

17. CONSTRUCTION AWARDS

A. Purpose. This chapter applies when activities under a Department of Commerce award involve construction, as described in Section C below. Construction awards are primarily granted by three operating units within the Department of Commerce (DOC or the Department): the Economic Development Administration (EDA), the National Oceanic and Atmospheric Administration (NOAA) and the National Institute of Standards and Technology (NIST). This chapter describes the procedures for compliance, reporting, record-keeping, and administrative requirements that generally apply to DOC construction awards. Contact the specific operating unit for more operating unit-specific information and also see the Appendix to this chapter for certain specific operating unit requirements. Also, when an appropriations statute or other direct statutory authority requires an operating unit to provide Federal assistance for a specific project or to a specific organization or individual (i.e., a hard earmark), FALD should be consulted to determine which provisions of this chapter apply.

B. Authority. Construction activity is allowable only when program legislation includes specific authority for construction and/or when the DOC operating unit specifically authorizes such activity.

C. Scope of Chapter.

1. Construction. This chapter applies to an award in which the major purpose of the project or program is construction, such as the construction of new buildings, completion of shell space in existing buildings, renovation or rehabilitation of existing buildings, and construction or development of real property infrastructure improvements (e.g., site preparation; utilities; streets; curbs; sidewalks; parking lots; and other streetscaping improvements, etc.).

2. Construction v. Alterations. Activities under an award are considered construction when the major purpose of the award is construction as defined in this chapter. In contrast, alteration of facilities incidental to a non-construction purpose is not considered construction under this chapter. For example, if the major purpose of an award is to allow a recipient to conduct educational or business seminars, the renovation of an educational exhibit or staging area would not be considered construction under this chapter.

D. Policy.

1. Grant Recipients as Trustees. Property that is acquired or improved, in whole or in part, with Federal assistance is held in trust by the recipient for the purpose(s) for which the award was made and for the estimated useful life of the project, during which period the DOC operating unit retains an undivided equitable reversionary interest in the property (the Federal Interest). Under the United States Constitution (Article I, Section 8, Clause 1), Congress has the power to appropriate Federal funds. Incident to this power is the right “to further broad policy objectives

by conditioning receipt of those Federal moneys upon compliance by the recipient with Federal statutory and administrative directives.” *South Dakota v. Dole*, 483 U.S. 203, 207, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980). *See also* Article IV, Section 3, Clause 2, regarding Congress' power to make rules regarding property of the United States. The requirement that property purchased or improved with Federal funds continue to be used for the original statutory purpose for which it was acquired is embodied in the DOC's administrative rules for financial assistance. *See* 15 CFR §§ 14.32, 14.33, 14.37, 24.31, as applicable.

The U.S. Government Accountability Office explained the concept in *Principles of Federal Appropriations Law*, 3d Ed., Vol. II, Ch. 10, Pt. D (2006):

[A] grantee holds grant funds, and property purchased with those funds, in the capacity of a trustee. For example, in *Joliet-Will*, 847 F.2d at 432 [*In re Joliet-Will County Community Action Agency*, 847 F.2d 430 (7th Cir.1988)], the court held that the grantee was essentially “a trustee, custodian, or other intermediary, who . . . is merely an agent for the disbursement of funds belonging to another,” and that the grantee's ‘ownership’ was nominal, like that of a trustee. The trust concept finds support in an early Supreme Court decision, *Stearns v. Minnesota*, 179 U.S. 223 (1900), a land grant case in which the Court discussed the grant in trust terms.

Accordingly, the recipient holds grant funds and DOC-financed property in trust to serve the purpose of the operating unit's program for which the Financial Assistance Award (issued on Form CD-450) was made. The recipient's obligation to the Federal government continues for the estimated useful life of the project, as determined by the operating unit. If it is determined that a recipient is failing to meet this obligation, the operating unit may assert its equitable reversionary interest in the project. However, the operating unit's non-assertion of its interest does not constitute a waiver thereof.

2. Eminent Domain. In making a discretionary award for a construction project, the operating unit will consider the policy on eminent domain set out in Executive Order 13406, “*Protecting the Property Rights of the American People*.” As appropriate, the terms and conditions of the award will include appropriate provisions to ensure that the recipient agrees:

- a. Not to use any power of eminent domain available to the recipient (including the commencement of eminent domain proceedings) for use in connection with the project for the purpose of advancing the economic interests of private parties;
- b. Not to accept title to land, easements, or other interest in land acquired by the use of any power of eminent domain for use in connection with the project for such purposes; and
- c. Any use of the power of eminent domain to acquire land, easements or interests in land, whether by the recipient or any other entity that has the power of eminent domain, in connection with the project without prior written consent of the operating unit is an unauthorized use of the

project. If the recipient puts the project to an unauthorized use, the recipient shall be required to compensate the operating unit for its fair share in accordance with 15 C.F.R. §§ 14.32 or 24.31, as applicable.

3. Terms and Conditions of Award. The Financial Assistance Award (on Form CD-450), executed by the operating unit and by the recipient, together with the budget, special award conditions, and the standard terms and conditions, each as may be amended, and other Federal requirements incorporated by reference, constitute the complete requirements, hereinafter referred to as the “Terms and Conditions,” applicable to the operating unit’s grant.

E. General Requirements. The following sections of this chapter contain requirements that are applicable to construction awards that originate in all Department operating units. The Appendices contain requirements specific to NOAA, EDA, or NIST.

1. Recipient Responsibilities.

a. The recipient is responsible for complying with all Federal laws and regulations, Departmental policies, Executive Orders, and Office of Management and Budget (OMB) Circulars that are referenced in the Terms and Conditions, each as may be amended. These may include applicable Federal cost principles and administrative, audit, programmatic, financial, and property management requirements. The recipient is responsible for supervising the design, bidding, construction, and operation of construction projects in compliance with all grant requirements.

b. The operating unit will assist the recipient by providing information and guidance on the Federal requirements for each grant, such as the information contained in this chapter, the references and forms listed in the Appendix (Section I), and direct guidance and assistance provided by operating unit project managers.

c. The Financial Assistance Award. The recipient should pay particular attention to the following portions of the Financial Assistance Award:

(1) The description of the project on Form CD-450 and in the official letter to the recipient extending the award determines the project scope(s) of work to be funded under the grant.

(2) All Federal requirements specifically listed or incorporated into the award describe applicable Federal administrative requirements. These publications provide critical information on procurement, record-keeping, and cost principles, as well as other important administrative issues. Reprints of critical documents are available as indicated in the Appendix (Section I).

(3) The specific standard terms and conditions of the Financial Assistance Award applicable to the construction project.

(4) Any special award conditions, which may contain conditions that must be satisfied prior to advertisement for bids, start of construction, disbursement of grant funds, or other critical events, as well as conditions that extend for the duration of the estimated useful life of the project.

