that period have not been enacted. Spending gaps occur most frequently at the beginning of a fiscal year, but agencies occasionally run out of money later in the year. During such periods, agencies sometimes furlough many of their employees and shut down many of their operations. A law permits agencies to classify certain employees as essential for carrying out activities involving the safety of human life and protection of property and to retain them during spending gaps, but it has been alleged that some agencies have applied that classification to employees engaged in routine activities. The Budget Enforcement Act of 1990 amended the law to emphasize that routine activities should not be continued during funding gaps.

General Appropriation Bill - A term applied to each of the thirteen annual bills that provide funds for most federal agencies and programs and also to the supplemental appropriation bills that contain appropriations for more than one agency or program. Only general appropriation bills are subject to the rules of the authorization-appropriation process; special appropriation bills are not. Because the House classifies continuing resolutions as special rather than general appropriations, unauthorized appropriations in, or offered as amendments to, such resolutions are not subject to points of order. The Senate, however, classifies continuing resolutions as general bills and permits points of order against such amendments. The Constitution does not require annual appropriations, but Congress has funded most agencies and programs annually since the first Congress. Because it rarely enacts all the regular annual appropriation bills before the beginning of the fiscal year to which they apply, Congress resorts to one or more stopgap funding measures (that is, continuing resolutions) every year so that all government agencies can continue to function.

Gephardt Rule - A House rule providing for automatic House passage of a joint resolution increasing the statutory limit on the public debt when the House agrees to a budget resolution that requires such an increase. The amount of the increase in the joint resolution must conform with the level established in the budget

resolution. The final House vote on the budget resolution is deemed to be the vote on the joint resolution, thus, a separate direct vote on raising the debt limit is avoided. Rep. Richard A.Gephardt (D-Mo.) was the rule's chief sponsor. If Congress does not enact legislation to raise the public debt limit when that limit has been reached, the government cannot borrow sufficient monies to pay for all of its commitments and its credit is endangered. Nevertheless, before the first version of this rule was approved in 1979, the House sometimes rejected such legislation because many Members feared a direct vote on it would harm them politically or because they opposed it for ideological or political reasons. In the Senate, which has no such rule, the measure is often the target of numerous riders because it is considered to be virtually veto-proof.

Gramm-Rudman-Hollings Act of 1985 - Common name for the Balanced Budget and Emergency Deficit Control Act of 1985, which established new budget procedures intended to balance the federal budget by fiscal year 1991--a goal subsequently extended to 1993. To achieve that goal, the act set annual maximum deficit targets and mandated automatic across-the-board spending cuts, called sequesters, by the President to enforce the limits. It also extensively amended the Congressional Budget Act of 1974. The act' s chief sponsors were Senators Phil Gramm (R-Texas), Warren Rudman (R-N.H.), and Ernest Hollings (D-S.C.). In 1986, the Supreme Court invalidated a provision of the act that authorized the General Accounting Office to determine the sequestrations required of the President. The Court held that the provision violated the Constitution's separation-of-powers doctrine because GAO is a legislative agency. In 1987, Congress assigned the function to the Office of Management and Budget as part of the Balanced Budget and Emergency Deficit Control Reaffirmation Act.

Humphrey-Hawkins Debate - Debate on the budget resolution in the House may not exceed 10 hours, not including up to four hours of debate (known as Humphrey-Hawkins time) reserved for the discussion of economic goals and policies. Originally included in the so-called Humphrey-Hawkins Act of 1978 (P.L. 95-523; amended by P.L. 97-258) and found in Section 305(a)(2) of the Congressional Budget Act; this debate time is intended to focus on the big-picture of the federal budget, rather than the budget resolution’s specific provisions.

