

## Appendix A to Part 435

### Contract Provisions

All contracts, awarded by a recipient including small purchases, must contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts must contain a provision requiring compliance with E.O. 11246, “Equal Employment Opportunity,” as amended by E.O. 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and as supplemented by regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

2. *Copeland “Anti-Kickback” Act* (18 U.S.C. 874 and 40 U.S.C. 276c)—All contracts and subgrants in excess of \$2000 for construction or repair awarded by recipients and subrecipients must include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient will be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient must report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended* (40 U.S.C. 276a to a-7)—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than \$2000 must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction”). Under this Act, contractors are required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors are required to pay wages not less than once a week. The recipient must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract will be conditioned upon the acceptance of the wage determination. The recipient must report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act* (40 U.S.C. 327–333)—Where applicable, all contracts awarded by recipients in excess of \$100,000 for construction contracts and for other contracts that involve the employment of mechanics or laborers must include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each

contractor is required to compute the wages of every mechanic and laborer on the basis of a standard workweek of 40 hours. Work in excess of the standard workweek is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the workweek. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic will be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work must provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

6. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the *Federal Water Pollution Control Act* (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subgrants of amounts in excess of \$100,000 must contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment* (31 U.S.C. 1352)—Contractors who apply or bid for an award of more than \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension* (Executive Orders 12549 and 12689)—No contract will be made to parties listed on the General Services Administration’s List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with Executive Orders 12549 and 12689, “Debarment and Suspension.” This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other

than Executive Order 12549. Contractors with awards that exceed the simplified acquisition threshold must provide the required certification regarding its exclusion status and that of its principal employees.

[FR Doc. 03–11851 Filed 5–23–03; 8:45 am]

BILLING CODE 4191–02–P

## SOCIAL SECURITY ADMINISTRATION

### 20 CFR Part 437

RIN 0960–AE28

### Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

**AGENCY:** Social Security Administration (SSA).

**ACTION:** Final rules.

**SUMMARY:** These final rules establish new regulations dealing with the administrative requirements for grants and cooperative agreements with State and local governments. The Social Security Independence and Program Improvements Act of 1994 established SSA as an independent agency separate from the Department of Health and Human Services (HHS), effective March 31, 1995. As part of our effort to implement our own set of grants regulations, we are codifying the text of the governmentwide grants management Common Rule, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.” This final rule, along with the final rules we are publishing elsewhere in today’s **Federal Register**, establish SSA grants regulations, separate from those of HHS, effective upon publication.

**EFFECTIVE DATE:** These final rules are effective May 27, 2003.

**FOR FURTHER INFORMATION CONTACT:** Phyllis Y. Smith, Chief Grants Management Officer, Office of Operations Contracts and Grants, Office of Acquisition and Grants, SSA, 1710 Gwynn Oak Ave., Baltimore, MD 21207–5279; telephone (410) 965–9518; FAX (410) 966–9310.

### SUPPLEMENTARY INFORMATION:

#### I. Background

In 1983, a 20-agency task force established under the President’s Council on Management Improvement explored streamlining grants management and reviewed OMB Circular A–102, “Uniform Administrative Requirements for Grants to State and Local Governments.” As an outgrowth of the task force studies, a governmentwide “common” rule was

drafted, which contained fiscal and administrative requirements for grants and cooperative agreements to State and local governments (grantees) and subrecipients which are State and local governments (subgrantees). At the same time, OMB and the agencies drafted a revised Circular A-102 containing guidance to Federal agencies on how they should manage the award and administration of Federal grants.

Consequently, two governmentwide documents were issued. On March 11, 1988, a revised OMB Circular A-102—directed solely to Federal agencies—was published in the **Federal Register** (53 FR 8028). On the same date, a common rule was published (53 FR 8033). Consistent with a March 12, 1987, Presidential memorandum, affected agencies adopted the grants management Common Rule verbatim, except where inconsistent with statutory requirements. The circular became effective immediately while the Common Rule did not become effective until October 1, 1988.