Failure to satisfy any Term or Condition may result in the disallowance of costs, or suspension or termination of the award and recovery of grant funds. In addition, such failure may have a negative impact on the recipient's ability to receive future funding from the Department. Special attention should be paid to the project development time schedule, which may only be extended as a result of a written request from the recipient for an amendment to the award and a corresponding written approval from the operating unit. The disbursement of grant funds is not permitted when a project has exceeded the time schedule in the award, unless the operating unit has given written approval for a time schedule extension.

2. Operating Unit's Responsibilities.

a. Pre-award Requirements. In preparing documentation for a financial assistance award for a construction project, the Program Officer should be familiar with the following requirements:

(1) Forms. Unless the operating unit uses other OMB-approved forms for construction, operating units shall use Form SF-424, "*Application for Federal Assistance*," Form SF-424C, "*Budget Information - Construction Programs*," and Form SF-424D, "*Assurances - Construction Programs*," when the major purpose of a project or program is construction or real property development.

(2) Construction Terms. The following terms shall be included in all DOC construction awards:

(a) Maintenance. The recipient agrees that, for the estimated useful life of the facility funded with this award, the project will be properly and efficiently administered, operated, and maintained for the purpose authorized by this award and in accordance with the terms, conditions, requirements, and provisions of the award. If the [operating unit] determines at any time during the estimated useful life of the project, that the project and any project property is not being properly and efficiently administered, operated, and maintained, the [operating unit] shall have the right to terminate this award for cause and pursue any other remedies allowed by law.

(b) Security Interest. The recipient shall execute a security interest or other statement of the Federal Interest in the property, acceptable in form and substance to the [operating unit], which statement must be perfected and placed of record in accordance with local law, with continuances re-filed as appropriate. The recipient must provide the [operating unit] with a written statement from a licensed attorney in the jurisdiction where the property is located certifying that the Federal Interest has been protected, as required under the award and in

accordance with local law. The attorney's statement, along with a copy of the instrument reflecting the recordation of the Federal Interest, shall be returned to the Grants Officer. The recipient may not dispose of, modify the use of, or change the terms of the real property title, or other interest in the project site and facilities without permission and instructions from [the operating unit]. No funds under this award shall be released until the recipient has complied with this provision, unless other arrangements satisfactory to [the operating unit] are made.

(c) Compliance. The recipient shall comply, and must require each contractor or subcontractor to comply, with all applicable Federal, state, and local laws and regulations.

(d) Energy Efficiency. The recipient shall apply, where feasible, sustainable, and energy efficient, design principles for the purpose of reducing pollution and energy costs and optimizing lifecycle costs associated with the construction.

(e) Signs. The recipient is responsible for constructing, erecting, and maintaining in good condition throughout the construction period a sign(s) satisfactory to the [operating unit] that identifies the project and indicates that the project is Federally funded. The [operating unit] also may require that the recipient maintain a permanent plaque or sign at the project site with the same or similar information.

(f) Land, Easements, and Rights of Way. The recipient must disclose all encumbrances to the operating unit. The operating unit will not accept any encumbrance that interferes with the construction, intended use, operation, or maintenance of the project during its estimated useful life. Unless otherwise provided for in the award, prior to grant of the award and commencement of construction, or when requested by the operating unit, the recipient must furnish evidence, satisfactory in form and substance to the operating unit, that title to real property is vested in the recipient, and that it has obtained any rights-of-way, easements, State and local government permits, long-term leases, or other property interests.

(g) Relocation Assistance. The provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (Pub. L. No. 91-646; 42 U.S.C. § 4601 *et seq.*), are applicable to each recipient of assistance from an operating unit. This Act provides assistance to persons, businesses, or farm operations affected by the acquisition, rehabilitation or demolition of real property acquired for a project financed wholly or in part with Federal assistance funds. It also requires compliance with specific guidelines pertaining to reimbursable costs incidental to such land acquisition.

(h) Tribal Employment Rights Ordinances. In accordance with Departmental policy, all operating units must recognize Tribal Employment Rights Ordinances ("TEROs"), which may provide for preferences in contracting and employment, in connection with its financial assistance awards. Tribal ordinances requiring preference in contracting, hiring, and firing and the payment of a TERO fee are allowable provisions under Federal awards and should be incorporated by the operating unit under its grants and contracts with American Indian and

Alaska Native tribal governments. The payment of the TERO fee, which supports the tribal employment rights office to administer the preferences, should generally be allowable as an expense that is “necessary and reasonable for proper and efficient performance and administration” of an award, as provided under the applicable cost principles set out in 2 C.F.R. part 225.

b. Post-award Requirements.

(1) Review of Recipient-Submitted Documentation. The operating unit must review documentation submitted by the recipient and ensure that all such documentation is complete and accurate and complies with all applicable award requirements. At a minimum, the recipient’s records must fully disclose: (a) all project expenditures, (b) procurement actions, (c) compliance with the Terms and Conditions of the Financial Assistance Award, and (d) contractor compliance with applicable Federal requirements, and (e) such other records as the operating unit determines will facilitate an effective audit.

(2) Reporting of Project Progress. Progress reports shall be due from the recipient on a regular basis and shall, at minimum, contain the following information:

(a) A comparison of actual accomplishments to the schedule established in the award;

(b) Reasons for delays in those cases where the schedule approved by the operating unit was not met;

(c) Any change to the purpose, nature, location, bona-fide need, neighborhood served, size, funding, or cost of the project;

(d) All change orders issued up to the date of the report and not previously reported to the operating unit; and other pertinent information including, when appropriate, an analysis and explanation of the cost overruns or high unit costs.

However, between the required reporting dates, events may occur, such as problems, delays, or adverse conditions, that will materially affect the ability of the recipient to attain program objectives, prevent time schedules and goals from being met, or preclude the attainment of project work units by established time periods. The recipient shall be required to inform the operating unit as soon as possible of any event which has an impact on the operating unit, including any favorable developments that enable the recipient to meet time schedules and goals sooner than anticipated or produce more work than originally projected. The recipient must notify the operating unit of such events in the most expeditious way possible and then, if the original notification was not in writing, provide the operating unit with written notification, including a statement of the event or issue, a statement of the course of action contemplated to resolve the matter, and any Federal assistance needed to resolve the situation. The operating unit will review and respond appropriately to documentation disclosing these events.

(3) Pre-Construction Documentation. The operating unit reviews documentation regarding the following:

(a) Environmental Compliance. The operating unit must ensure that environmental project reviews are conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (Pub. L. No. 91-190; 42 U.S.C. § 4321 *et seq.*, as implemented under 40 C.F.R. chapter V) (NEPA), when the award activities remain subject to Federal authority and control, and all other Federal environmental statutes, regulations and Executive Orders, as listed in the Terms and Conditions to the award. These authorities include the implementing regulations of NEPA, which require the operating units to provide public notice of the availability of project-specific environmental documents, such as environmental impact statements, environmental assessments, findings of no significant impact, and records of decision, as specified in 40 C.F.R. § 1506.6(b).

