

DEPARTMENT OF COMMERCE

Docket No. 010925233-4337-03

Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements

AGENCY: Department of Commerce (DOC).

ACTION: Notice.

SUMMARY: This notice revises and updates the Department of Commerce (DOC) Pre-Award Notification Requirements for Grants and Cooperative Agreements published in the Federal Register (66 FR 49917) on October 1, 2001, as amended on October 30, 2002 (67 FR 66109), which pertain to information provided to applicants for funding under grants and cooperative agreements awarded by the DOC. This announcement constitutes a recompilation of the notice with all amendments and revisions to date.

DATES: These provisions are effective December 30, 2004.

FOR FURTHER INFORMATION CONTACT: Gary Johnson, Office of Acquisition Management, Telephone Number - 202-482-1679.

SUPPLEMENTARY INFORMATION: The DOC is authorized to award grants and cooperative agreements under a wide range of programs that support economic development; international trade; minority businesses; standards and technology; oceanic/atmospheric services; and telecommunications and information.

It is the policy of DOC to seek full and open competition for award of discretionary financial assistance funds. Moreover, DOC financial assistance must be awarded through a merit-based review and selection process whenever possible. Notices announcing the availability of Federal funds for each DOC competitive financial assistance program with funds available for new awards will be published by the sponsoring operating unit in the Federal Register and posted on the Grant.gov website in the uniform format for announcements of funding opportunities mandated by the Office of Management and Budget (OMB). These announcements will reference or include the DOC Pre-Award Notification Requirements identified in Sections A and B of this notice, and will include program-specific information as identified in Section C of this notice and will follow the uniform format for announcements of funding opportunities as identified in Section D.

This announcement provides notice of the DOC Pre-Award Notification Requirements that apply to all DOC sponsored grant and cooperative agreement programs and may supplement those program announcements which make reference to this notice. Some of the DOC general provisions published herein contain, by reference or substance, a summary of the pertinent statutes or regulations published in the U.S. Code (U.S.C.), Federal Register, Code of Federal Regulations (CFR), Executive Orders (EOs), OMB Circulars (circulars), or Assurances (Forms SF-424B, 424D). To the extent that it is a summary, such provision is not in derogation of, or an amendment to, any such statute, regulation, EO, circulars, or Forms SF-424B and SF-424D.

Each individual award notice will complete and include an analysis of the requirements in Executive Order 12866, Executive Order 13132, the Administrative Procedure Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act, as applicable.

A. The following pre-award notice provisions will apply to all applicants for and recipients of DOC grants and cooperative agreements:

1. Federal Policies and Procedures. Applicants, recipients and subrecipients are subject to

all Federal laws and Federal and DOC policies, regulations, and procedures applicable to Federal financial assistance.

2. Debarment, Suspension, Drug-Free Workplace, and Lobbying Provisions. All applicants must comply with the requirements of Subpart C of 15 CFR Part 26, "Governmentwide Debarment and Suspension (Nonprocurement)," 15 CFR Part 29, "Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)" (published in the *Federal Register* on November 26, 2003, 68 FR 66534), and 15 CFR Part 28, "New Restrictions on Lobbying," including the submission of required forms and obtaining certification from lower tier applicants/bidders.

3. Pre-Award Screening of Applicant's and Recipient's Management Capabilities, Financial Condition, and Present Responsibility. It is the policy of DOC to make awards to applicants and recipients who are competently managed, responsible, financially capable and committed to achieving the objectives of the award(s) they receive. Therefore, pre-award screening may include, but is not limited to, the following reviews:

(a) Past Performance. Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

(b) Credit Checks. A credit check will be performed on individuals, for-profit, and non-profit organizations.

(c) Delinquent Federal Debts. No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until:

(1) The delinquent account is paid in full,

(2) A negotiated repayment schedule is established and at least one payment is received, or

(3) Other arrangements satisfactory to DOC are made.

(4) Pursuant to 31 U.S.C. § 3720B, unless waived, the DOC is not permitted to extend financial assistance in the form of a loan, loan guarantee, or loan insurance to any person delinquent on a nontax debt owed to a Federal agency. This prohibition does not apply to disaster loans.

(5) Pursuant to 28 U.S.C. § 3201(e), unless waived by the DOC, a debtor who has a judgment lien against the debtor's property for a debt to the United States shall not be eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly by the United States or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied.