The grants management Common Rule sets forth consistent and uniform standards among Federal agencies in the management of grants and cooperative agreements with State, local, and federally recognized Indian tribal governments. HHS implements the provisions of the grants management Common Rule through its regulations at 45 CFR part 92. Prior to March 31, 1995, SSA was an operating component of HHS. As a result of Public Law 103-296, SSA became an independent agency on March 31, 1995. However, pursuant to section 106(b) of that law, the HHS regulations at 45 CFR part 92 remain applicable to SSA. In order to implement our own set of grants regulations, we are essentially adopting the text of the governmentwide grants management Common Rule. The result is the SSA grants administration regulations, 20 CFR part 437. HHS regulations at 45 CFR part 92 will cease to be applicable to SSA on the effective date of these regulations, in accordance with section 106(b) of Pub. L. 103-296.

## II. Differences Between Part 437 and Common Rule

We have made several minor editorial corrections to the language in the common rule.

1. In § 437.20(a), in the first sentence, we have replaced the word “expand” with the word “expend.” The sentence correctly reads: “A State must *expend* and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds.”

2. In § 437.30(f)(1), we have replaced the word “formal” with the word “format.” The sentence correctly reads: “A request for prior approval of any budget revision will be in the same budget *format* the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.”

3. In § 437.42(f), we have included a period after the word “records” so that a new sentence begins with the word “unless.” The sentences correctly read: “The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records. Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.”

In addition to these changes, throughout new part 437, we have replaced, where appropriate, references to “awarding agency(ies)” to SSA. We have also made numerous nonsubstantive changes to make these rules easier for the public to read and understand.

## III. Differences Between Part 437 and 45 CFR Part 92

We have also modified our rules from the HHS rules at part 92 in two ways:

1. We have not included the language at §§ 92.4(a)(2)–(10) and 92.4(b) in our regulations. These provisions, which list block grants and entitlements that are non-SSA programs, do not apply to SSA.

2. We have modified the language in § 92.30(a)(1), which appears in our regulations at § 437.30(a)(1), to show that approvals regarding revision of budget and program plans should be signed by the responsible SSA Grants Management Officer; or the SSA Commissioner or subordinate official with proper delegated authority from the Commissioner. SSA regional offices are not involved with grant administration activities. Therefore, language dealing with the delegation of approval authority to the regional offices is unnecessary.

## Regulatory Procedures

### *Justification for Final Rule*

This rule is being published as a final instead of as a proposed rule. Section 702(a)(5) of the Social Security Act (Act) makes the regulations we prescribe subject to the rulemaking procedures established under section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553. These procedures generally require publication of notice of the proposed rulemaking and the solicitation of comments from interested persons. However, the APA provides

exceptions to notice and comment procedures when an agency finds that there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest.

After due consideration, we have determined that under 5 U.S.C. 553(b)(B), good cause exists for waiver of notice of proposed rulemaking because such procedure would be unnecessary. These final regulations adopt as SSA regulations the provisions of the governmentwide grants management Common Rule without substantive change. Pursuant to section 106(b) of Public Law 103-296, the HHS regulations at 45 CFR part 92, which implement the provisions of the grants management Common Rule, remain applicable to SSA until such time as these regulations become effective. The differences in these regulations over those of the grants management Common Rule or those of 45 CFR part 92 are not substantive. Accordingly, promulgation of these regulations pursuant to notice and comment rulemaking is unnecessary and may be dispensed with pursuant to 5 U.S.C. 553(b)(B).

### *Waiver of 30-Day Delay in Effective Date*

These regulations are effective on publication, rather than effective 30 days after publication. As indicated above, section 702(a)(5) of the Act makes the regulations we prescribe subject to the rulemaking procedures established under section 553 of the APA. Section 553(d) of the APA requires that the effective date of a substantive rule be no less than 30 days after its publication, except in cases of: rules which grant or recognize an exemption or relieve a restriction; interpretative rules and statements of policy; or as otherwise provided by the agency for good cause found and published with the rule.

Under 5 U.S.C. 553(d)(3), good cause exists for dispensing with the minimum 30-day period between publication date and effective date. As indicated above, these regulations adopt without change the substantive provisions of the governmentwide grants management Common Rule. A 30-day delay in the effective date of these regulations would serve no purpose since, during such delay, the identical provisions of Part 92, which implement the provisions of the grants management Common Rule, would remain applicable. Accordingly, these regulations are effective on publication.

*Executive Order 12866*

We have consulted with the Office of Management and Budget (OMB) and have determined that these final rules do not meet the criteria for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, they were not subject to OMB review. We have also determined that these rules meet the plain language requirement of Executive Order 12866, as amended by Executive Order 13258.