(b) Civil Rights Compliance. Discrimination by a grant recipient is prohibited in accordance with the following authorities:

(i) Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000d *et seq.*) and the Department's implementing regulations at 15 C.F.R part 8;

(ii) 42 U.S.C. § 3123 and 42 U.S.C. § 6709 (for EDA recipients), and the Department's implementing regulations at 15 C.F.R. §§ 8.7-8.15;

(iii) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) and the Department's implementing regulations at 15 C.F.R. part 8b;

(iv) The Age Discrimination Act of 1975, as amended (42 U.S.C. § 6101 *et seq.*) and the Department's implementing regulations at 15 C.F.R. part 20;

(v) The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*) prohibiting discrimination on the basis of disability under programs, activities, and services provided or made available by State and local governments or instrumentalities or agencies thereto, as well as public or private entities that provide public transportation; and

(vi) Other Federal statutes, regulations, and Executive Orders, as applicable.

(4) Project Management Conference. Shortly after approval of the award, the operating unit may contact the recipient to arrange a project management conference. The purpose of the project management conference is to explain to the recipient its post-approval responsibilities for administration of the award, including its responsibilities with respect to the Terms and Conditions of the award and applicable Federal requirements. Whenever practical, the project management conference should be held where appropriate operating unit regional office

personnel will be available. The recipient's authorized representative, architect/engineer, attorney, and possibly the recipient's financial representative should attend.

(5) Architect/Engineer Agreement.

(a) The recipient's architect/engineer agreement shall provide for all services required by the recipient for the design and engineering phases of the project. Appropriate standards, guidance, or forms developed by professional organizations, such as the American Consulting Engineers Council ("ACEC"), American Society of Civil Engineers ("ASCE"), National Society of Professional Engineers ("NSPE"), and/or the Institute of Architects ("AIA") may be used where the recipient does not have standard procurement documents.

(b) The recipient must select the architect/engineer in accordance with the procurement standards set forth in 15 C.F.R. parts 14 or 24, as applicable. The "cost-plus-percentage-of-cost" and "percentage-of-cost" methods of contracting are specifically prohibited. *See* 15 C.F.R. §§ 14.44(c) or 24.36(f)(4), as applicable.

(c) The architect/engineer agreement shall cover all services necessary for the successful execution of the project, including consultations, surveys, soil investigations, supervision, travel, "as-built" or record drawings, arrow diagram (CPM/PERT) where applicable, and incidental costs. Regardless of who furnishes the construction inspector, the architect/engineer shall be held responsible for making sufficient visits to the project site to determine if the work is proceeding in accordance with the approved plans and specifications.

(d) All architect/engineer contracts awarded by the recipient shall include a provision to the effect that the recipient, the operating unit, the Comptroller General of the United States, the Inspector General of the Department of Commerce (OIG), or any of their duly authorized representatives, shall have access to any paper or electronic documents, books, correspondence, and records of the architect/engineer that are pertinent to the award in order to verify the recipient's compliance with award requirements.

(6) Early Construction Starts. In order for project costs to be eligible for reimbursement by the operating unit, the operating unit must determine that all contracts necessary for design and construction of the project facilities have been awarded in compliance with the Terms and Conditions of the award. If construction commences prior to the operating unit's determination, the recipient proceeds at its own risk until the operating unit's review and concurrence.

(7) Requirements During Construction.

(a) During construction, the recipient is responsible for:

(i) Ensuring project completion in accordance with approved plans and specifications;

- (ii) Monitoring project progress and reporting progress to the operating unit;
- (iii) Providing for adequate construction inspection;
- (iv) Promptly paying costs incurred for the project purposes;
- (v) Monitoring contractors' compliance with Federal, State, and local requirements; and
- (vi) Constructing and maintaining in good condition throughout the construction period, of a sign or signs, at the project site in a conspicuous place indicating that the Federal Government is participating in the project.

(8) Scheduling Inspection for Final Acceptance. The recipient will schedule a final inspection when all construction has been completed, the architect/engineer has conducted a final inspection, and any deficiencies have been corrected. Representatives of the recipient, the architect/engineer, and the contractor(s) will make the final inspection. The operating unit must be given advance notice of the final inspection so that a representative of the operating unit may participate.

(9) Change Orders.

(a) As applicable, all contract change orders must be approved by the operating unit even if operating unit is not participating in any costs associated with the change or if the contract price is to be reduced. Necessary supporting statements, estimates, specifications, and plans should be attached. Absent express legal authority, the operating unit will not approve change orders that change the purpose and intent (the scope) of the project. The recipient will be notified in writing of the operating unit's concurrence if the change order is acceptable.

(b) Unit prices are often used as a basis on which to make a contract award. In addition, they may be used for establishing actual costs where actual quantities differ from estimated quantities. Variations will normally require a change order to the contract whether or not a change in unit price is involved. Any increase in quantity that will result in an overall project cost overrun will require a change order to the contract. Any change to a unit price shown in the contract documents will require a change order to the contract. A change order may also be required at project completion to establish final quantities for unit price contracts.

(10) Specific Requirements for Subcontractors. The recipient is responsible for ensuring that the contractor includes applicable provisions in all subcontracts to bind subcontractors to Departmental and operating unit requirements as contained in the Terms and Conditions of the award, including 15 C.F.R. parts 14 or 24, as applicable. Each subcontractor must agree to comply with all applicable Federal, state, and local requirements in addition to the requirements set forth in this section.

(11) Services Performed by the Recipient's Own Forces.

(a) The recipient may have a portion or all of the design, construction, inspection, legal services, or other work or services in connection with the project performed by personnel who are employed by the recipient either full-time or part-time ("in-house" or "force account" construction). If the recipient elects to use force account labor, the operating unit will furnish specific guidance to the recipient that must be followed for the cost for such work to be eligible for reimbursement from the operating unit.

(b) The operating unit must review and approve the recipient's plan if this method is to be elected by the recipient.

(12) Contracting Standards.

(a) Standards of conduct. The recipient shall maintain a written code of conduct, which shall govern the actions individuals, such as any officer, employee or member of the board of directors or other governing board of the recipient, including any other parties that advise, approve, recommend or otherwise participate in the business decisions of the recipient, such as agents, advisors, consultants, attorneys, accountants or shareholders. This also includes immediate family, significant others, partners, and other persons directly connected to such persons by law or through a business arrangement.

(b) Awards to responsible contractors. The recipient shall make awards only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed procurement.

(c) Maintenance of records. The recipient shall maintain records sufficient to detail the history of each procurement transaction related to the project. These records will include but are not necessarily limited to the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for determining the contract price.

(d) Settlement of issues. The recipient alone shall be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues (e.g., source evaluation, protests, disputes, and claims) arising out of procurements. The operating unit will not substitute its judgment for that of the recipient unless the matter, as determined in the operating unit's sole discretion, primarily involves a Federal issue.