Impoundment - An executive branch action or inaction that delays or withholds the expenditure or obligation of budget authority provided by law. The Impoundment Control Act of 1974 classifies impoundments as either deferrals or rescissions, requires the president to notify Congress about all such actions, and gives Congress authority to approve or reject them. The Constitution is unclear on whether a president may refuse to spend appropriated money, but Congress usually expects the President to spend at least enough to achieve the purposes for which the money was provided whether or not he agrees with those purposes.

Impoundment Control Act of 1974 - A title within the Congressional Budget and Impoundment Control Act of 1974 that prescribes procedures for congressional review and control over impoundments proposed by the executive branch.

Incremental Funding - The appropriation by Congress in one fiscal year of only a portion of the estimated total cost of a project or activity that may take several years to complete and require periodic or intermittent expenditures over that period of time.

Legislation on an Appropriation Bill - A common reference to provisions changing existing law that appear in, or are offered as amendments to, a general appropriation bill. A House rule prohibits the inclusion of such provisions in general appropriation bills unless they retrench expenditures. An analogous Senate rule permits points of order against amendments to a general appropriation bill that propose "general legislation." The intent of both rules is to enforce the separation between substantive legislation and appropriations legislation.

Limitation on a General Appropriation Bill - Language that prohibits expenditures for part of an authorized purpose from funds provided in a general appropriation bill. Precedents require that the language be phrased in the negative: that none of the funds provided in a paragraph or the act shall be used for a specified activity. Limitations in general appropriation bills are permitted on the grounds that Congress can refuse to fund authorized programs and, therefore, can refuse to fund any part of them as long as the prohibition does not change existing law. House precedents have established that a limitation does not change existing law if it does not impose additional duties or burdens on executive branch officials, interfere with their discretionary authority, or require them to make judgments or determinations not required by existing law. The proliferation of limitation amendments in the 1970s and early1980s prompted the House to adopt a rule in 1983 making it more difficult for members to offer them. The rule bans such amendments during the reading of an appropriation bill for amendments unless they are specifically authorized in existing law. Other limitations

may be offered after the reading, but the Committee of the Whole can foreclose them by adopting a motion to rise and report the bill back to the House. In 1995, the rule was amended to allow the motion to rise and report to be made only by the majority leader or his designee. The House Appropriations Committee, however, can include limitation provisions in the bills it reports.

Liquidating Appropriation - An appropriation to pay obligations incurred under contract authority.

Loan Guarantee - A statutory commitment by the federal government to pay part or all of a loan's principal and interest to a lender or the holder of a security in case the borrower defaults. The Federal Credit Reform Act of 1990 requires that the cost of guaranteed loans be included in the computation of budget authority and outlays. The congressional budget resolution includes loan guarantee totals.

Look-Back - A procedure that closes sequestration loopholes for pay-as-you-go violations and for breaches of discretionary spending limits. Under the Budget Enforcement Act of 1990, a deficit increase for a fiscal year caused by direct spending or revenue legislation results in a sequester only once a year--within fifteen days after the end of a session of Congress. When Congress causes such a deficit increase for that fiscal year after the sequester for that year, the look-back procedure requires that the next year's sequestration reduce funding to offset that amount. Appropriations that breach the discretionary spending limit for the current fiscal year trigger a sequester only if they are enacted before July 1 of that year. When an appropriation enacted after that date causes such a breach, the look-back procedure requires an equivalent reduction in the appropriate spending limits for the next fiscal year.

Mandatory Appropriations - Amounts that Congress must appropriate annually because it has no discretion over them unless it first amends existing substantive law. Certain entitlement programs, for example, require annual appropriations.

Maximum Deficit Amounts - The maximum amount of the federal budget deficit for each fiscal year specified in the Gramm-Rudman-Hollings Act. Under the Budget Enforcement Act of 1990, the President may make certain adjustments in the maximum deficit level permitted in any year. If the deficit for a particular year is estimated to exceed the adjusted maximum deficit amount by more than a specified margin, a sequester is required to eliminate the excess.

Mid-Session Budget Review - A report to Congress that is prepared by the Office of Management and Budget updating the President's budget estimates and economic forecast. The President is required to submit it no later than July 15 each year.