*Regulatory Flexibility Act*

We certify that these final regulations will not have a significant economic impact on a substantial number of small entities because this rule merely reflects the adoption of existing grant policies and procedures by SSA and does not promulgate any new policies or procedures which would impact the public. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

*Paperwork Reduction Act*

The Paperwork Reduction Act (PRA) of 1995 says that no persons are required to respond to a collection of information unless it displays a valid OMB control number. In accordance with the PRA, SSA is providing notice that the Office of Management and Budget has approved the information collection requirements contained in §§ 437.10 and 437.41 of these final rules. The OMB Control Numbers for these collections are 0348-0039 (SF-269), 0348-0038 (SF-269A), 0348-0043 (SF-424), 0348-0004 (SF-270), 0348-0002 (SF-271) and 0348-00030 (SF-272).

(Catalog of Federal Domestic Assistance: Program No. 96.007—Social Security—Research and Demonstration; and Program No. 96.008—Social Security Administration—Benefits Planning, Assistance, and Outreach Program)

**List of Subjects in 20 CFR Part 437**

Accounting, Administrative practice and procedures, Grant programs—health, Grant programs—social programs, Grants administration, Reporting and recordkeeping requirements.

Dated: April 25, 2003.

**Jo Anne B. Barnhart,**  
*Commissioner of Social Security.*

■ For the reasons set out in the preamble, we are adding a new part 437 to chapter III of title 20 of the Code of Federal Regulations to read as follows:

■ 1. Part 437 is added to read as follows:

**PART 437—UNIFORM  
ADMINISTRATIVE REQUIREMENTS  
FOR GRANTS AND COOPERATIVE  
AGREEMENTS TO STATE AND LOCAL  
GOVERNMENTS**

**Subpart A—General**

Sec.

- 437.1 Purpose and scope of this part.
- 437.2 Scope of subpart.
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**Subpart B—Pre-Award Requirements**

- 437.10 Forms for applying for grants.
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- 437.12 Special grant or subgrant conditions for “high-risk” grantees.

**Subpart C—Post-Award Requirements****Financial Administration**

- 437.20 Standards for financial management systems.
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- 437.22 Allowable costs.
- 437.23 Period of availability of funds.
- 437.24 Matching or cost sharing.
- 437.25 Program income.
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**Changes, Property, and Subawards**

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- 437.34 Copyrights.
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- 437.36 Procurement.
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**Reports, Records, Retention, and Enforcement**

- 437.40 Monitoring and reporting program performance.
- 437.41 Financial reporting.
- 437.42 Retention and access requirements for records.
- 437.43 Enforcement.
- 437.44 Termination for convenience.

**Subpart D—After-the-Grant Requirements**

- 437.50 Closeout.
- 437.51 Later disallowances and adjustments.
- 437.52 Collection of amounts due.

**Subpart E—Entitlement [Reserved]**

Authority: 5 U.S.C. 301.

**Subpart A—General****§ 437.1 Purpose and scope of this part.**

This part establishes the Social Security Administration’s administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments. The provisions of 20 CFR part 435, Subpart E (Disputes), also apply to grants and cooperative agreements covered by this part 437.

**§ 437.2 Scope of subpart.**

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

**§ 437.3 Definitions.**

As used in this part:

*Accrued expenditures* mean the charges incurred by the grantee during a given period requiring the provision of funds for:

- (1) Goods and other tangible property received;
- (2) Services performed by employees, contractors, subgrantees, subcontractors, and other payees; and
- (3) Other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

*Accrued income* means the sum of:

- (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and
- (2) Amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

*Acquisition Cost of an item of purchased equipment* means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee’s regular accounting practices.

*Administrative requirements* mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from programmatic requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

*Awarding agency means:*

- (1) With respect to a grant, the Social Security Administration, and
- (2) With respect to a subgrant, the party that awarded the subgrant.

*Cash contributions* means the grantee’s cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be

considered as grantee or subgrantee cash contributions.

*Contract* means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by Federal) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

*Cost sharing or matching* means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

*Cost-type contract* means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

*Equipment* means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined in this section.

*Expenditure report means:*

(1) For nonconstruction grants, the SF—269 “Financial Status Report” (or other equivalent report);

(2) For construction grants, the SF—271 “Outlay Report and Request for Reimbursement” (or other equivalent report).

*Federally recognized Indian tribal government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

*Government* means a State or local government or a federally recognized Indian tribal government.