(e) Wage rate requirements. For construction projects administered by EDA or as otherwise required, wage rates paid for labor must not be less than the prevailing area wages, as determined by the U.S. Secretary of Labor and embodied in the construction contract pursuant to the requirements of the Davis-Bacon Act, as amended (40 U.S.C. § 276a *et seq.*).

(13) Review of Plans and Specifications.

(a) Review Prior to Advertising. When required by the operating unit, the recipient must submit plans, specifications, and certain related documents for review and concurrence prior to advertising for bids. This review is to ensure compliance with the Terms and Conditions of the award and does not attest to the accuracy or completeness of design, dimensions, details, proper selection of materials, or compliance with required codes or ordinances. This responsibility rests with the recipient.

(b) Review Prior to Award. The operating unit will also review proposed contracts and related procurement documents prior to award if:

(i) The procurement is expected to exceed the simplified acquisition threshold (currently set at \$100,000);

(ii) The proposed action is to be awarded without competition after one bid or offer is received in response to a solicitation;

(iii) 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;

(iv) The proposed contract modification changes the scope of the contract or increases the contract amount by more than the simplified acquisition threshold;

(v) The recipient's procurement procedures and operations fail to comply with the procurement standards set out in the award, or

(vi) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "name brand" product.

Until the operating unit has reviewed recipient's proposed contracts and related procurement documents and determined they comply with the Terms and Conditions, the recipient will proceed at its own risk regarding the eligibility of any costs incurred.

(c) Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally-Funded Construction Projects. Pursuant to Executive Order 13202, "*Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects*," unless the project is exempted under section 5(c) of the Order, bid specifications, project agreements, or other controlling documents for construction contracts awarded by recipients of grants or cooperative agreements, or those of any construction manager acting on their behalf, shall not: (1) include any requirement or prohibition on bidders, offerors, contractors, or subcontractors about entering into or adhering to agreements with one or more

labor organizations on the same or related construction project(s); or (2) otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

(14) **Alternate Construction Procurement Methods.** The Recipient may use alternate construction procurement methods to the traditional design/bid/build procedures (including lump sum or unit price-type construction contracts). If an alternate method is used, the recipient shall submit to the operating unit for approval a construction services procurement plan. In this situation, the recipient must secure a design professional to oversee the process.

(15) **Protest Procedures.** If the recipient is a State or local government, each operating unit must have an administrative procedure to handle complaints or protests regarding recipient contractor selection actions. No protest or complaint regarding a contractor selection action shall be accepted by the operating unit until all administrative remedies at the recipient level have been exhausted. The operating unit's review will be limited in accordance with the regulations set out at 15 C.F.R. §§ 14.41 or 24.36(11) and (12), as applicable. The operating unit review of a protest is limited to violations of:

(a) Federal law or regulations (violations of State or local law remain under the jurisdiction of State or local authorities); and

(b) The recipient's protest procedures or the recipient's failure to review a complaint or protest.

F. Disbursement of Grant Funds and Financial Administration. Unless the award provides that payments will be made using the Department of Treasury's Automated Standard Application for Payment (ASAP) system or other automated payment system, after the initial disbursement has been made, the recipient may request interim disbursements by submitting Form SF-270, "*Request For Advance Or Reimbursement*" or Form SF-271, "*Outlay Report And Request For Reimbursement For Construction Programs,*" as required for reimbursing the operating unit's share of eligible project costs. When project construction is complete, the final inspection has been completed, and the recipient has accepted the project from the contractor, the recipient can begin the closeout process by submitting the following documentation for review and approval to the respective operating unit:

1. A request for final disbursement on an executed Form SF-270 or SF-271;
2. A certificate of substantial completion, final acceptance report, or similar documentation;
3. Other documentation as may be required by the operating unit or other Federal authority.

G. Award Amendments. In most instances, proposed modifications must be accomplished only through a formal amendment to the award on Form CD-451, “*Amendment to Financial Assistance Award.*” Types of amendments may include:

1. **Time Schedule Extensions.** The recipient is responsible for compliance with the project development time schedule deadlines contained in the Financial Assistance Award. As soon as the recipient becomes aware that it will not be possible to meet the time schedule, it immediately should contact the operating unit to request a time extension. A time extension (no cost) must ordinarily be submitted to the Federal project officer at least 30 days prior to the end date of the award. A budget of the remaining funds should be included in the time extension request. The operating unit may inform the recipient that grant disbursements cannot be made while the recipient is not in compliance with the time schedule. The recipient’s notice to the operating unit should contain the following information:

a. An explanation of the recipient’s inability to complete work by the specified date (e.g., a lengthy period of unusual weather delayed the contractor’s ability to excavate the site; major re-engineering required in order to obtain Federal or state approvals; unplanned environmental mitigation required).

b. A statement that no other changes to the project are contemplated;

c. A budget for the remaining funds;

d. Documentation that demonstrates there is still a bona fide need for the project; and

e. A statement that no further delay is anticipated and that the project can be completed within the revised time schedule.

2. **Budget Line Item Revisions.** The tabulation of estimated project costs contained in the award is the controlling budget for the project. The recipient shall request the operating unit’s prior written approval for any budget revision in accordance with 15 C.F.R. parts 14 or 24, as applicable. The recipient shall notify the operating unit of any proposed deviations from budget and program plans.

3. **Additional Funding.** In accepting an award from an operating unit, the recipient normally agrees to fund any overrun(s). Additional funding for an approved project may not be approved. To be considered for approval, it must compete with other requests for scarce program funds. If an overrun occurs as a result of the construction contract bid opening, before the operating unit will accept a formal request for additional funds, it will be necessary for the recipient to furnish the following documentation to the operating unit:

a. A written statement from the recipient’s architect/engineer giving reasons for the architect/engineer’s professional opinion that redesign of the project within the approved scope

or using new or additional deductive alternates cannot reasonably be expected to reduce the cost to within the available funds; and

b. A written statement from the administrative head of the recipient's organization justifying why the recipient cannot furnish the additional funds required, why non-Federal sources of funds cannot be secured, and, for EDA projects, certifying that the recipient's effective taxing and/or borrowing capacity have or has been exhausted.

The operating unit's acceptance of a request for additional funding does not indicate approval. Any further action by the recipient pending the operating unit's review of the request is at the recipient's risk.

4. Termination (for Cause or Convenience).

a. Termination for Cause.

(1) If a recipient materially fails to comply with any Term or Condition of the award, whether stated in a Federal statute, regulation, assurance, application for Federal financial assistance, or notice of award, the operating unit may take one or more of the actions, as set out in 15 C.F.R. §§14.62(a) or 24.43(a), as applicable.

(2) Costs resulting from obligations incurred by the recipient after notice by the operating unit of suspension or termination of the award are not allowable unless the operating unit expressly authorizes them in the notice of suspension or intent to terminate, or subsequently. Other costs incurred by the recipient during suspension or after termination that are necessary and not reasonably avoidable are allowable if:

(a) The costs result from obligations that were properly incurred by the recipient before the effective date of the suspension or termination, are not in anticipation of it, and in the case of termination, are non-cancellable; and

(b) The costs would be allowable if the award was not suspended or expired normally at the end of the funding period in which the termination takes effect.

