

16. CONSTRUCTION AWARDS

A. Purpose

This chapter describes the procedures for compliance, reporting, record-keeping, and administrative requirements that generally apply to DOC construction awards. Operating units shall refer to Appendix A (Applicable Regulations, OMB Circulars and Agency-specific Guidance) to this chapter for applicable authorities and for specific operating unit requirements. FALD should be consulted to determine which provisions of this chapter apply.

B. Authority

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

C. Scope of Chapter

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

2. Alterations. Alterations that are incidental to the primary purpose of an award are generally not considered to constitute a construction award under this chapter. For example, if the primary purpose of an award is to allow a recipient to conduct educational or business seminars, the renovation of an educational exhibit or staging area would be considered an alteration and not considered construction.

D. Policy

1. Property that is acquired or improved, in whole or in part, with Federal financial assistance is held in trust by the recipient or subrecipient for the purpose(s) for which the award was made and for the estimated useful life of the project, during which period the DOC operating unit retains an undivided equitable reversionary interest in the property (the Federal Interest). Under the United States Constitution (Article I, Section 8, Clause 1), Congress has the power to appropriate Federal funds. Incident to this power is the right “to further broad policy objectives by conditioning receipt of those Federal moneys upon compliance by the recipient with Federal statutory and administrative directives.” *South Dakota v. Dole*, 483 U.S. 203, 207, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980). See also Article IV, Section 3, Clause 2, regarding Congress’ power to make rules regarding property of the United States. The requirement that property purchased or improved with Federal funds continue to be used for the original statutory purpose for which it was acquired is embodied in the Property Standards of the Uniform Guidance at 2 CFR §§ 200.310 (Insurance coverage) -200.316 (Property trust relationship).

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

[A] grantee holds grant funds, and property purchased with those funds, in the capacity of a trustee. For example, in *Joliet-Will*, 847 F.2d at 432 [*In re Joliet-Will County Community Action Agency*, 847 F.2d 430 (7th Cir.1988)], the court held that the grantee was essentially “a trustee, custodian, or

other intermediary, who . . . is merely an agent for the disbursement of funds belonging to another,” and that the grantee's ‘ownership’ was nominal, like that of a trustee. The trust concept finds support in an early Supreme Court decision, *Stearns v. Minnesota*, 179 U.S. 223 (1900), a land grant case in which the Court discussed the grant in trust terms.

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

2. Eminent Domain. In making a discretionary award for a construction project, the operating unit shall consider the policy on eminent domain set out in Executive Order 13406, (Protecting the Property Rights of the American People, June 28, 2006). As appropriate, the terms and conditions of the award will include appropriate provisions to ensure that the recipient agrees:

- a. Not to exercise any power of eminent domain available to the recipient (including the commencement of eminent domain proceedings) for use in connection with the project for the purpose of advancing the economic interests of private parties;
- b. Not to accept title to land, easements, or other interest in land acquired by the use of any power of eminent domain for use in connection with the project for such purposes; and
- c. Any use of the power of eminent domain to acquire land, easements or interests in land, whether by the recipient or any other entity that has the power of eminent domain, in connection with the project without prior written consent of the operating unit constitutes an unauthorized activity and/or use of funds under the award, and subjects the recipient to appropriate enforcement action by the Grants Officer, including but not limited to the disallowance of award costs and the termination of an award.

E. General Requirements

The following sections of this chapter contain requirements that are applicable to construction awards that originate in all DOC operating units. The Appendices contain requirements specific to NOAA, NIST, and EDA construction awards.

1. Recipient Responsibilities.

- a. The recipient is responsible for complying with all Federal laws and regulations, DOC policies, Executive Orders, and OMB Circulars that are referenced in the Terms and Conditions, each as may be amended. These may include environmental requirements, applicable Federal cost principles and administrative, audit, programmatic, financial, and property management requirements. The recipient is responsible for supervising the design, bidding, construction, and operation of construction projects in compliance with the terms and conditions of an award, including requirements incorporated by reference into an award.