Multiyear Appropriation - An appropriation that remains available for spending or obligation for more than one fiscal year; the exact period of time is specified in the act making the appropriation. Some multiyear appropriations are made available for periods that do not coincide with the beginning or end of a fiscal year.

Multiyear Authorization - (1) Legislation that authorizes the existence or continuation of an agency, program, or activity for more than one fiscal year. (2) Legislation that authorizes appropriations for an agency, program, or activity for more than one fiscal year.

No-Year Appropriation - An appropriation that is obligated for an indefinite period. The unobligated balances of one-year and multiyear appropriations revert to the Treasury at the end of the period for which they are provided.

Obligated Balance - The amount of an appropriation that has been obligated but not spent. Usually this balance is carried forward to succeeding fiscal years until the obligations are paid.

Obligation - A binding agreement by a government agency to pay for goods, products, services, studies, and the like, either immediately or in the future. When an agency enters into such an agreement, it incurs an obligation. As the agency makes the required payments, it liquidates the obligation. Appropriation laws usually make funds available for obligation for one or more fiscal years but do not require agencies to spend their funds during those specific years. The actual outlays can occur years after the appropriation is obligated; for example, a contract for payment for a submarine when it is delivered in the future. Such obligated funds are often said to be "in the pipeline." Under these circumstances, an agency's outlays in a particular year can come from appropriations obligated in previous years as well as from its current-year appropriation. Consequently, the money Congress appropriates for a fiscal year rarely coincides with the total amount of appropriated money the government will actually spend in that year.

Off-Budget Entities - Specific federal entities whose budget authority, outlays, and receipts are excluded by law from the calculation of budget totals, although they are part of government spending and income. As of early 1993, these included the Social Security trust funds (Federal Old-Age and Survivors Insurance Fund and the Federal Disability Insurance Trust Fund) and the Postal Service. Government- sponsored enterprises are also excluded from the budget because they are considered private rather than public organizations.

Offsetting Receipts - Funds collected by the federal government that are not counted as revenue. Instead, they are deducted from outlays and are called negative outlays. Some receipts are proprietary ones from the public such as flat premiums for supplementary medical insurance, funds from timber and oil leases, and proceeds from the sale of electric power. Others are intergovernmental transactions such as payments by federal agencies to retirement and other funds. Some offsetting receipts are deducted from specific budget accounts; others, called undistributed offsetting receipts, are deducted from total outlays.

Omnibus Bill - A measure that combines the provisions of several disparate subjects into a single and often lengthy bill. Examples include reconciliation bills, continuing resolutions that contain all or most of the thirteen general appropriation bills, and omnibus claims bills that combine several private bills into a single measure.

On-Budget - Transactions of all federal government entities that are included within the budget.

One-Year Appropriation - An appropriation made available for spending or obligation during a single year, usually the fiscal year specified in the enacting clause of the appropriation act. General appropriation acts usually provide one-year appropriations. Any portion of an agency's one-year appropriation that it does not spend or obligate during that fiscal year is said to lapse, and the agency loses it.

Outlays - Amounts of government spending. They consist of payments, usually by check or in cash, to liquidate obligations incurred in prior fiscal years as well as in the current year, including the net lending of funds under budget authority. In federal budget accounting, net outlays are calculated by subtracting the amounts of refunds and various kinds of reimbursements to the government from actual spending.

Outyears - Years that follow an upcoming fiscal year. The Congressional Budget Act of 1974 requires both the president and Congress to make projections of economic conditions and budget estimates for several outyears. In addition, committee reports on measures are required to contain cost estimates of that measure for the upcoming fiscal year and the following five fiscal years.