*Grant* means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance that provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

*Grantee* means the government to which a grant is awarded and which is

accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

*Local government* means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

*Obligations* means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

*OMB* means the United States Office of Management and Budget.

*Outlays (expenditures)* mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

*Percentage of completion method* refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

*Prior approval* means documentation evidencing consent prior to incurring specific cost.

*Real property* means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

*Share*, when referring to SSA's portion of real property, equipment or

supplies, means the same percentage as SSA's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

*SSA* means the Social Security Administration.

*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

*Subgrant* means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance that is excluded from the definition of grant in this part.

*Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

*Supplies* means all tangible personal property other than equipment as defined in this part.

*Suspension* means depending on the context, either:

(1) Temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or

(2) An action taken by a suspending official in accordance with SSA regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

*Termination* means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. “Termination” does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

*Terms of a grant or subgrant* mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

*Third party in-kind contributions* mean property or services that benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

*Unliquidated obligations* for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by SSA that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

#### **§ 437.4 Applicability.**

Subparts A through D of this part do not apply to grants and subgrants to governments issued under Federal statutes or regulations authorized in accordance with the exception provision of § 437.6, nor do they apply to grants and subgrants to State and local institutions of higher education or State and local hospitals.

#### **§ 437.5 Effect on other issuances.**

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials apply to grants and subgrants to governments only to the extent they are required by statute, or authorized in accordance with the exception provision in § 437.6.

#### **§ 437.6 Additions and exceptions.**

(a) For classes of grants and grantees subject to this part, SSA may not impose additional administrative requirements except in codified regulations published in the **Federal Register**.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by SSA.

### **Subpart B—Pre-Award Requirements**

#### **§ 437.10 Forms for applying for grants.**

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs that do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to SSA for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants must only use standard application forms or those prescribed by the SSA with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. SSA may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF—424 facesheet, SSA may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

#### **§ 437.11 State plans.**

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State needs to meet only Federal administrative or programmatic requirements for a plan

that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect:

(1) New or revised Federal statutes or regulations or

(2) A material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

#### **§ 437.12 Special grant or subgrant conditions for "high-risk" grantees.**

(a) A grantee or subgrantee may be considered "high risk" if SSA determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if SSA determines that an award will be made, special conditions and/or restrictions will correspond to the high-risk condition and will be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If SSA decides to impose such conditions, SSA's awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

- (1) The nature of the special conditions/restrictions;
- (2) The reason(s) for imposing them;
- (3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and
- (4) The method of requesting reconsideration of the conditions/restrictions imposed.

### Subpart C—Post-Award Requirements

#### Financial Administration

##### § 437.20 Standards for financial management systems.

(a) A State must expend and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records that adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are

required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, SSA program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to SSA. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) SSA may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

##### § 437.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which SSA will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment must minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees will be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement is the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and

subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, SSA may not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, SSA's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and SSA determines that reimbursement is not feasible because the grantee lacks sufficient working capital, SSA may provide cash or a working capital advance basis. Under this procedure, SSA will advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, SSA will reimburse the grantee for its actual cash disbursements. The working capital advance method of payment may not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees must disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees must disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, SSA will not withhold payments for proper charges incurred by grantees or subgrantees unless—(i) The grantee or subgrantee fails to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, will be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 437.43(c).

(3) SSA will not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure

satisfactory completion of work. SSA will make payments when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee must maintain a separate bank account only

when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees must promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

#### **§ 437.22 Allowable costs.**

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
(1) State, local or Indian tribal government .....	OMB Circular A-87.
(2) Private nonprofit organization other than an (i) institution of higher education, (ii) hospital, or (iii) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
(3) Educational institutions .....	OMB Circular A-21.
(4) For profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

#### **§ 437.23 Period of availability of funds.**

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). SSA may extend this deadline at the request of the grantee.

#### **§ 437.24 Matching or cost sharing.**

(a) *Basic rule.* Costs and contributions acceptable. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to

which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions.* (1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 437.25, may not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of

general program income is described in § 437.25(g).)

(5) *Services or property financed by income earned by contractors.*

Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.*

(i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.



(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been indirect costs. Costs sharing or matching credit for such contributions will be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services.* (1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2)(i) and (ii) of this section apply:

(i) If approval is obtained from SSA, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from SSA as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 437.22, in the same way as depreciation or use allowances for purchased equipment and buildings.