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

(1) The scope and description of the project as set forth in the award documents;

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

(3) The general terms and conditions of the Financial Assistance Award applicable to the construction project; and

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

Failure of a recipient to satisfy the terms and conditions of an award may result in appropriate enforcement action by the Grants Officer, including but not limited to the disallowance of costs, or suspension or termination of the award and recovery of federal funds. In addition, such failure may have a negative impact on the recipient's ability to receive future funding from DOC. Special attention should be paid to the project development time schedule, which may only be extended as a result of a written request from the recipient for an amendment to the award and a corresponding written approval from the operating unit. The disbursement of financial assistance funds for project activities (not including award closeout activities) is not permitted when a project has exceeded the time schedule unless the operating unit has given written approval for a time schedule extension.

2. Operating Unit's Responsibilities.

Operating units shall assist the recipient by providing information and guidance on the Federal requirements for each award, such as the information contained in this chapter, the references and forms listed in the Appendix, and direct guidance and assistance provided by operating unit project managers.

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

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

(2) Construction Terms. For EDA construction awards, the below terms in subparagraphs (2)(a) – (h) or substantively similar terms shall be included in all awards. For construction awards of other DOC operating units, the below terms in subparagraphs (2)(a) – (h) or substantively similar terms

shall also be required, except that the Grants Officer may provide an alternative means of providing public notice of the Federal Interest under subparagraph 2(b) below or, as warranted by the circumstances of a particular award, may forego the filing of a public notice of the Federal Interest but this does not alter the trust relationship by which the recipient holds title (*see* 2 CFR § 200.316 (Property trust relationship)). Requiring a recipient to provide public notice of the Federal Interest in DOC construction projects is a highly encouraged practice and should be required by the operating unit Grants Officer whenever feasible considering the totality of circumstances surrounding a specific construction project or group of similarly situated construction projects.

(a) Maintenance. The recipient agrees that, for the estimated useful life of the facility funded with this award, the project will be properly and efficiently administered, operated, and maintained for the purpose authorized by this award and in accordance with the terms, conditions, requirements, and provisions of the award. If the [operating unit] determines at any time during the estimated useful life of the project, that the project and any project property is not being properly and efficiently administered, operated, and maintained, the [operating unit] shall have the right to terminate this award (if it is still active) and pursue any other remedies allowed by law. *See* 2 CFR § 200.311 (Real property).

(b) Notice of Federal Interest. The recipient shall execute a covenant, property management agreement, mortgage or other statement of the Federal Interest in real property acquired or improved, in whole or in part, under a DOC financial assistance award, acceptable in form and substance to the operating unit, which must be placed of record in accordance with local law, with continuances (for fixture filings) and amendments filed as appropriate. The recipient must provide the operating unit with a written statement from a licensed attorney in the jurisdiction where the property is located certifying that the covenant, mortgage or other statement of the Federal Interest has been properly executed and duly recorded and that the Federal Interest has been protected, as required under the award and in accordance with local law. The attorney's statement, along with a copy of the instrument reflecting the recordation of the Federal Interest, shall be returned to the Grants Officer. The recipient may not dispose of, modify the use of, or change the terms of the real property title, or other interest in the project site and facilities without permission and instructions from the operating unit. No funds under this award shall be released until the recipient has complied with this provision unless other arrangements satisfactory to the operating unit are made.

(c) Compliance. The recipient shall comply, and must require each subrecipient or contractor, including lower tier subrecipients or subcontractors, to comply with all applicable Federal, state, and local laws and regulations.

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

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

(f) Land, Easements, and Rights of Way. Unless otherwise specified in the terms of the award, before commencement of construction, or when requested by the operating unit, the recipient must furnish evidence, satisfactory in form and substance to the operating unit, that title to real property required for the project is vested in the recipient, and that such easements, rights-of-way, State or local government occupancy or use permits, long-term leases, or other property interests or access rights required for the project have been or will be obtained by the recipient within an acceptable time, as determined by the operating unit. The recipient must disclose all pre-existing or contemplated encumbrances to the operating unit as they pertain to real property that will be acquired or contributed by a recipient or subrecipient pursuant to a DOC construction award. The operating unit will not accept any encumbrance that interferes with the construction, intended use, operation, or maintenance of, or the Federal Interest in, the project during its estimated useful life.

An operating unit may specify a variety of points in time to verify that a recipient provides the necessary evidence of title to project property. For example, the operating unit may require evidence before the operating unit approves award or before the operating unit approves the recipient to advertise for construction bids.