(d) Name Check Review. A name check review will be performed by the OIG on key individuals associated with non-profit and for-profit organizations, unless (1) proposed award amounts are \$100,000 or less; (2) applicants have been recipients of financial assistance from the Department of Commerce for three or more consecutive years without any adverse programmatic or audit finding; or (3) applicants are units of a state or local government. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges (e.g., fraud, theft, perjury), or other matters which significantly reflect on the applicant's management honesty or financial integrity. If any of the conditions listed below in paragraphs (1), (2), or (3) occur, DOC reserves the right to take one or more of the following actions: consider suspension/termination of an award immediately for cause; require the removal of any key individual from association with management of and/or implementation of the award; and make appropriate provisions or revisions with respect to the method of payment and/or financial reporting requirements:

(1) A key individual fails to submit the required Form CD-346, Applicant for Funding

Assistance;

(2) A key individual makes an incorrect statement or omits a material fact on the Form CD-346; or

(3) The name check reveals significant adverse findings that reflect on the business integrity or responsibility of the recipient and/or key individual.

(e) List of Parties Excluded from Procurement and Nonprocurement Programs. The Excluded Parties Listing System (EPLS) maintained by the General Services Administration (GSA) {Found at <http://epls.arnet.gov>} that lists parties excluded from Federal procurement and nonprocurement programs will be checked to assure that an applicant is not debarred or suspended on a government-wide basis from receiving financial assistance.

(f) Pre-Award Accounting System Surveys. The Grants Office, in cooperation with the OIG when appropriate, may require a pre-award survey of the applicant's financial management system in cases where the recommended applicant has had no prior Federal support, the operating unit has reason to question whether the financial management system meets Federal financial management standards, or the applicant is being considered for a high-risk designation.

4. No Obligation for Future Funding. If an application is selected for funding, DOC has no obligation to provide any additional future funding in connection with that award. Amendment of an award to increase funding or to extend the period of performance is at the total discretion of DOC.

5. Pre-Award Activities. If applicants incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal or written assurance that may have been received, there is no obligation on the part of DOC to cover preaward costs unless approved by the Grants Officer as part of the terms when

the award is made, or as authorized for awards that support research by 15 CFR 14.25(e)(4).

6. Freedom of Information Act (FOIA) Disclosure. The FOIA, 5 U.S.C. § 552 and implementing DOC regulations at 15 CFR Part 4, set forth DOC's rules to make requested material, information, and records publicly available. Unless prohibited by law and to the extent required under the FOIA, contents of applications and proposals submitted by applicants may be released in response to FOIA requests.

7. False Statements. A false statement on an application is grounds for denial or termination of an award and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. § 1001.

8. Application Forms. Unless the individual programs specify differently in their annual notice of availability of funding or in other appropriate publications, the following forms and certifications will be used in applying for DOC grants and cooperative agreements: OMB Standard Forms 424, Application for Federal Assistance; SF-424A, Budget Information - Non-Construction Programs; SF-424B, Assurances - Non-Construction Programs; SF-424C, Budget Information - Construction Programs; SF-424D, Assurances - Construction Programs; as well as the Commerce Department (CD) form CD-346, Applicant for Funding Assistance, as appropriate, shall be used in applying for financial assistance. In addition, Forms CD-511, Certification Regarding Lobbying; CD-512, Certification Regarding Lobbying—Lower-Tier Covered Transactions; and SF-LLL, Disclosure of Lobbying Activities, will be used as appropriate.

9. Environmental Requirements. Environmental impacts must be considered by Federal decision makers in their decisions whether or not to (1) approve a proposal for Federal assistance; (2) approve the proposal with mitigation; or (3) approve a different proposal/grant having less adverse environmental impacts. Federal environmental laws require that the funding agency initiate a planning process with an early consideration of potential environmental impacts

that projects funded with Federal assistance may have on the environment. The recipient and subrecipients must comply with all environmental standards, to include those prescribed under the following statutes and Executive Orders, and shall identify to the awarding agency any impact the award may have on the environment. In some cases, award funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental compliance information sufficient to enable the DOC to make an assessment on any impacts that a project may have on the environment.

(a) The National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 et seq.). Recipients of Federal assistance are required to identify to the awarding agency any impact an award will have on the quality of the human environment, and assist the agency to comply with the National Environmental Policy Act. Applicants for assistance may be required to prepare environmental impact information as part of a proposal.

(b) Floodplain Management, EO 11988 and, Protection of Wetlands, EO 11990, May 24, 1977. Recipients must identify proposed actions in Federally defined floodplains and wetlands to enable the agency to make a determination whether there is an alternative to minimize any potential harm.