(3) The enforcement remedies identified in 15 C.F.R. §§ 14.62 or 24.43, as applicable, including suspension and termination, do not preclude the recipient from being subject to debarment and suspension under Executive Orders 12549 and 12689 and the Department of Commerce's implementing regulations at 2 C.F.R. part 1326, "*Governmentwide Debarment and Suspension (Non-Procurement)*."

b. Termination for Convenience. Terminations for convenience must comply with 15 C.F.R. §§ 14.61 or 24.44, as applicable.

H. Post-Construction Requirements.

1. Audit Requirements.

a. Recipients are subject to the audit requirements contained in OMB Circular A-133, “*Audits of States, Local Governments, and Non-Profit Organizations*” and the related *Compliance Supplement* (as revised from time to time). OMB Circular A-133 is issued pursuant to the Single Audit Act of 1984 (Pub. L. No. 98-502), as amended by the Single Audit Act Amendments of 1996 (Pub. L. No. 104-156; 31 U.S.C. §§ 7501-7507). OMB Circular A-133 requires that recipients that are nonprofit organizations, government agencies, Indian tribes, and educational institutions expending Federal awards of \$500,000 or more during the recipient’s fiscal year conduct an audit in accordance with the requirements of the Circular. If the recipient does not have a current audit performed in accordance with OMB Circular A-133, the operating unit shall advise the recipient of the procedure for securing the required audit.

b. The operating unit or the OIG may conduct audits of awards. The recipient will be notified in advance if it is selected for an audit. The recipient must permit the operating unit, the Comptroller General of the United States, the OIG, or any of their duly authorized representatives, access to any paper or electronic documents, books, correspondence, and any records (that are pertinent to a specific award to verify the recipient’s compliance with the Terms and Conditions.

2. Property Management.

a. Section E.2.a.(2)(a) of this chapter provides that all DOC construction awards include a term requiring that the recipient to agree that, for the estimated useful life of the facility funded with the award, the project will be properly and efficiently administered, operated and maintained, for the purpose authorized by the award and in accordance with the Terms and Conditions of the award.

b. Estimated Useful Life. Unless the operating unit determines otherwise, the following ranges of estimated useful lives are considered reasonable for the listed assets:

- (1) New buildings, 20 – 40 years.
- (2) Rehabilitation or outfitting of existing buildings, 15 – 20 years.
- (3) Improvements other than buildings, 15 – 20 years.

c. Security Interest. Section E.2.a.(2)(b) of this chapter provides that all DOC construction awards include a term requiring the recipient to execute a security interest or other statement of the operating unit’s interest in the property (the “Federal Interest”), acceptable in form and substance to the operating unit, that must be perfected and placed of record in accordance with

local law, with continuances re-filed as appropriate. The Federal Interest secures compliance with matters such as the purpose, scope, and use of a project and it should be reflected by a recorded lien, statement, or other recordable instrument setting forth the DOC operating unit's property interest in a project (e.g., a mortgage, covenant, or other statement of the operating unit's real property interest in the case of a project involving the acquisition, construction, or improvement of real property and/or buildings). The statement should specify the estimated useful life of the project and should include but not be limited to the nature of the encumbrance and the procedure for disposition of the property when it is no longer needed for the originally-authorized purpose. The statement of the DOC operating unit's interest must be perfected and placed of record in the real property records of the jurisdiction in which the real property is located, all in accordance with applicable law. In view of the complexities and varying requirements for perfecting interests in real property from jurisdiction to jurisdiction, the DOC requires a written statement from a licensed attorney in the jurisdiction where the property is located, certifying that the Federal Interest has been protected as required under the award and in accordance with this general policy. A copy of the recorded lien, statement, or other recordable instrument must be attached to the attorney's certification.

When the recipient's executed certification and attached documentation is received by the operating unit, the operating may want to consider consulting with other legal counsel within the DOC (for example, EDA's Office of Chief Counsel) who have experience in dealing with real property construction grants, for assurance that the certification and attached documentation reasonably appear to adequately protect the Federal Interest.

d. Type of Federal Security Interest. Operating units should consider the nature of the recipient and the asset and the potential risk of loss to the government when determining the type of security interest that the recipient should be required to execute and record. For example, in the case of nonprofits, a first priority mortgage is considered the best protection of the government's interest in new buildings or the rehabilitation or outfitting of existing buildings. (A sample mortgage and cover letter are included as Exhibit A to this chapter.) In the case of State and local governments and educational institutions, for either buildings or other improvements to real property, a covenant of purpose, use, and ownership may be sufficient to protect the government's interest. (A sample covenant of purpose, use and ownership and cover letter are included as Exhibit B to this chapter.) State or local law may dictate the exact nature of the security interest to be perfected on behalf of the Federal Government.

3. Closeout Procedures.

a. After construction is complete and the project is closed out financially, the recipient has an ongoing responsibility to properly operate and maintain the project for its estimated useful life in accordance with its original purpose. The recipient also must comply with all applicable requirements including but not limited to ongoing compliance with Federal statutes, regulations, and Executive Orders prohibiting discrimination; applicable Federal laws prohibiting inherently religious activity; applicable environmental law and performance measures; and maintaining

records to document such compliance which shall be made available for inspection by the operating unit or other government officials as required. When project construction and final inspection have been completed, and the recipient has accepted the project from the contractor, the recipient may begin the closeout process. The recipient should furnish the following to the operating unit:

- (1) Confirmation of compliance with all Terms and Conditions of the Award, including all Special Award Conditions;
- (2) All required financial and progress reports.
- (3) Confirmation of procurement of permanent insurance coverage for aboveground facilities.
- (4) Confirmation that all changes to the project have been brought to the attention of the operating unit.
- (5) Confirmation that provisions have been made for the retention for three years of all records pertaining to the award.
- (6) A copy of the executed Certificate of Final Completion, or similar documentation.
- (7) Confirmation that as-built drawings have been received from the contractor or the architect/engineer.
- (8) Confirmation that a copy of the recipient's currently valid OMB Circular A-133 audit has been submitted to the Federal Audit Clearinghouse and, if required, furnished to the operating unit. If an OMB Circular A-133 audit is required, but not available, the recipient must submit a plan to secure the required audit to the operating unit. The recipient must advise the operating unit if an OMB Circular A-133 audit is not required.
- (9) Confirmation that no Davis-Bacon (if applicable) or local labor employment violations exist.
- (10) Notification of any change, lien, mortgage, or other encumbrance relating to the ownership of the project.
- (11) Notification of any unresolved contract/contractor disputes.
- (12) Execution and recordation of a lien, mortgage, or covenant of purpose, use, and ownership in favor of the operating unit, if this has not already been accomplished.