FALD should be consulted to the extent that a Grants Officer or operating unit has questions relative to a recipient's title interest in project property, whether a recipient has secured the requisite licenses, permits or other property interests for a project, or with respect to the nature and impact of any pre-existing or competing encumbrances to project property.

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

(h) Tribal Employment Rights Ordinances. In accordance with DOC policy, all operating units must recognize Tribal Employment Rights Ordinances (TEROs), which may provide for preferences in contracting and employment, in connection with its financial assistance awards. Tribal ordinances requiring preference in contracting, hiring, and firing and the payment of a TERO fee are allowable provisions under Federal awards and should be incorporated by the operating unit under its grants and contracts with American Indian and Alaska Native tribal governments. The payment of the TERO fee, which supports the tribal employment rights office to administer the preferences, should generally be allowable as an expense that is "necessary and reasonable for proper and efficient performance and administration" of an award, as provided under the applicable cost principles set out in 2 CFR Part 200, Subpart E.

b. Post-award Requirements. The Grants Officer, in consultation with the Federal Program Officer, should ensure that construction awards contain appropriate post-award terms and conditions to help ensure the successful completion of the project by the recipient, as well as the protection and maximization of the DOC investment in the recipient's project. In this connection, below is a non-exhaustive list of post-award requirements for a Grants Officer and a Federal Program Officer to consider in developing appropriate terms and conditions for a construction

award.

(1) Recipient Documentation. At a minimum, the recipient's records must fully disclose: (a) all project expenditures, (b) procurement actions, (c) compliance with the Terms and Conditions of the Financial Assistance Award, and (d) contractor compliance with applicable Federal requirements, and (e) such other records as identified in 2 CFR § 200.334 (Record retention requirements), or in the terms and conditions of an award.

The operating unit needs to review documentation submitted by the recipient, ensure that all such documentation is complete, accurate and complies with all applicable award requirements, and, in consultation with the Grants Officer, ensure that any necessary or appropriate follow-up actions are taken.

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

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

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

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

(d) All change orders issued up to the date of the report and not previously reported to the operating unit; and

(e) Other pertinent information including, when appropriate, an analysis and explanation of the cost overruns or high unit costs.

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

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

(a) Environmental Compliance. The operating unit must ensure that environmental project reviews are conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (Pub. L. No. 91-190; 42 U.S.C. § 4321 *et seq.*, as implemented under 40 CFR chapter V) (NEPA), when the award activities remain subject to Federal authority and control, and all other Federal environmental statutes, regulations and Executive Orders, as listed in the Terms and Conditions to the award. These authorities include the implementing regulations of NEPA.

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

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

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

(iii) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) and the DOC's implementing regulations at 15 CFR Part 8b. For purposes of complying with the accessibility standards set forth in 15 CFR § 8b.18(c), recipients and subrecipients must adhere to the regulations, published by the U.S. Department of Justice, implementing Title II of the Americans with Disabilities Act (ADA) (28 CFR Part 35; 75 FR 56164, as amended by 76 FR 13285) and Title III of the ADA (28 CFR Part 36; 75 FR 56164, as amended by 76 FR 13286). The revised regulations adopted new enforceable accessibility standards called the "2010 ADA Standards for Accessible Design" (2010 Standards), which replace and supersede the former Uniform Federal Accessibility Standards for new construction and alteration projects. *See also* the Terms and Conditions of the Award;

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

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

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

(c) Build America, Buy America. The Build America, Buy America Act (BABA), which was enacted as part of the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), established a domestic and content procurement preference for all Federal financial assistance obligated for infrastructure projects after May 14, 2022. For infrastructure projects subject to BABA requirements, all iron, steel, manufactured products, and construction materials used in federally funded projects for infrastructure must be produced in the United States. See 2 CFR § 200.322 and 2 CFR Part 184.

(4) Project Management Conference. Shortly after approval of the award, the operating unit may contact the recipient to arrange a project management conference. The purpose of the project management conference is to explain to the recipient its post-approval responsibilities for administration of the award, including its responsibilities with respect to the Terms and Conditions

of the award and applicable Federal requirements. Whenever practical, the project management conference should be held where appropriate operating unit regional office personnel will be available. The recipient's authorized representative, architect/engineer, attorney, and possibly the recipient's financial representative should attend.