Pay-As-You-Go (PAYGO) - A requirement of the Budget Enforcement Act of 1990 that congressional action on revenue legislation and legislation on entitlement or other mandatory programs should not add to the budget deficit. Increased spending for such programs resulting from new legislation and revenue losses from legislation reducing taxes or fees are supposed to be offset by legislated spending reductions in other programs subject to PAYGO or by legislated increases in other taxes. If Congress fails to enact the appropriate offsets, the act requires presidential sequestration of sufficient offsetting amounts in specific direct spending accounts. Congress and the President can circumvent the requirement if both agree that an emergency makes a particular action necessary or if a law is enacted declaring that deteriorated economic circumstances make it necessary to suspend the requirement.

Permanent Appropriation - An appropriation that remains continuously available, without current action or renewal by Congress, under the terms of a previously enacted authorization or appropriation law. One such appropriation provides for payment of interest on the public debt and another the salaries of Members of Congress.

Permanent Authorization - An authorization without a time limit. It usually does not specify any limit on the funds that may be appropriated for the agency, program, or activity that it authorizes, leaving such amounts to the discretion of the appropriations committees and the two houses. A permanent authorization continues in effect unless, or until, Congress changes or terminates it.

Pork or Pork Barrel Legislation - Pejorative terms for federal appropriations, bills, or policies that provide funds to benefit a legislator's district or state, with the implication that the legislator presses for enactment of such benefits to ingratiate himself or herself with constituents rather than on the basis of an impartial, objective assessment of need or merit. The terms are often applied to such benefits as new parks, post offices, dams, canals, bridges, roads, water projects, sewage treatment plants, and public works of any kind, as well as

demonstration projects, research grants, and relocation of government facilities. Funds released by the president for various kinds of benefits or government contracts approved by him allegedly for political purposes are also sometimes referred to as pork.

Power of the Purse - A reference to the constitutional power Congress has over legislation to raise revenue and appropriate funds from the Treasury. Article I, Section 8, states that Congress "shall have Power To lay and collect Taxes, Duties, Imposts and Excises, [and] to pay the Debts. . ." Section 9 declares: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

Public Debt - Federal government debt incurred by the Treasury or the Federal Financing Bank by the sale of securities to the public or borrowings from a federal fund or account.

Reappropriation - Congressional action that permits all or part of the unobligated portion of an appropriation that has expired, or would otherwise expire, to remain available for obligation for the same or different purposes.

Reconciliation - A procedure for changing existing revenue and spending laws to bring total federal revenues and spending within the limits established in a budget resolution. Reconciliation begins with directives in the budget resolution instructing specific committees to report legislation adjusting revenues or spending within their respective jurisdictions by specified amounts, usually by a specified deadline. Although the total amount for each committee is based on program assumptions usually printed in the House and Senate Budget Committees' reports on the budget resolution, an instructed committee is not bound by them and can decide for itself how the total should be allocated. When several committees are instructed, the Budget Committee in each house consolidates their proposals in an omnibus reconciliation bill that the Budget Committee brings to the floor without changes but to which it may offer amendments. Amendments to the bill must be germane and deficit neutral. Debate on reconciliation bills is limited in both houses. Congress has applied reconciliation chiefly to revenues and mandatory spending programs, especially entitlements. Discretionary spending is controlled through annual appropriation bills.

Reconciliation Resolution - A concurrent resolution directing the Clerk of the House or the Secretary of the Senate, as appropriate, to make specified changes in bills and resolutions that have been passed but have not yet been enrolled to make them conform with the terms of the budget resolution. Under the Congressional Budget Act, a budget resolution can contain a provision delaying the enrollment of certain measures should such changes be necessary.

Reestimates - Changes made in executive branch or congressional budget estimates to reflect changes in economic conditions, spendout rates, workload, and other factors, but not the effects of changes in policy. From time to time, the reestimates are entered into budget baseline projections and score-keeping reports.

Reprogramming - An executive agency's shift of funds from one purpose to another within the same appropriation account. Reprogramming does not require specific statutory authority, but agencies usually consult with the appropriate congressional committees before taking such an action. Agencies often are required to give those committees formal notification and, in some instances, are expected to obtain their approval.