(13) Confirmation that the recipient will maintain project facilities for the estimated useful life of the facility as determined by the operating unit, during which period the recipient may not alienate its ownership or change the use and purpose of the assisted facility without the operating unit's written permission.

b. Within 90 calendar days of project completion, the recipient shall submit all financial, performance, and other reports as required by the Terms and Conditions of the award.

c. Unless the operating unit authorizes an extension, the recipient shall liquidate all obligations incurred under the award no later than 90 calendar days after the acceptance of the project from the contractor or before the end of the funding period, whichever occurs earlier, as specified in the Terms and Conditions of the award.

d. The following documentation should accompany the recipient's final disbursement request when submitted to the operating unit, unless such documentation has been previously furnished, as applicable:

(1) Copies of all executed contracts, subcontracts (if claimed separate from the prime contract), contract change orders, vouchers, canceled checks, and other evidence of costs incurred necessary to substantiate the costs claimed on the operating unit award;

(2) A copy of the recipient's currently valid audit performed in accordance with OMB Circular A-133, if such an audit is required, and if the operating unit requires submission of the audit;

(3) Payroll forms, if any of the cost claimed is for work performed by the recipient's in-house work forces ("force account");

(4) Title opinions, legal descriptions, bills of sale, title records, etc., for any land cost being claimed;

(5) Specifics of any administrative costs being claimed.

e. The closeout of an award does not affect any of the following:

(1) The right of the operating unit to disallow costs and recover funds on the basis of a later audit or other project review;

(2) The obligation of the recipient to return any funds due as a result of later corrections or other transactions;

(3) Requirements for property management, records retention, and performance measurement reports; and

(4) Single or program-specific audit requirements per OMB Circular A-133 and the related “*Compliance Supplement*.”

I. Appendix

The following regulations, OMB Circulars, and forms are available from public libraries and may also be accessed at the following internet websites:

- OMB (www.whitehouse.gov/omb/)
- The Government Printing Office Access site of the National Archives and Records Administration (www.gpoaccess.gov/cfr/index.html), and/or
- The Office of Acquisition Management and Financial Assistance of the Department of Commerce (http://oamweb.osc.doc.gov/aboutoam_organization_gmd.html)

See also Chapter 2 of this manual.

1. 2 C.F.R. part 1326, “*Government-wide Debarment and Suspension (Non-Procurement)*”
2. 15 C.F.R. part 11, “*Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs*”
3. 15 C.F.R. part 14, “*Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit and Commercial Organizations*”
4. 15 C.F.R. part 24, “*Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments*”
5. 36 C.F.R. part 800, “*Protection of Historic Properties*”
6. 48 C.F.R. part 31, “*Contract Cost Principles and Procedures*”
7. OMB Circular A-87 (2 C.F.R. part 225), “*Cost Principles for State, Local, and Indian Tribal Governments*”
8. OMB Circular A-133, “*Audits of States, Local Governments, and Non-Profit Organizations*”
9. OMB Circular A-122 (2 C.F.R. part 230), “*Cost Principles for Nonprofit Organizations*”
10. OMB Circular A-21 (2 C.F.R. part 220), “*Cost Principles for Educational Institutions*”
11. OMB Standard Form 424D, “*Assurances – Construction Programs*,” which references laws and regulations that may apply to particular awards

12. Davis Bacon Wage Rates are available at www.gpo.gov/davisbacon/

a. The following are available from EDA:

The Summary of EDA Construction Standards (with Exhibits) at www.eda.gov

b. The following are available from the NOAA.

NOAA(Construction) Grants Policy Directive

NOAA Grants Standard Operating Procedures – Construction Grants

The following are included as exhibits to this chapter below:

1. Exhibit A – Sample Mortgage Cover Letter
2. Exhibit B – Sample Mortgage
3. Exhibit C – Sample Covenant Cover Letter
4. Exhibit D – Sample Covenant

Exhibit A—Sample Mortgage Cover Letter

[Address of Recipient's Representative]

Re: Award No. XXXXXXXXXXXX—[Project Title]

Dear _____:

Please refer to Special Award Condition (SAC) No. _____, which is a term of the above-referenced Financial Assistance Award between the [operating unit] and the [recipient]. This term requires the recipient to execute a security interest or other statement of [operating unit's] interest in real property acquired or improved under the Award, acceptable in form and substance to [operating unit], which statement must be perfected and placed of record in accordance with local law, with continuances re-filed as appropriate.

Property that is acquired or improved, in whole or in part, with Federal assistance is held in trust by the recipient for the benefit of the project for the estimated useful life of the project, during which period the [operating unit] retains an undivided equitable reversionary interest in the property (the Federal Interest). The recipient may not dispose of, modify the use of, or change the terms of the real property title, or other interest in the project site and facilities without permission and instructions from [operating unit]. The Federal Interest secures compliance with matters such as the purpose, scope and use of a project. Where Federal assistance is used in the construction of [Insert construction purpose], such as the recipient's [Project Title], [operating unit] requires that the Federal Interest be protected through the execution of a first priority mortgage on the facility.

I am enclosing an "Amendment To Financial Assistance Award," Form CD-451, which includes the "Agreement and Mortgage" document that will satisfy the requirements of the above-mentioned SAC after the real property description has been attached, and the instrument properly executed and recorded. Please sign the Form CD-451 and return it to this office within the prescribed time, and forward the "Agreement and Mortgage" document to your counsel, requesting the following actions:

- (1) Prepare property description of the land where the above project facility is being constructed, mark as Exhibit "A" and attach to the document;
- (2) Approve the instrument in the place indicated thereon;
- (3) See that the instrument is properly executed, recorded, and acknowledged; and

- (4) Return a copy of the instrument to me being certain that the recording data is reflected thereon, along with a title opinion showing that [operating unit] holds a first priority lien position on the property encumbered by the mortgage.

Compliance with SAC _____ by the recipient is required prior to the disbursement of funds under this award. Please have your attorney contact _____, at _____ should there be any questions. _____ may also be reached at the following e-mail address: _____.