(5) Architect/Engineer Agreement.

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

(b) The recipient must select the architect/engineer in accordance with the procurement standards set forth in 2 CFR §§ 200.317 (Procurements by States and Indian Tribes) through 200.327 (Contract provisions). The "cost plus a percentage of cost" and "percentage of construction costs" methods of contracting are specifically prohibited. *See* 2 CFR § 200.324(c).

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

(d) All architect/engineer contracts awarded by the recipient shall include a provision to the effect that the recipient, the operating unit, the Comptroller General of the United States, the Inspector General of the Department of Commerce (OIG), or any of their duly authorized representatives, shall have access to any paper or electronic documents, books, correspondence, and records of the architect/engineer that are pertinent to the award in order to verify the recipient's compliance with award requirements. *See also* 2 CFR § 200.327, (Contract provisions) for a listing of the required provisions for contracts awarded by recipients pursuant to a DOC financial assistance award (including construction awards).

(6) Early Construction Starts. In order for project costs to be eligible for reimbursement by the operating unit, the operating unit must determine that all contracts necessary for design and construction of the project facilities have been awarded in compliance with the Terms and Conditions of the award. If construction commences prior to the operating unit's determination, the recipient proceeds at its own risk and at the risk of not being reimbursed by DOC for such activities, unless and until the operating unit's review and concurrence.

(7) Requirements during construction.

(a) At a minimum, during construction, the recipient is responsible for:

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

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

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

(9) Change Orders.

(a) The recipient shall submit all contract change orders for review and for approval by the operating unit even if the operating unit is not participating in any costs associated with the change or if the contract price is to be reduced. Necessary supporting statements, estimates, specifications, and plans should be attached. Absent express legal authority, the operating unit may not approve change orders that change the purpose and intent (the scope) of the project. Change orders that minimally or incidentally increase the cost of the project, but do not change the project scope, may be approved by the operating unit, provided that either:

(i) The recipient has agreed in writing to fund the additional cost, in which case all work to effect the change order will be an ineligible project cost, and no federal funds will be used to pay for it; *or*

(ii) There are sufficient funds remaining in the award budget to cover the change order without jeopardizing the completion of the project.

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

(10) Specific Requirements for Contractors and Subcontractors. The recipient is responsible for ensuring that it includes applicable DOC compliance provisions, as contained in the Terms and Conditions of the award, including the contract provisions required by 2 CFR§ 200.327 (Contract

provisions), in all contracts let by the recipient under a DOC construction award. The recipient is also responsible for ensuring that, in turn, each contractor under a DOC construction award includes the applicable DOC compliance provisions in all subcontracts awarded under the prime contract. Additionally, the recipient must ensure that each contractor and subcontractor agree to comply with all applicable Federal, state, and local requirements pertaining to the project.

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

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

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

(c) Due to the difficulty in monitoring in-house construction and the possibility of limited operating staff availability for monitoring in-house construction is strongly discouraged. Generally, the in-house method of construction may only be approved if:

(i) The recipient has a special skill required for the construction (e.g., construction of unique Indian structure); *or*

(ii) Substantial cost savings can be demonstrated; *or*

(iii) The operating unit Engineer/Construction Manager or Project Officer is satisfied that the recipient has made all reasonable efforts to obtain a contractor, but has failed to do so because of uncontrollable factors (such as the remoteness of the site combined with a small contract or an overabundance of construction work in the project area); *or*

(iv) It has been determined by the operating unit that special circumstances require its use to successfully complete the project.

(12) Contracting Standards.

(a) In General.

(i) States and Indian Tribes. When procuring property and services under a Federal award, a State or Indian Tribe must follow the same policies and procedures it uses for procurements from its non-Federal funds. If such policies and procedures do not exist, States and Indian Tribes must follow the procurement standards in §§ 200.318 through 200.327. In addition to its own policies and procedures, a State or Indian Tribe must also comply with 2 CFR §§ 200.321 (Contracting with small businesses, minority businesses, women's business enterprises, veteran-owned businesses, and labor surplus area firms), 200.322 (Domestic preferences for procurements). A State must comply with 2 CFR § 200.323 (Procurement of recovered materials) and ensure that every purchase order or

other contract includes any clauses required by 2 CFR § 200.327 (Contract provisions). *See* 2 CFR § 200.317 (Procurements by States and Indian Tribes).