(c) Clean Air Act, Clean Water Act, and EO 11738. Recipients must comply with the provisions of the Clean Air Act (42 U.S.C. §§ 7401 et seq.), Clean Water Act (33 U.S.C. §§1251 et seq.), and EO 11738, and shall not use a facility on EPA's List of Violating Facilities in performing any award that is nonexempt under 40 CFR §15.5, and shall notify the Program Officer in writing if it intends to use a facility that is on the EPA List of Violating Facilities or knows that the facility has been recommended to be placed on the List.

(d) The Flood Disaster Protection Act of 1973 (42 U.S.C. § 4002 et seq.). Flood insurance, when available, is required for Federally assisted construction or acquisition in flood-prone areas.

- (e) The Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 et seq.). Recipients must identify any impact or activities which may involve a threatened or endangered species. Federal agencies have the responsibility to ensure that no adverse effects to a protected species or habitat occur from actions under Federal assistance awards and conduct the required reviews under the Endangered Species Act, as applicable.
- (f) The Coastal Zone Management Act, as amended (16 U.S.C. § 1451 et seq.). Funded projects must be consistent with a coastal state's approved management program for the coastal zone.
- (g) The Coastal Barriers Resources Act (16 U.S.C. § 3501 et seq.). Restrictions are placed on Federal funding for actions within a Coastal Barrier System.
- (h) The Wild and Scenic Rivers Act, as amended (16 U.S.C. §§ 1271 et seq.). This Act applies to awards that may affect existing or proposed components of the National Wild and Scenic Rivers system.
- (i) The Safe Drinking Water Act of 1974, as amended (42 U.S.C. §§ 300f-j). This Act precludes Federal assistance for any project that the EPA determines may contaminate a sole-source aquifer so as to threaten public health.
- (j) The Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §§ 6901 et seq.). This act regulates the generation, transportation, treatment, and disposal of hazardous wastes, and also provides that recipients of Federal funds give preference in their procurement programs to the purchase of recycled products pursuant to EPA guidelines.
- (k) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, and the Superfund Amendments and Reauthorization Act of 1986, and the Community Environmental Response Facilitation Act of 1992, as amended, (42 U.S.C. §§ 9601

et seq.). These requirements address responsibilities of hazardous substance releases, threatened releases and environmental cleanup. There is also a requirement to impose reporting and community involvement requirements to ensure disclosure of the release or disposal of regulated substances and cleanup of hazards.

(l) Environmental Justice in Minority Populations and Low Income Populations, EO 12898, February 11, 1994. This order identifies and addresses adverse human health or environmental effects of programs, policies and activities on low income and minority populations.

10. Limitation of Liability. In no event will the Department of Commerce be responsible for proposal preparation costs if programs announced under notices of funding availability fail to receive funding or are cancelled because of other agency priorities. Publication of announcements of funding availability do not oblige the agency to award any specific project or to obligate any available funds.

B. The following general provisions will apply to all DOC grant and cooperative agreement awards:

1. Administrative Requirements and Cost Principles. The uniform administrative requirements for all DOC grants and cooperative agreements are codified at 15 CFR Part 14, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit, and Commercial Organizations;" and 15 CFR Part 24, "Uniform Administrative Requirements for Grants and Agreements to State and Local Governments." The following list of cost principles incorporated by reference in 15 CFR Parts 14 and 24 are included in DOC's grants and cooperative agreements: OMB Circular A-21, "Cost Principles for Educational Institutions;" OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments;" OMB Circular A-122, "Cost Principles for Nonprofit Organizations;" and Federal Acquisition Regulation Subpart 31.2, "Contracts with Commercial Organizations," codified at 48 CFR § 31.2. Applicable administrative requirements and cost

principles are identified in each award and are incorporated into the award by reference.

2. Award Payments. When advanced payment is authorized, advances will be limited to the minimum amounts necessary to meet immediate disbursement needs, but in no case should advances exceed the amount of cash required for a 30-day period. Advanced funds not disbursed in a timely manner must be promptly returned to DOC. Certain bureaus within the DOC use the Department of Treasury's Automated Standard Application for Payment (ASAP) system. In order to receive payments under ASAP, recipients will be required to enroll with the Department of Treasury, Financial Service, Regional Financial Centers, which allows them to use the on-line and Voice Response System (VRS) method of withdrawing funds from their ASAP established accounts.

3. Federal and Non-Federal Sharing.

(a) Awards that include Federal and non-Federal sharing will incorporate a budget consisting of shared allowable costs. If actual allowable costs are less than the total approved budget, the Federal and non-Federal cost shares shall be calculated by applying the approved Federal and non-Federal cost share ratios to actual allowable costs. If actual allowable costs are greater than the total approved budget, the Federal share will not exceed the total Federal dollar amount authorized by the award.