The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, SSA may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

#### § 437.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in SSA regulations, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by SSA regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or SSA regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or SSA regulations as program income. (See § 437.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of § 437.31 and § 437.32.

(g) *Use of program income.* Program income will be deducted from outlays that may be both Federal and non-Federal as described in paragraphs (g)(1) through (3) of this section, unless SSA



regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, SSA may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When SSA authorizes the alternatives in paragraphs (g)(2) and (3) of this section, program income in excess of any limits stipulated will also be deducted from outlays.

(1) *Deduction.* Ordinarily program income must be deducted from total allowable costs to determine the net allowable costs. Program income must be used for current costs unless SSA authorizes otherwise. Program income that the grantee did not anticipate at the time of the award must be used to reduce SSA and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by SSA and the grantee. The program income must be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (*i.e.*, until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or SSA regulations provide otherwise.

#### **§ 437.26 Non-Federal audit.**

(a) *Basic Rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, “Audits of States, Local Governments, and Non-Profit Organizations.” The audits must be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends \$300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, must:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (*e.g.*, program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee’s own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, grantees and subgrantees must follow the rules in § 437.36.

#### **Changes, Property, and Subawards**

##### **§ 437.30 Changes.**

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the SSA, certain types of post-award changes in budgets and projects require the prior written approval of SSA. Approvals are not valid unless they are in writing, and signed by at least one of the following SSA officials:

(1) The responsible SSA Grants Management Officer; or

(2) The SSA Commissioner or subordinate official with proper delegated authority from the Commissioner.

(b) *Relation to cost principles.* The applicable cost principles (see § 437.22) contain requirements for prior approval

of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes.* (1)

*Nonconstruction projects.* Except as stated in other SSA regulations or an award document, grantees or subgrantees must obtain prior approval from SSA whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by SSA, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever SSA’s share exceeds \$100,000.

(iii) Transfer of funds allotted for training allowances (*i.e.*, from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees must obtain prior written approval for any budget revision that would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from SSA before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval from SSA whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator always requires approval unless waived by SSA.

(4) Under nonconstruction projects, contracting out, subcontracting (if authorized by law) or otherwise obtaining the services of a third party to perform activities that are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 437.36 but does not apply to the procurement of equipment, supplies, and general support services.

(5) Providing medical care to individuals under research grants.

(e) *Additional prior approval requirements.* SSA may not require prior approval for any budget revision that is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget format the grantee used in its application and must be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 437.22) may be made by letter.

(3) A request by a subgrantee for prior approval must be addressed in writing to the grantee. The grantee will promptly review such request and must approve or disapprove the request in writing. A grantee may not approve any budget or project revision that is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision requested by the subgrantee would result in a change to the grantee's approved project that requires Federal prior approval, the grantee must obtain SSA's approval before approving the subgrantee's request.

#### § 437.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purpose, and the grantee or subgrantee may not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee must request disposition instructions from SSA. The instructions must provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating SSA. The amount paid to SSA is computed by applying SSA's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate SSA. The amount due SSA is calculated by applying SSA's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures must be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to SSA or to a third-party designated/approved by SSA. The grantee or subgrantee must be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

#### § 437.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees must follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment must be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee must also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by SSA. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 437.25(a) to earn program income, the grantee or subgrantee may not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide

equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of SSA.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place must meet the following minimum requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft will be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by SSA or for other projects or programs currently or previously supported by the Federal government, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to SSA.

(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and SSA has a right to an amount calculated by multiplying the current market value or proceeds from sale by SSA's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, SSA may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with SSA rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from SSA.

(g) *Right to transfer title.* SSA may reserve the right to transfer title to the Federal Government or a third party named by SSA when such a third party is otherwise eligible under existing statutes. Such transfers are subject to the following standards:

(1) The property must be identified in the grant or otherwise made known to the grantee in writing.

(2) SSA will issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If SSA fails to issue disposition instructions within the 120 calendar-day period the grantee must follow paragraph (e) of this section.

(3) When title to equipment is transferred, the grantee will be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

#### **§ 437.33 Supplies.**

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee must compensate SSA for its share.

#### **§ 437.34 Copyrights.**

SSA reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor

purchases ownership with grant support.