Sincerely,

Grants Officer

Enclosures

Exhibit B—Sample Mortgage

AGREEMENT AND MORTGAGE

WHEREAS, the _____ (hereinafter “Mortgagor”), whose address is _____, has applied to, received and accepted from the United States Department of Commerce, [operating unit] (hereinafter “_____”) an award in the amount of \$_____ (hereinafter “Award Amount”) pursuant to a Financial Assistance Award (hereinafter “Award Agreement”) entered into by the parties on _____, and bearing [operating unit] Award Number _____; and

WHEREAS, pursuant to the application (hereinafter “Award Application”) filed by Mortgagor requesting said award and pursuant to the Award Agreement, \$_____ of the Award Amount is to be used for the [Project Title] for the purpose of making improvements consisting of _____ on the real property described in Exhibit “A,” attached hereto and made a part hereof (hereinafter the “Property”); and

WHEREAS, any transfer or conveyance of the Property by a recipient of a Financial Assistance Award must have the prior written approval of [operating unit]; and

WHEREAS, the aforesaid Award Agreement from [operating unit] provides the authorized purpose for which the Award Amount may be used while further providing, *inter alia*, that Mortgagor will not sell, mortgage, or otherwise use or alienate any right to, or interest in the Property, or use the Property for purposes other than, and different from, those purposes set forth in the Award Agreement and the Award Application made by Mortgagor, such alienation or use being prohibited by 15 C.F.R. Part 14 [15 C.F.R. part 24 or any other programmatic authority](hereinafter the “Regulations”) as may be amended from time to time; and

WHEREAS, the value of said right to repayment under the terms of the Regulations is difficult to establish; and

WHEREAS, at this time, Mortgagor and [operating unit] desire to establish a value for [operating unit’s] share of the Project in the event that the Property is used, transferred or alienated in violation of the Award Agreement, or the Regulations;

NOW THEREFORE, Mortgagor does hereby mortgage, warrant, grant and convey unto [operating unit], its successors and assigns, a first priority mortgage on said Property to secure a

debt that shall become due and payable by Mortgagor to [operating unit] upon the use, transfer, or alienation of the Property, or interest therein, in violation of the Award Agreement or in violation of the Regulations, as such Award Agreement or Regulations may be amended from time to time, provided, however, that the lien and encumbrance of this AGREEMENT AND MORTGAGE shall terminate and be of no further force and effect ____ years from the date hereof, which period of years has been established as the useful life of the improvements to the Property. The amount of the lien, encumbrance and debt created by this Agreement shall be the amount determined by [operating unit], pursuant to the Regulations. Mortgagor does hereby acknowledge that said debt shall accrue and be due and payable upon any use, transfer, or alienation prohibited by the Award Agreement or the Regulations, as such may be amended from time to time, and does, moreover, agree that such debt shall be extinguished only through the full payment thereof to the United States.

Mortgagor further covenants and agrees as follows:

1. Charges; Liens:

Mortgagor shall protect the title and possession of the Property, pay when due all taxes, assessments, and other charges, fines and impositions now existing or hereafter levied or assessed upon the Property and preserve and maintain the priority of the lien hereby created on the Property including any improvements hereafter made a part of the realty.

2. Hazard Insurance:

Mortgagor shall insure and keep insured all improvements now or hereafter created upon the Property against loss or damage by fire and windstorm and any other hazard or hazards included within the term "extended coverage." The amount of insurance shall be the full insurable value of said improvements. Any insurance proceeds received by Mortgagor due to loss shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security of this Mortgage is not thereby impaired. If such restoration or repair is not economically feasible or if the security of this mortgage would be impaired, Mortgagor shall use said insurance proceeds to compensate [operating unit] for its fair share. [operating unit's] fair share shall be a percentage of said insurance proceeds equal to its award percentage in the total cost of the award program for which the damaged or destroyed real property was acquired or improved.

3. Preservation and Maintenance of the Property:

Mortgagor shall keep the Property in good condition and repair and shall not permit or commit any waste, impairment, or deterioration of the Property.

4. Inspection:

[operating unit] may make or cause to be made reasonable entries upon and inspection of the Property.

5. Condemnation:

The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taxing of the Property, or part thereof, or for any conveyance in lieu of condemnation shall be used by Mortgagor to compensate [operating unit] for its fair share. [operating unit's] fair share shall be the percentage of said condemnation proceeds equal to its award percentage in the total cost of the award program for which the condemned property was acquired or improved.

6. Forbearance by [operating unit] Not a Waiver:

Any forbearance by [operating unit] in exercising any right or remedy hereunder or otherwise affordable by applicable law, shall not be a waiver of or preclude the exercise of any right or remedy hereunder.

7. Recording of Mortgage—Mortgagee's Copy:

Mortgagor shall record this AGREEMENT AND MORTGAGE in the County where the Property is located, thereby securing to [operating unit] an estate in the Property and any other place where recording is required under applicable law. Mortgagee shall be furnished a conformed copy of this Mortgage at the time of execution, and after recordation thereof.

8. Remedies Cumulative:

All remedies provided in this mortgage are distinct and cumulative to any other right or remedy under this Mortgage or afforded by law or equity, and may be exercised concurrently, independently or successively.

9. Notice:

Any notice from [operating unit] to Mortgagor provided for in this Mortgage shall be mailed by certified mail to Mortgagor's last know address or at such address as Mortgagor may designate to [operating unit] by certified mail to [operating unit's] address, except for any Notice given to Mortgagor in the manner as may be prescribed by applicable law as provided hereafter in this Mortgage.

10. Remedies:

Upon Mortgagor's breach of any covenant or agreement herein, [operating unit], its designees, successors or assigns may declare the entire indebtedness secured hereby immediately due, payable and collectible. This AGREEMENT AND MORTGAGE may be enforced by the Secretary of Commerce of the United States of America, or his/her designees, successors or assigns, by and through a foreclosure action brought either in a United States District Court, or in any State Court having jurisdiction, but such action shall not be deemed to be a waiver of the aforesaid debt or of any possible further or additional action to recover repayment thereof.

After any breach on the part of the Mortgagor, [operating unit], its designees, successor or assigns shall, upon bill filed or the proper legal proceedings being commenced for the foreclosure of this Mortgage, be entitled, as a matter of right, to the appointment by any competent court, without notice to any party, of a receiver of the rents, issues and profits of the Property, with power to lease and control the Property, and with such other powers as may be deemed necessary.

11. Governing Law; Severability:

This AGREEMENT AND MORTGAGE shall be governed by applicable Federal law and nothing contained herein shall be construed to limit the rights the [operating unit], its designees, successors or assigns is entitled to under applicable Federal law. In the event that any provision or clause of this instrument conflicts with applicable law, such conflict shall not affect other provisions of this instrument, which can be given effect without the conflicting provision, and to this end the provisions of this instrument are declared to be severable.

IN WITNESS WHEREOF, Mortgagor has hereunto set its hand and seal on this the ____ day of _____, 20____.

A completed duly recorded copy of this Agreement and Mortgage shall be forwarded to NIST.

Mortgagor

By: _____

Its: _____

(The appropriate acknowledgement must be included for recording in the Mortgagor's jurisdiction.)

STATE OF)
)
COUNTY OF)

THIS INSTRUMENT WAS ACKNOWLEDGED BEFORE ME ON THIS

_____ day of _____, 20____, by _____.

Notary Public, State of

Exhibit C—Sample Covenant Cover Letter

[Address of Recipient's Representative]

Re: Award No. XXXXXXXXXXXX—[Project Title]

Dear _____:

Please refer to Special Award Condition (SAC) No. _____, which is a term of the above-referenced Financial Assistance Award between the [operating unit] and the [recipient]. This term requires the recipient to execute a security interest or other statement of [operating unit's] interest in real property acquired or improved under the Award, acceptable in form and substance to [operating unit], which statement must be perfected and placed of record in accordance with local law, with continuances re-filed as appropriate.