(b) The non-Federal share, whether in cash or in-kind, will be expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient DOCumentation demonstrating previously determined plans for or later commitment of cash or in-kind contributions. In any case, recipients must meet the cost share commitment over the life of the award.

4. Budget Changes. When the terms of an award allow the recipient to transfer funds among approved direct cost categories, the transfer authority does not authorize the recipient to

create new budget categories within an approved budget unless the Grants Officer has provided prior approval. In addition, the recipient will not be authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.

5. Indirect Costs.

(a) Indirect costs will not be allowable charges against an award unless specifically included as a line item in the approved budget incorporated into the award. (The term “indirect cost” has been replaced with the term “facilities and administrative costs” under OMB Circular A-21, “Cost Principles for Educational Institutions.”)

(b) Excess indirect costs may not be used to offset unallowable direct costs.

(c) If the recipient has not previously established an indirect cost rate with a Federal agency, the negotiation and approval of a rate will be subject to the procedures in the applicable cost principles and the following subparagraphs:

(1) a. State, local, and Indian Tribal Governments; Educational Institutions; and Non-Profit Organizations (Non-Commercial Organizations)

For those organizations for which DOC is cognizant or has oversight, DOC or its designee will either negotiate a fixed rate with carryforward provisions or, in some instances, limit its review to evaluating the procedures described in the recipient’s cost allocation methodology plan. Indirect cost rates and cost allocation methodology reviews are subject to future audits to determine actual indirect costs.

b. Commercial Organizations

For commercial organizations, cognizant federal agency is defined as the agency that provides the largest dollar amount of negotiated contracts, including options. If the only federal funds received by a commercial organization are DOC award funds, then DOC becomes the cognizant federal agency for the purpose of indirect cost negotiations. For those organizations for which DOC is cognizant, DOC or its designee will negotiate a fixed rate with carryforward provisions for the recipient. Fixed rate means an indirect cost rate which has the same characteristics as a pre-determined rate, except that the difference between the estimated costs and the actual costs of the period covered by the rate is carried forward as an adjustment to the rate computation of the subsequent period. DOC or its designee will negotiate indirect cost rates using the cost principles found in 48 CFR Part 31, "Contract Cost Principles and Procedures." For guidance on how to put an indirect cost plan together go to: <http://www2.dol.gov/oasam/programs/guide.htm>.

(2) Within 90 days of the award start date, the recipient shall submit to the address listed below documentation (indirect cost proposal, cost allocation plan, etc.) necessary to perform the review. The recipient shall provide the Grants Officer with a copy of the transmittal letter.

Office of Acquisition Management

U.S. Department of Commerce

14th Street and Constitution Avenue, N.W., Room-6054

Washington, DC 20230

(3) The recipient can use the fixed rate proposed in the indirect cost plan until such time as the DOC provides a response to the submitted plan. Actual indirect costs must be calculated annually and adjustments made through the carryforward provision used in calculating next year's rate. This calculation of actual indirect costs and the carryforward provision is subject to audit. Indirect cost rate proposals must be submitted annually. Organizations that have previously established indirect cost rates must submit a new indirect cost proposal to the

cognizant agency within six months after the close of each recipient's fiscal year.

(4) When DOC is not the oversight or cognizant Federal agency, the recipient shall provide the Grants Officer with a copy of a negotiated rate agreement or a copy of the transmittal letter submitted to the cognizant or oversight Federal agency requesting a negotiated rate agreement.

(5) If the recipient fails to submit the required documentation to the DOC within 90 days of the award start date, the recipient may be precluded from recovering any indirect costs under the award. If the DOC, oversight, or cognizant Federal agency determines there is a finding of good and sufficient cause to excuse the recipient's delay in submitting the documentation, an extension of the 90-day due date may be approved by the Grants Officer.

(6) Regardless of any approved indirect cost rate applicable to the award, the maximum dollar amount of allocable indirect costs for which DOC will reimburse the recipient shall be the lesser of the line item amount for the Federal share of indirect costs contained in the approved budget of the award, or the Federal share of the total allocable indirect costs of the award based on the indirect cost rate approved by an oversight or cognizant Federal agency and current at the time the cost was incurred, provided the rate is approved on or before the award end date.