#### **§ 437.35 Subawards to debarred and suspended parties.**

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

#### **§ 437.36 Procurement.**

(a) *States.* When procuring property and services under a grant, a State must follow the same policies and procedures it uses for procurements from its non-Federal funds. The State must ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees must follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees must use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees must maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees must maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee may participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- (i) The employee, officer or agent,
- (ii) Any member of his immediate family,
- (iii) His or her partner, or
- (iv) An organization which employs, or is about to employ, any such persons, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents may neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or

the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct must provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. SSA may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures must provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis must be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration must be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees must maintain records sufficient to detail the significant history of a procurement. These records must include, but are not necessarily limited to the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees must use time and materials type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. SSA will not substitute its judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees must have protest procedures to handle and resolve disputes relating to their procurements and must in all instances disclose information regarding the protest to SSA. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with SSA. Reviews of protests by SSA Federal agency are limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by SSA other than those specified in this paragraph (b)(12) will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees must have written selection procedures for procurement transactions. These procedures must ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description may not, in competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors must be clearly stated; and

(ii) Identify all requirements that the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees may not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed.* (1) *Procurement by Small*

*Purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(2) *Procurement by sealed bids (formal advertising).* Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (d)(2)(i) of this section apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids must be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(C) All bids must be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award must be made in writing to the lowest responsive and responsible bidder.

Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) *Procurement by competitive proposals.* The technique of competitive proposals is normally conducted with

more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be honored to the maximum extent practical;

(ii) Proposals must be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees must have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards must be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) *Procurement by noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is not feasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) SSA authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, *i.e.*, verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to SSA for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.*

(1) The grantee and subgrantee must take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, *e.g.*, under professional, consulting, and architectural engineering services contracts. A cost analysis is necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis must be used in all other instances to

determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants are allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (*see* § 437.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting may not be used.

(g) *SSA review.* (1) Grantees and subgrantees must make available, upon request of SSA, technical specifications on proposed procurements where SSA believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally must take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, SSA may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for SSA pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

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

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee is exempt from the pre-award review in paragraph (g)(2) of this section if SSA determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by SSA to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews will occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification does not limit SSA's right to survey the system. Under a self-certification procedure, SSA may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee must cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, SSA may accept the bonding policy and requirements of the grantee or subgrantee provided SSA has made a determination that the SSA's interest is adequately protected. If such a determination has not been made, the minimum requirements are as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" will consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. SSA is permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (Contracts more than the simplified acquisition threshold).

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement (All contracts in excess of \$10,000).

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR chapter 60) (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees).

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3) (All contracts and subgrants for construction or repair).

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of \$2,000 awarded by grantees and subgrantees when required by Federal grant program legislation).

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers).

(7) Notice of SSA requirements and regulations pertaining to reporting.

(8) Notice of SSA requirements and regulations pertaining to patent rights with respect to any discovery or invention that arises or is developed in the course of or under such contract.

(9) SSA requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, SSA, the Comptroller General of the United States, or any of

their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clear Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15) (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

#### **§ 437.37 Subgrants.**

(a) *States.* States must follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States must:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 437.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by SSA.

(b) *All other grantees.* All other grantees must follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees must:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

- (1) Section 437.10;
- (2) Section 437.11;
- (3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 437.21; and
- (4) Section 437.50.

#### **Reports, Records, Retention, and Enforcement**

##### **§ 437.40 Monitoring and reporting program performance.**

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* SSA may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by SSA, this report is due on the same date as the final Financial Status Report.

(1) Grantees must submit annual performance reports unless SSA requires quarterly or semi-annual reports. However, performance reports are not required more frequently than quarterly. Annual reports are due 90 days after the grant year, quarterly or semi-annual reports are due 30 days after the reporting period. The final performance report is due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, SSA may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by SSA.

(2) Performance reports must contain, for each grant, brief information on the following:

- (i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.
- (ii) The reasons for slippage if established objectives were not met.
- (iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees must adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. SSA will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates that have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform SSA as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments that enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) *Site visits.* SSA may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) SSA may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

##### **§ 437.41 Financial reporting.**

(a) *General.* (1) Except as provided in paragraphs (a)(2) and (5) of this section, grantees may use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

- (i) Submitting financial reports to SSA, or
- (ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not use the forms prescribed in this section in dealing with their subgrantees. However, grantees may not impose more

burdensome requirements on subgrantees.