Rescission - A provision of law that repeals previously enacted budget authority in whole or in part. Under the Impoundment Control Act of 1974, the President can impound such funds by sending a message to Congress requesting one or more rescissions and the reasons for doing so. If Congress does not pass a rescission bill for the programs requested by the President within forty-five days of continuous session after receiving the message, the President must make the funds available for obligation and expenditure. If the President does not, the comptroller general of the United States is authorized to bring suit to compel the release of those funds. A rescission bill may rescind all, part, or none of an amount proposed by the president, and may rescind funds the president has not impounded. The term "continuous session" means days on which either house is in actual session. The houses rarely meet seven days a week; therefore, the forty-five-day deadline usually takes a longer period of calendar days to expire. Rescission bills are privileged in both houses and time for debate on them is limited. The Line Item Veto Act, enacted in 1996 but declared unconstitutional by the Supreme Court in 1997, authorized a special type of rescission authority for the President.

Retrenchment - A reduction in an amount of money contained in a general appropriation bill. Under the Holman Rule in the House of Representatives, a germane provision in, or amendment to, such a bill is permitted if it changes existing law by reducing the amount of money covered by the bill. During consideration of a general appropriation bill in Committee of the Whole, retrenchment amendments may be offered only after the reading for amendments has been completed, and then only if the committee does not prevent their offering by adopting a motion to rise and report the bill back to the House. Members have seldom used the Holman Rule in recent decades, relying instead on limitation amendments.

Revenue Legislation - Measures that levy new taxes or tariffs or change existing ones. Under Article I, Section 7, Clause 1 of the Constitution, the House of Representatives originates federal revenue measures, but the Senate can propose amendments to them. The House Ways and Means Committee and the Senate Finance Committee have jurisdiction over such measures, with a few minor exceptions. A House rule adopted in 1983 prohibits the reporting of a tax or tariff measure by a committee not having that jurisdiction; if the chair sustains a point of order on that basis, the offending provision is automatically stricken from the bill. The rule also prohibits a tax or tariff proposal offered as an amendment to a bill reported by a committee not having jurisdiction over such measures. On various occasions, the House has refused to consider Senate bills that, in its view, violated House prerogatives on revenue measures. Any House member may rise to a question of privilege on such a measure and introduce a resolution (often called a blue slip resolution) to return it. The House has also returned a nonrevenue House bill to which the Senate added a revenue amendment--the 1983 House rule prohibits consideration of such a Senate amendment to a House measure reported by a committee not having revenue jurisdiction.

Revolving Fund - A trust fund or account whose income remains available to finance its continuing operations without any fiscal year limitation.

Scorekeeping - The process of calculating the budgetary effects of pending and enacted legislation and assessing their impact on the targets or limits in the budget resolution, as required by the Congressional Budget Act of 1974. The Congressional Budget Office (CBO) produces detailed scorekeeping reports, and the Budget Committees issue summarized versions at least once a month and often more frequently. By using these reports and CBO's cost estimates on proposed legislation, members can determine whether approval of a particular amendment or bill would breach the spending ceilings or revenue floor, established by the budget resolution or the allocations of budget resolution amounts made to committees. Scorekeeping reports tabulate congressional actions affecting budget authority, receipts, outlays, the surplus or deficit, and the public debt limit. CBO derives its scorekeeping estimates from analyses of the president's budget, baseline budget projections, and bill cost estimates.