6. Tax Refunds. Refunds of FICA/FUTA taxes received by a recipient during or after an award period must be refunded or credited to DOC where the benefits were financed with Federal funds under the award. Recipients must agree to contact the Grants Officer immediately upon receipt of these refunds. Recipients must further agree to refund portions of FICA/FUTA taxes determined to belong to the Federal Government, including refunds received after the award end date.

7. Other Federal Awards with Similar Programmatic Activities. Recipients will be required to provide written notification to the Federal Program Officer and the Grants Officer in the event that, subsequent to receipt of the DOC award, other financial assistance is received to support or fund any portion of the scope of work incorporated into the DOC award. DOC will not pay for costs that are funded by other sources.

8. Non-Compliance With Award Provisions. Failure to comply with any or all of the provisions of an award may have a negative impact on future funding by DOC and may be considered grounds for any or all of the following actions: establishment of an account receivable, withholding payments under any DOC awards to the recipient, changing the method of payment from advance to reimbursement only, or the imposition of other special award conditions, suspension of any DOC active awards, and termination of any DOC active awards.

9. Prohibition Against Assignment by the Recipient. Notwithstanding any other provision of an award, recipients may not transfer, pledge, mortgage, or otherwise assign an award, or any interest therein, or any claim arising thereunder, to any party or parties, banks, trust companies, or other financing or financial institutions without the express written approval of the Grants Officer.

10. Non-Discrimination Requirements. There are several Federal statutes, regulations, Executive Orders, and policies relating to nondiscrimination. No person in the United States shall, on the ground of race, color, national origin, handicap, religion, age, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. These requirements include but are not limited to:

- (a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.) and DOC implementing regulations published at 15 CFR Part 8 prohibiting discrimination on the grounds of race, color, or national origin under programs or activities receiving Federal financial assistance;

- (b) Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) and implementing regulations at 15 CFR Part 8a prohibiting discrimination on the basis of sex under Federally assisted education programs or activities;

- (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §§ 794) and DOC implementing regulations published at 15 CFR Part 8b prohibiting discrimination on the basis of handicap under any program or activity receiving or benefitting from Federal assistance;

- (d) The Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101 et seq.) and DOC implementing regulations published at 15 CFR Part 20 prohibiting discrimination on the basis of age in programs or activities receiving Federal financial assistance;

- (e) 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;

- (f) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing;

(g) Parts II and III of Executive Order 11246, as amended by Executive Orders 11375 and 12086 requiring Federally assisted construction contracts to include the nondiscrimination provisions of §§ 202 and 203 of that Executive Order and Department of Labor regulations implementing Executive Order 11246, 41 CFR § 60-1.4(b).

(h) EO 13166 (August 11, 2000), “Improving Access to Services for Persons With Limited English Proficiency,” and DOC policy guidance issued on March 24, 2003 (68 FR 14180) to Federal financial assistance recipients on the Title VI prohibition against national origin discrimination affecting Limited English Proficient (LEP) persons.

(i) In recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., expressly exempts religious organizations from the prohibition against discrimination on the basis of religion. 42 U.S.C. § 2000e-1(a).

11. Audits of Organizations Not Covered By OMB Circular A-133. In accordance with 15 CFR 14.26 (c) and (d), for-profit hospitals, commercial, and other organizations not covered by the audit provisions of OMB Circular A-133 that expend \$500,000 or more in a year in Federal funding, are required to have a program-specific audit performed at the conclusion of the project, but no less than once every five years. The DOC award may include a line item in the budget for the cost of the audit. Some DOC programs have specific audit guidelines that will be incorporated into the award. If DOC does not have a program-specific audit guide available for the program, the auditor should follow Generally Accepted Government Auditing Standards and the requirements for a program-specific audit as described in OMB Circular A-133 § 235.

12. Policies and Procedures for Resolution of Audit-Related Debts. DOC has established policies and procedures for handling the resolution and reconsideration of financial assistance

audits which have resulted in, or may result in, the establishment of a debt (account receivable) for financial assistance awards. These policies and procedures are contained in the Federal Register notice dated January 27, 1989. See 54 FR 4053. The policies and procedures are also provided in more detail in the Department of Commerce Financial Assistance Standard Terms and Conditions.

13. Debts. Any debts determined to be owed the Federal Government shall be paid promptly by the recipient. In accordance with 15 CFR § 21.4, a debt will be considered delinquent if it is not paid within 15 days of the due date, or if there is no due date, within 30 days of the billing date. Failure to pay a debt by the due date, or if there is no due date, within 30 days of the billing date, shall result in the imposition of late payment charges. In addition, failure to pay the debt or establish a repayment agreement by the due date, or if there is no due date, within 30 days of the billing date, will also result in the referral of the debt for collection action and may result in DOC taking further action as specified in the terms of the award. Funds for payment of a debt must not come from other Federally sponsored programs. Verification that other Federal funds have not been used will be made, e.g., during on-site visits and audits.