(3) Grantees must follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. SSA may issue substantive supplementary instructions only with the approval of OMB. SSA may shade out or instruct the grantee to disregard any line item that SSA finds unnecessary for its decisionmaking purposes.

(4) Grantees are not required to submit more than the original and two copies of forms required under this part.

(5) SSA may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. SSA may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) SSA may waive any report required by this section if not needed.

(7) SSA may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report.* (1) *Form.* Grantees must use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with paragraph (e)(2)(iii) of this section.

(2) *Accounting basis.* Each grantee must report program outlays and program income on a cash or accrual basis as prescribed by SSA. If SSA requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee will not be required to convert its accounting system but must develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* SSA may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If SSA does not specify the frequency of the report, it must be submitted annually. A final report is required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they are due 30 days after the reporting period. When required on an annual basis, they are due 90 days after the grant year. Final reports are due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report.* (1) *Form.* (i) For grants paid by letter or



credit, Treasury check advances or electronic transfer of funds, the grantee must submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by SSA to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by SSA, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, SSA may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement.* (1) *Advance payments.* Requests for Treasury check advance payments must be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form may not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants must also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in paragraph (b)(3) of this section.

(e) *Outlay report and request for reimbursement for construction programs.* (1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction

grants must be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. SSA may, however, prescribe the Request for Advance or Reimbursement form, specified in paragraph (d) of this section, instead of this form.

(ii) The frequency for submitting reimbursement requests is discussed in paragraph (b)(3) of this section.

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee must report its outlays to SSA using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. SSA will provide any necessary special instruction. However, frequency and due date are governed by paragraphs (b)(3) and (4) of this section.

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances must be requested on the form specified in paragraph (d) of this section.

(iii) SSA may substitute the Financial Status Report specified in paragraph (b) of this section for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs is governed by paragraph (b)(2) of this section.

#### **§ 437.42 Retention and access requirements for records.**

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees that are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 437.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the

records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, SSA may make special arrangements with grantees and subgrantees to retain any records that are continuously needed for joint use. SSA will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by SSA, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period.*

(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to SSA its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of SSA.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: Indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then

the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records.* (1) *Records of grantees and subgrantees.* SSA and the Comptroller General of the United States, or any of their authorized representatives, have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records. Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

#### **§ 437.43 Enforcement.**

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, SSA may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by SSA.

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program.

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, SSA will provide

the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless SSA expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

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

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 437.35).

#### **§ 437.44 Termination for convenience.**

Except as provided in § 437.43, awards may be terminated in whole or in part only as follows:

(a) By SSA with the consent of the grantee or subgrantee in which case the two parties will agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to SSA, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, SSA determines that the remaining portion of the award will not accomplish the purposes for which the award was made, SSA may terminate the award in its entirety under either § 437.43 or paragraph (a) of this section.

#### **Subpart D—After-the-Grant Requirements**

##### **§ 437.50 Closeout.**

(a) *General.* SSA will close out the award when it determines that all applicable administrative actions and all required work of the grant have been completed.

(b) *Reports.* (1) Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, SSA may extend this timeframe. These may include but are not limited to:

(i) Final performance or progress report.

(ii) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).

(iii) Final request for payment (SF-270) (if applicable).

(iv) Invention disclosure (if applicable).

(v) Federally-owned property report:

(2) In accordance with § 437.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from SSA of property no longer needed.

(c) *Cost adjustment.* SSA will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) SSA will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to SSA any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

##### **§ 437.51 Later disallowances and adjustments.**

The closeout of a grant does not affect:

(a) SSA's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 437.42;

(d) Property management requirements in § 437.31 and § 437.32; and

(e) Audit requirements in § 437.26.

##### **§ 437.52 Collection of amounts due.**

(a) Any funds paid to a grantee in excess of the amount to which the

grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, SSA may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, SSA will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR chapter II). Litigation or the filing of any form of appeal does not extend the date from which interest is computed.

#### Subpart E—Entitlement [Reserved]

[FR Doc. 03–11852 Filed 5–23–03; 8:45 am]

BILLING CODE 4191–02–P

## SOCIAL SECURITY ADMINISTRATION

### 20 CFR Part 438

RIN 0960–AE29

#### Restrictions on Lobbying

**AGENCY:** Social Security Administration (SSA).

**ACTION:** Final rules.

**SUMMARY:** These final rules establish new regulations dealing with the restrictions on lobbying contained in the Common Rule, “New Restrictions on Lobbying,” commonly referred to as the Byrd Anti-Lobbying Amendment common rule. The Social Security Independence and Program Improvements Act of 1994 established SSA as an independent agency separate from the Department of Health and Human Services (HHS), effective on March 31, 1995. To implement our own set of grants regulations, we have essentially codified the text of the Common Rule. These final rules, along with the final rules we are publishing elsewhere in today’s **Federal Register**, establish SSA grants regulations, separate from those of HHS, effective upon publication.