Sequestration - A procedure for canceling budgetary resources--that is, money available for obligation or spending--to enforce budget limitations established in law. Sequestered funds are no longer available for obligation or expenditure. Automatic sequestration occurs by presidential order following a report from the Office of Management and Budget (OMB) declaring that a specified budget limit has been breached. The procedure was first established in the Gramm- Rudman-Hollings Act and subsequently modified by the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 and the Budget Enforcement Act of 1990. If OMB determines that a discretionary spending cap has been breached, a Presidential sequestration cancels enough budgetary resources in order to bring the total within the cap. If legislation that reduces revenues or increases direct spending also increases the deficit, a sequestration offsets the increase by reducing funding from entitlements not otherwise exempted by law. An end-of-session sequestration is one that occurs within fifteen calendar days after Congress adjourns. A within-session sequestration refers to one or more additional sequesters that can occur during the following session to eliminate any breach in the discretionary spending limits of the current fiscal year enacted before July 1. During the course of a session, OMB and the Congressional Budget Office are required to issue several sequestration preview reports. In addition, OMB must provide Congress with cost estimates of budgetary legislation within five days of enactment.

Special Appropriation Bill - An appropriation measure other than a general appropriation bill and therefore not subject to the rules of the authorization-appropriation process apply the term to measures providing appropriations for a single agency or purpose, but the House classifies a continuing resolution as special whereas the Senate regards it as a general measure.

Spending Authority - The technical term for backdoor spending. The Congressional Budget Act of 1974

defines it as borrowing authority, contract authority, and entitlement authority for which appropriation acts do not provide budget authority in advance. Under the Budget Act, legislation that provides new spending authority may not be considered unless it provides that the authority shall be effective only to the extent or in such amounts as provided in an appropriation act.

Subdivisions - The Congressional Budget Act of 1974 requires that committees that are allocated budget authority and outlay amounts from a budget resolution must subdivide them by programs or subcommittees. The Appropriations Committees must subdivide among their subcommittees. Other committees may subdivide by program or subcommittee.

Supplemental Appropriation Bill - A measure providing appropriations for use in the current fiscal year, in addition to those already provided in annual general appropriation bills. Supplemental appropriations are often for unforeseen emergencies requiring urgent expenditures that cannot be postponed until enactment of the next regular annual appropriations act. The funds may be in addition to those provided in previously enacted appropriation legislation, or to fund programs or activities authorized after enactment of the regular appropriation bills, or even for unauthorized programs. Supplemental appropriations enacted before July 1 trigger a sequestration fifteen days after enactment if they exceed the spending caps fixed by the Budget Enforcement Act of 1990 on discretionary spending. The sequestration involves automatic spending cuts to offset the excess budget authority over the cap.

Surplus - The amount by which the government's budget receipts exceed its outlays for a given fiscal year.

Tax - A payment imposed upon persons or groups for governmental support. The power to impose and collect federal taxes is given to the Congress in Article I, Section 8 of the Constitution. Collections that arise from the sovereign powers of the federal government constitute the bulk of governmental receipts, which are compared with budget outlays to calculate a budget surplus or deficit.

Tax Expenditure - Loosely, a tax exemption or advantage, sometimes called an incentive or loophole; technically, a loss of governmental tax revenue attributable to some provision of federal tax laws that allows a special exclusion, exemption, or deduction from gross income or that provides a special credit, preferential tax rate, or deferral of tax liability. The tax exemption or advantage is usually intended to assist a certain group or to encourage a certain activity, such as the purchase of homes. In their impact on the federal budget, tax expenditures are, in effect, subsidies provided through the tax system. Instead of making direct payments to beneficiaries, the government permits certain taxpayers to pay lower taxes than they otherwise would have to pay.

Tax Expenditure Statement - A statement on the effect a measure will have on the level of tax expenditures. The statement is required to appear in the committee report on that measure.

Tax Expenditures Budget - An enumeration of tax expenditures and their levels by major functional categories of the federal budget. A tax expenditures budget is required to appear in the Budget Committee's report accompanying a concurrent resolution on the budget.