14. Post-Award Discovery of Adverse Information. After an award is made, if adverse information on a recipient or any key individual associated with a recipient is discovered which reflects significantly and adversely on the recipient's responsibility, the Grants Officer may take the following actions:

- (a) Require the recipient to correct the conditions.
- (b) Consider the recipient to be "high risk" and unilaterally impose special award conditions to protect the Federal Government's interest.

(c) Suspend or terminate an active award. The recipient will be afforded adequate due process while effecting such actions.

(d) Require the removal of personnel from association with the management of and/or implementation of the project and require Grants Officer approval of personnel replacements.

15. Competition and Codes of Conduct.

(a) Pursuant to the certification in SF-424B, Paragraph 3, recipients must maintain written standards of conduct to establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of a personal or organizational conflict of interest, or personal gain in the administration of this award and any subawards.

(b) Recipients must maintain written standards of conduct governing the performance of their employees engaged in the award and administration of subawards. No employee, officer, or agent shall participate in the selection, award, or administration of a subaward supported by Federal funds if a real or apparent conflict of interest is or would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization in which he/she serves as an officer or which employs or is about to employ any of the parties mentioned in this section, has a financial or other interest in the organization selected or to be selected for a subaward. The officers, employees, and agents of the recipient may not solicit or accept anything of monetary value from subrecipients. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of a recipient.

(c) All subawards will be made in a manner to provide, to the maximum extent practicable, open and free competition. Recipients must be alert to organizational conflicts of interest as well as other practices among subrecipients that may restrict or eliminate competition. In order to ensure objective subrecipient performance and eliminate unfair competitive advantage, subrecipients that develop or draft work requirements, statements of work, or requests for proposals will be excluded from competing for such subawards.

(d) For purposes of the award, a financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with an applicant. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to act in an impartial manner. It could also result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field.

16. **Minority Owned Business Enterprise.** DOC encourages recipients to utilize minority and women-owned firms and enterprises in contracts under financial assistance awards. The Minority Business Development Agency can assist recipients in matching qualified minority owned enterprises with contract opportunities.

17. **Subaward and/or Contract to a Federal Agency.** Recipients, subrecipients, contractors, and/or subcontractors may not sub-grant or sub-contract any part of an approved project to any Federal department, agency, instrumentality, or employee thereof, without the prior written approval of the Grants Officer.

18. **Foreign Travel.** Recipients must comply with the provisions of the Fly America Act, 49 U.S.C. § 40118. The Fly America Act requires that Federal travelers and others performing U.S. Government-financed foreign air travel must use U.S. flag carriers, to the extent that service by

such carriers is available. Foreign air carriers may be used only in specific instances, such as when a U.S. flag air carrier is unavailable, or use of U.S. flag carrier service will not accomplish the agency's mission. The implementing Federal Travel Regulations are found at 41 CFR §§ 301-10.131 through 301-10.143.

19. Purchase of American-Made Equipment and Products. Recipients are hereby notified that they are encouraged, to the greatest extent practicable, to purchase American-made equipment and products with funding provided under DOC financial assistance awards.

20. Intellectual Property Rights.

(a) Inventions. The rights to any invention made by a recipient under a DOC financial assistance award are determined by the Bayh-Dole Act, Pub. L. 96-517, as amended, and codified in 35 U.S.C. § 200 et seq., except as otherwise required by law. The specific rights and responsibilities are described in more detail in 37 CFR Part 401 and in particular, in the standard patent rights clause in 37 CFR § 401.14, which is incorporated by reference into awards.

(b) Patent Notification Procedures. Pursuant to EO 12889, the Department of Commerce (DOC) is required to notify the owner of any valid patent covering technology whenever the DOC or its financial assistance recipients, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the recipient uses or has used patented technology under this award without a license or permission from the owner, the recipient will be required to notify the DOC Patent Counsel and the Grants Officer. This notice does not necessarily mean that the government authorizes and consents to any copyright or patent infringement occurring under the financial assistance.

(c) Data, Databases, and Software. The rights to any work produced or purchased under a DOC Federal financial assistance award are determined by 15 CFR § 24.34 and 15 CFR § 14.36. Such works may include data, databases or software. The recipient owns any work produced or purchased under a DOC Federal financial assistance award subject to DOC's right to obtain, reproduce, publish or otherwise use the work or authorize others to receive, reproduce, publish or otherwise use the data for Government purposes.