Property that is acquired or improved, in whole or in part, with Federal assistance is held in trust by the recipient for the benefit of the project for the estimated useful life of the project, during which period the [operating unit] retains an undivided equitable reversionary interest in the property (the Federal Interest). The recipient may not dispose of, modify the use of, or change the terms of the real property title, or other interest in the project site and facilities without permission and instructions from [operating unit]. The Federal Interest secures compliance with matters such as the purpose, scope and use of a project. Where Federal assistance is used in the construction of [Insert construction purpose], such as the recipient's [Project Title], [operating unit] requires that the Federal Interest be protected through the execution of a covenant of purpose, use, and ownership.

I am enclosing an "Amendment To Financial Assistance Award," Form CD-451, which includes the "Agreement and Mortgage" document that will satisfy the requirements of the above-mentioned SAC after the real property description has been attached, and the instrument properly executed and recorded. Please sign the Form CD-451 and return it to this office within the prescribed time, and forward the "Agreement and Mortgage" document to your counsel, requesting the following actions:

- (5) Prepare property description of the land where the above project facility is being constructed, mark as Exhibit "A" and attach to the document;
- (6) Approve the instrument in the place indicated thereon;
- (7) See that the instrument is properly executed, recorded, and acknowledged; and

- (8) Return a copy of the instrument to me being certain that the recording data is reflected thereon, along with a title opinion showing that [operating unit] holds a first priority lien position on the property encumbered by the mortgage.

Compliance with SAC _____ by the recipient is required prior to the disbursement of funds under this award. Please have your attorney contact _____, at _____ should there be any questions. _____ may also be reached at the following e-mail address: _____.

Sincerely,

Grants Officer

Enclosures

Exhibit D—Sample Covenant

COVENANT OF PURPOSE, USE AND OWNERSHIP

THIS COVENANT OF PURPOSE, USE AND OWNERSHIP dated this _____ day of _____, 200__, by and between _____

_____ whose address is _____

_____ (hereinafter with its successors and assigns called “Recipient”); and the [operating unit], UNITED STATES OF AMERICA, whose address is _____

_____ (hereinafter with successors and assigns called “_____”):

RECITALS:

WHEREAS, Recipient submitted an application, designated as [operating unit] Award No. _____, for financial assistance pursuant to _____ (hereinafter the “Act”); and

WHEREAS, by offer of Award, dated _____, [operating unit] Offered to Recipient a financial assistance award in the amount of \$ _____ (hereinafter called “Award Amount”) to assist in financing

_____ (hereinafter called “Project”); and

WHEREAS, said Project included acquisition of and/or specifically improving the real property described in Exhibit “A” attached hereto and incorporated herein (hereinafter with all improvements called “Property”); and

WHEREAS, on _____, Recipient accepted the Offer Of Award (hereinafter called “Award Agreement”) subject to terms and conditions, pursuant to which Recipient covenanted and agreed to comply with the applicable Requirements of 15 C.F.R. parts 14 or 24, as applicable [add any programmatic authority]; and

WHEREAS, the Award Agreement provides the purposes for which the Award Amount may be used and provides, inter alia, that Recipient will not sell, lease, mortgage, or otherwise

alienate any right to or interest in the Property, or use the Property for purposes other than, and different from, those purposes set forth in the Award Agreement and the application made by Recipient therefore (hereinafter called "Project Purposes"), such alienation and use being prohibited by 15 C.F.R. parts 14 or 24, as applicable; and

WHEREAS, under the authority of the Act, [operating unit] is not authorized to permit Recipient to use the property for purposes other than Project Purposes or to lease, transfer, convey, mortgage or hypothecate the Project to any party without prior approval from [operating unit], unless [operating unit] is repaid its share of the market value of the Project, as set forth below;

WHEREAS, Recipient as owner of all or part of the real property described in Exhibit "A", attached hereto, agreed to record this Covenant in the appropriate office for the recording of public records affecting real property so as to constitute notice to all persons of any and all restrictions on title to and use of the Project and all or part of the real property described in Exhibit "A", attached hereto; and

WHEREAS, the _____
located at _____
is the proper office to record this covenant;

NOW THEREFORE, in consideration of financial assistance rendered and/or to be rendered by [operating unit] and of other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and to assure that the benefits of the Project will accrue to the public and be used as intended by both [operating unit] and Recipient, Recipient hereby covenants and agrees as follows:

1. The estimated useful life of the project is _____ years as determined by

_____.

2. Recipient agrees that for the estimated useful life set forth above, Recipient will not sell, transfer, convey, or mortgage any interest in the real property acquired or improved in whole or in part with funds made available through this Award, nor shall Recipient use the Property for purposes other than the Project Purposes without the prior written approval of the Grants Officer, [operating unit], or his/her designee or successor. Such approval may be withheld until such time as Recipient first pays to [operating unit] the Federal share of the Property as provided in 15 C.F.R. parts 14 or 24, as applicable. The Federal share of the value of the Property is that percentage of the current fair market value of the Property attributable to the [operating unit's] participation in the Project (after deducting actual and reasonable selling and fix-up expenses, if any, incurred to put the property into condition for sale). The Federal share excludes that value of the Property attributable to acquisition or improvements before or after [operating unit's] participation in the Project and not included in Project costs.

3. Recipient further covenants that in the event the Property is used for purposes other than Project Purposes, or is sold, leased, transferred, conveyed, or mortgaged without the prior written approval of the Grants Officer, Recipient will compensate the Federal Government for the Federal share of the Property as described above and in 15 C.F.R. parts 14 or 24, as applicable.

4. Recipient further agrees that, as a prerequisite to accepting the disbursement of any Award funds by [operating unit], Recipient shall execute and place on record against the Property acquired or improved in whole or in part with the funds made available through this Award, this Covenant of Purpose, Use and Ownership. Recipient further agrees that whenever the property is sold, leased, or otherwise conveyed pursuant to 15 C.F.R. parts 14 or 24, as applicable, Recipient or the transferor shall add to the document conveying such interest a Covenant of Purpose, Use and Ownership. [operating unit] will in its sole discretion determine whether the Covenant is satisfactory. [operating unit] may require an opinion of counsel for recipient that the Covenant is valid and enforceable according to its terms and has been properly recorded.

5. It is stipulated and agreed that the terms hereof constitute a reasonable restraint on alienation of use, control, and possession of or title to the Property given the Federal Interest expressed herein.

6. This covenant shall run with the land.

IN WITNESS WHEREOF, the recipient has hereunto set their hand as of the day and year first above written by their duly authorized officer. A completed duly recorded copy of this Covenant shall be forwarded to [operating unit]. (The appropriate acknowledgment must be included for recording in Recipient's jurisdiction.)

Recipient

BY _____
Title

ATTEST:

By _____

Title _____