**EFFECTIVE DATE:** These final rules are effective May 27, 2003.

**FOR FURTHER INFORMATION CONTACT:**

Phyllis Y. Smith, Chief Grants Management Officer, Office of Operations Contracts and Grants, Office of Acquisition and Grants, SSA, 1710 Gwynn Oak Ave., Baltimore, MD 21207–5279; telephone (410) 965–9518; FAX (410) 966–9310.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 319 of Pub. L. 101–121, enacted October 23, 1989, amended title 31, United States Code, by adding a new section 1352, entitled “Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions,” commonly known as the Byrd Anti-Lobbying Amendment. This law prohibits the recipient of a Federal contract, grant, loan or cooperative agreement from using appropriated funds to pay any person to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions:

- The awarding of any Federal contract,
- The making of any Federal grant,
- The making of any Federal loan,
- The entering into of any cooperative agreement, and
- The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

The law also imposes requirements for disclosure and certification related to lobbying by recipients of any of the covered Federal actions. As called for by section 319 of Public Law 101–121, on December 18, 1989 (published December 20, 1989), the Office of Management and Budget (OMB) issued interim final guidance entitled “Governmentwide Guidance for New Restrictions on Lobbying,” which called for governmentwide implementation of, and compliance with, the requirements of section 1352.

HHS implements the provisions of the Byrd Anti-Lobbying Amendment common rule through its regulations at 45 CFR part 93. Prior to March 31, 1995, SSA was an operating component of HHS. As a result of Public Law 103–296, SSA became an independent agency on March 31, 1995. However, pursuant to section 106(b) of that law, the HHS regulations at 45 CFR part 93 have remained applicable to SSA. In order to implement our own set of grants regulations dealing with lobbying, we are essentially adopting the text of the anti-lobbying common rule at 20 CFR part 438. Part 438 is similar in all material respects to 45 CFR part 93 and to the governmentwide anti-lobbying common rule, which implements the requirements of section 319, Public Law 101–121 (31 U.S.C. 1352). HHS regulations at 45 CFR part 93 will cease to be applicable to SSA on the effective

date of these regulations, in accordance with section 106(b) of Public Law 103–296.

##### II. Differences Between Part 438 and Common Rule/Part 93

A. In § 438.100(a), we have corrected the spelling of the word “agreement” where it is initially used in the term “cooperative agreement.”

B. In the second sentence of § 408.300(c), we have changed the word “or” to “of.” The sentence properly reads “For example, drafting of a legal document accompanying a bid \* \* \*.”

C. Throughout new part 438, we have replaced, where appropriate, references to “awarding agency(ies)” with references to SSA. We have also made numerous nonsubstantive changes to make these rules easier for the public to read and understand.

#### Regulatory Procedures

##### *Justification for Final Rule*

Section 702(a)(5) of the Social Security Act (Act) makes the regulations we prescribe subject to the rulemaking procedures established under section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553. These procedures generally require publication of notice of the proposed rulemaking and the solicitation of comments from interested persons. However, the APA provides exceptions to notice and comment procedures when an agency finds that there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest.

After due consideration, we have determined that under 5 U.S.C. 553(b)(B), good cause exists for waiver of notice of proposed rulemaking because such procedure would be unnecessary. These final regulations adopt as SSA regulations the provisions of the governmentwide anti-lobbying common rule without substantive change. Pursuant to section 106(b) of Public Law 103–296, the HHS regulations at 45 CFR part 93, which implement the provisions of the anti-lobbying common rule, remain applicable to SSA until such time as these regulations become effective. The differences in these regulations over those of the anti-lobbying common rule or those of 45 CFR part 93 are not substantive. Accordingly, promulgation of these regulations pursuant to notice and comment rulemaking is unnecessary and may be dispensed with pursuant to 5 U.S.C. 553(b)(B).

##### *Waiver of 30-Day Delay in Effective Date*

As indicated above, section 702(a)(5) of the Act makes the regulations we