Trust Funds - Special accounts in the Treasury that receive earmarked taxes or other kinds of revenue collections, such as user fees, and from which payments are made for special purposes or to recipients who meet the requirements of the trust funds as established by law. Of the more than 150 federal government trust funds, several finance major entitlement programs, such as Social Security, Medicare, and retired federal employees' pensions. Others fund infrastructure construction and improvements, such as highways and airports. Technically, the funds credited to these accounts are restricted by law to their designated programs or uses and are not available for the general purposes of government. Nevertheless, the Treasury borrows from the trust funds for that purpose and the borrowings become part of the public debt.

Unauthorized Appropriation - An appropriation for a purpose not authorized in law or one that exceeds the amount authorized in law. The rules of both houses prohibit unauthorized appropriations in general appropriation bills, but permit some exceptions. In a technical sense, in both houses an unauthorized appropriation also violates the rules that ban legislation on a general appropriation bill, because it proposes to enact a provision of law that does not yet exist.

Uncontrollable Expenditures - A frequently used term for federal expenditures that are mandatory under existing law and therefore cannot be controlled by the President or Congress without a change in the existing

law. Technically, such expenditures are referred to as "relatively uncontrollable under current law." Uncontrollable expenditures include spending required under entitlement programs and also fixed costs, such as interest on the public debt and outlays to pay for prior-year obligations. In recent years, uncontrollables have accounted for approximately three-quarters of federal spending in each fiscal year.

Unexpended Balance - The amount of budget authority that has not been spent. The obligated portion of the balance remains available until it is spent or rescinded by law. The unobligated portion of the balance remains available for spending or obligation only until the end of the period for which it was made available. The rules of both houses forbid the reappropriation of unobligated unexpended balances.

Unfunded Mandate - Generally, any provision in federal law or regulation that imposes a duty or obligation on a state or local government or private sector entity without providing the necessary funds to comply. The Unfunded Mandates Reform Act of 1995 amended the Congressional Budget Act of 1974 to provide a mechanism for the control of new unfunded mandates.

Unfunded Mandates Reform Act of 1995 - A law establishing procedures governing congressional consideration of legislation containing unfunded mandates. The Act establishes a point of order in each house against considering a bill or joint resolution that would increase the unfunded costs of intergovernmental (public sector) mandates by more than $50 million, or that is not accompanied by a CBO estimate of the unfunded costs of intergovernmental and private sector mandates. A point of order also lies against an amendment, motion, or conference report that would result in the unfunded costs of intergovernmental mandates in the measure exceeding the $50 million threshold. The Senate may waive any of these points of order by majority vote, and the House may vote to consider a measure, amendment, or conference report notwithstanding the point of order. Under the Act, a mandate may be funded through annual appropriations or direct spending (entitlement) authority. If annual appropriations are insufficient to implement the mandate during any fiscal year, it ceases to be effective unless Congress changes the requirements of the mandate accordingly.

Unobligated Balance - The portion of budget authority not yet committed as payment for specific products or services. In one-year accounts, the unobligated balance expires at the end of the fiscal year for which it was made available. In multiyear accounts, it remains available for obligation for the specified number of years. Unobligated balances in no-year accounts are carried forward indefinitely until either the purposes for which they were provided have been accomplished, disbursements have not been made against the appropriation for two full consecutive years, or they are rescinded by law.

Urgent Supplemental Appropriation Bill - A title sometimes given to a supplemental appropriation bill for political public relations purposes. Such a title has no legal, parliamentary, or procedural significance.

User Fee - A fee charged to users of goods or services provided by the federal government. When Congress levies or authorizes such fees, it determines whether the revenues should go into the general collections of the Treasury or be available for expenditure by the agency that provides the goods or services.

Views and Estimates Report - A report commenting or making recommendations on budgetary matters for the upcoming fiscal year that each House and Senate Committee with legislative jurisdiction must submit to the Budget Committee in its house. The Budget Enforcement Act of 1990 requires the submission of the reports within six weeks after the President transmits his annual budget to Congress to give the Budget Committees time to review the comments and suggestions before preparing and reporting the annual budget resolution.