(d) Copyright. The recipient may copyright any work produced under a DOC Federal financial assistance award subject to DOC's royalty-free nonexclusive and irrevocable right to reproduce, publish or otherwise use the work or authorize others to do so for Government purposes. Works jointly authored by DOC and recipient employees may be copyrighted but only the part authored by the recipient is protected because, under 17 U.S.C. § 105, works produced by Government employees are not copyrightable in the United States. On occasion, DOC may ask the recipient to transfer to DOC its copyright in a particular work when DOC is undertaking the primary dissemination of the work. Ownership of copyright by the Government through assignment is permitted by 17 U.S.C. § 105.

21. Seat Belt Use. Pursuant to EO 13043, recipients should encourage employees and contractors to enforce on-the-job seat belt policies and programs when operating recipient/company-owned, rented or personally owned vehicles.

22. Research Involving Human Subjects. All proposed research involving human subjects must be conducted in accordance with 15 CFR Part 27, "Protection of Human Subject." No research involving human subjects is permitted under any DOC financial assistance award unless expressly authorized by the Grants Officer.

23. Federal Employee Expenses. Federal agencies are generally barred from accepting funds

from a recipient to pay transportation, travel, or other expenses for any Federal employee unless specifically approved in the terms of the award. Use of award funds (Federal or non-Federal) or the recipient's provision of in-kind goods or services for the purposes of transportation, travel, or any other expenses for any Federal employee, may raise appropriation augmentation issues. In addition, DOC policy prohibits the acceptance of gifts, including travel payments for Federal employees, from recipients or applicants regardless of the source.

24. Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects. Pursuant to EO 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).

25. Minority Serving Institutions (MSIs) Initiative. Pursuant to EOs 12876, 12900, and 13021, DOC is strongly committed to broadening the participation of MSIs in its financial assistance programs. DOC goals include achieving full participation of MSIs in order to advance the development of human potential, strengthen the Nation's capacity to provide high-quality education, and increase opportunities for MSIs to participate in and benefit from Federal financial assistance programs. DOC encourages all applicants and recipients to include meaningful participation of MSIs. Institutions eligible to be considered MSIs are

listed on the Department of Education Web site at
<http://www.ed.gov/offices/OCR/minorityinst.html>.

26. Access to Records. The Inspector General of the DOC, or any of his or her duly authorized representatives, the Comptroller of the United States and, if appropriate, the State, shall have access to any pertinent books, documents, papers and records of the parties to a grant or cooperative agreement, whether written, printed, recorded, produced, or reproduced by any electronic, mechanical, magnetic or other process or medium, in order to make audits, inspections, excerpts, transcripts, or other examinations as authorized by law. An audit of an award may be conducted at any time. Recipients that are subject to OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," and that expend \$500,000 or more annually in Federal awards shall have an organization-wide audit performed, unless a program-specific audit is determined by DOC to be more appropriate. Other recipients will be subject to the audit requirements as stipulated in the award or subaward document.

27. Scientific or Research Misconduct. Scientific or research misconduct refers to the fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. It does not include honest errors or differences of opinion. The recipient organization has the primary responsibility to investigate allegations and provide reports to the Federal Government. Funds expended on an activity that is determined to be invalid or unreliable because of scientific misconduct may result in a disallowance of costs for which the institution may be liable for repayment to the awarding agency. The Office of Science and Technology Policy at the White House published in the Federal Register on December 6, 2000, a final policy that addressed research misconduct. The policy was developed by the National Science and Technology Council (65 FR 76260). The DOC requires that any allegation be submitted to the Grants Officer, who will also notify the OIG of such allegation. Generally,

the recipient organization shall investigate the allegation and submit its findings to the Grants Officer. The DOC may accept the recipient's findings or proceed with its own investigation. The Grants Officer shall inform the recipient of the DOC's final determination.

28. Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763). Recipients must comply with this act relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of the Office of Personnel Management Standards for a Merit System of Personnel Administration (5 CFR Part 900, Subpart F).

29. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. §§ 4601 et seq.); and implementing regulations issued at 15 CFR Part 11. These provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or Federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

30. Historic Preservation. Recipients must assist the DOC in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended and the Advisory Council on Historic Preservation Guidelines, (16 U.S.C. §§ 470 et seq.); the Archaeological and Historic Preservation Act of 1974, (16 U.S.C. §§ 469a-1 et seq.); Protection and Enhancement of the Cultural Environment, EO 11593; Locating Federal Facilities on Historic Properties in our Nation's Central Cities, EO 13006; and Indian Sacred Sites, EO 13007 (ensures protection and accommodation of access).

31. Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.). This act prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

32. Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328). This act limits the political activities of employees or officers of state or local governments whose principal employment activities are funded in whole or in part with Federal funds.

33. Labor standards for Federally-assisted construction subagreements (wage guarantees). Recipients must comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7); the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. § 874); and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327 - 333).

34. Care and Use of Live Vertebrate Animals. Recipients must comply with the Laboratory Animal Welfare Act of 1966 (Public Law 89-544), as amended, (7 U.S.C. §§ 2131 et seq.) (animal acquisition, transport, care, handling, and use in projects), and implementing regulations, 9 CFR Parts 1, 2, and 3; the Endangered Species Act (16 U.S.C. §§ 1531 et seq.); Marine Mammal Protection Act (16 U.S.C. §§ 1361 et seq.) (taking possession, transport, purchase, sale, export or import of wildlife and plants); The Nonindigenous Aquatic Nuisance Prevention and Control Act (16 U.S.C. §§ 4701 et seq.) (ensure preventive measures are taken or that probable harm of using species is minimal if there is an escape or release); and all other applicable statutes pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by Federal financial assistance. No research involving vertebrate animals is permitted under any DOC financial assistance award unless authorized by the Grants Officer.

35. Publications and Acknowledgment of Sponsorship. Publication of the results of a research project in appropriate professional journals is encouraged as an important method of recording and reporting scientific information. The recipient is required to submit a copy to the funding agency and when releasing information related to a funded project include a statement that the project or effort undertaken was or is sponsored by DOC. The recipient is also

responsible for assuring that every publication of material (including Internet sites) based on or developed under an award, except scientific articles or papers appearing in scientific, technical or professional journals, contains the following disclaimer: “ This [report/video] was prepared by [recipient name] under award [number] from [name of operating unit], U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the [name of operating unit] or the U.S. Department of Commerce.” This also applies to videos produced under DOC financial assistance awards.

36. Videos Produced under DOC Financial Assistance Awards. Before production of a video for public viewing is begun, the Grants Officer must review and approve the production plans and the final video to ensure that it will be of an acceptable quality and appropriately represents the DOC.

C. The Federal Register notices announcing the availability of Federal funds for each DOC competitive financial assistance program will contain only the following program-specific information: summary description of program; deadline dates; addresses for submission of applications; information contacts (including electronic access); amount of funding available; statutory authority; Catalog of Federal Domestic Assistance (CFDA) number; eligibility requirements; cost sharing or matching requirements; Intergovernmental Review requirements; evaluation criteria used by the merit reviewers; selection procedures, including funding priorities/selection factors/policy factors to be applied by the selecting official; and Administrative and National Policy Requirements.

D. The DOC follows the uniform format for announcements of funding opportunities for

discretionary grants and cooperative agreements established by the Office of Management and Budget in a policy letter published in the Federal Register. See 68 FR 37370 (June 23, 2003). These funding opportunity announcements are available on grants.gov or from the information contact listed in the Federal Register.

Executive Order 12866

This notice has been determined to be "not significant" for purposes of EO 12866, "Regulatory Planning and Review."

Administrative Procedure Act and Regulatory Flexibility Act

Because notice and comment are not required under 5 U.S.C. 553, or any other law, for this notice relating to public property, loans, grants benefits or contracts (5 U.S.C. 553(a)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice.

Executive Order 12132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in EO 13132.

Paperwork Reduction Act

These regulatory actions do not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act. Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection-of-information, subject to the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. Forms SF-424, SF-424A, SF-424B, SF-424C, SF-424D, SF-LLL, and CD-346, have been approved under control numbers

0348-0043, 0348-0044, 0348-0040, 0348-0041, 0348,0042, 0348-0046, and 0605-0001, respectively.

Catalog of Federal Domestic Assistance

This notice affects all of the grant and cooperative agreement programs funded by DOC. The Catalog of Federal Domestic Assistance can be accessed on the Internet under the DOC Grants Management Web site at <http://www.cfda.gov>.

List of Subjects

Accounting, Administrative practice and procedures, Grants administration, Grant programs-economic development, Grant programs-oceans, atmosphere and fisheries management, Grant programs-minority businesses, Grant programs-technology, Grant programs-telecommunications, Grant programs-international, Reporting and recordkeeping requirements.

Issued this 22nd day of December 2004, at Washington, D.C.

Michael S. Sade
Director for Acquisition Management
and Procurement Executive