(ii) Other Recipients and Subrecipients. All other recipients and subrecipients, including subrecipients of a State, must follow 2 CFR §§200.318 (General procurement standards) through 200.327 (Contract provisions), which are outlined below.

(b) General Procurement Standards. The recipient shall adhere to the procurement standards contained in 2 CFR § 200.318 (General procurement standards). In particular, the recipient shall make awards only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed procurement. In accordance with 2 CFR § 200.318(c), the recipient must maintain written standards of conduct covering conflicts of interest and governing the actions of employees engaged in the selection, award, and administration of contracts. No employee, officer, agent, or board member with a real or apparent conflict of interest may participate in the selection, award, or administration of a contract supported by the Federal award.

A conflict of interest includes when the employee, officer, agent, or board member, any member of their immediate family, their partner, or an organization that employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from an entity considered for a contract. An employee, officer, agent, and board member of the recipient or subrecipient may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors. However, the recipient or subrecipient may set standards for situations where the financial interest is not substantial, or a gift is an unsolicited item of nominal value. The recipient's or subrecipient's standards of conduct must also provide for disciplinary actions to be applied for violations by its employees, officers, agents, or board members. *See* 2 CFR 200 § 200.218(c) for additional information on conflicts of interest.

(c) Competition. All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of 2 CFR § 200.319 (Competition) and § 200.320 (Procurement methods). The recipient or subrecipient must have written procedures for procurement transactions and recipient or subrecipient must ensure that all prequalified lists of persons, firms, or products used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the recipient or subrecipient must not preclude potential bidders from qualifying during the solicitation period.

(d) Methods of Procurement. Recipients and subrecipients must adhere to the methods of procurement set forth in 2 CFR § 200.320 (Procurement methods). The recipient and any subrecipient shall maintain records sufficient to detail the history of each procurement transaction related to the project. These records will include but are not necessarily limited to the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for determining the contract price. *See* 2 CFR § 200.334 (Record retention requirements).

(e) Contracting with Small Businesses, Minority Businesses, Women's Business Enterprises, Veteran-owned businesses, and Labor Surplus Area Firms. As set forth in 2 CFR § 200.321 (Contracting with small businesses, minority businesses, women's business enterprises, veteran-owned businesses, and labor surplus area firms), when possible, the recipient or subrecipient must ensure that small businesses, minority businesses, women's business enterprises, veteran-owned

businesses, and labor surplus area firms are used when possible. *See also* the Terms and Conditions of the Award.

(f) Procurement of Recovered Materials. In accordance with 2 CFR § 200.323 (Procurement of recovered materials):

(i) A recipient or subrecipient that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. § 6962). The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

(ii) The recipient or subrecipient should, to the greatest extent practicable and consistent with law, purchase, acquire, or use products and services that can be reused, refurbished, or recycled; contain recycled content, are biobased, or are energy and water efficient; and are sustainable. This may include purchasing compostable items and other products and services that reduce the use of single-use plastic products.

(g) Contract Cost and Price. A recipient or subrecipient must adhere to the cost and contract pricing requirements set forth in 2 CFR § 200.324 (Contract cost and price). In particular, a recipient must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications.

(h) Bonding Requirements. The operating unit or pass-through entity may accept the recipient's or subrecipient's bonding policy and requirements for construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold. Before doing so, the operating unit or pass-through entity must determine that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements set forth in 2 CFR § 200.326 (Bonding requirements) shall apply.

(i) Required Contract Provisions. A recipient, including a State or Indian Tribe, must ensure that contracts and subcontracts awarded pursuant to a DOC financial assistance award contain the applicable provisions described in 2 CFR § 200.327 (Contract provisions) and in Appendix II to Part 200 (Contract Provisions for non-Federal Entity Contracts Under Federal Awards).

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

(13) Review of Plans and Specifications.

(a) Review Prior to Advertising. When required by the operating unit, the recipient must submit plans, specifications, and certain related documents for review and concurrence prior to advertising for bids. This review is to ensure compliance with the Terms and Conditions of the award and does not attest to the accuracy or completeness of design, dimensions, details, proper selection of materials, or compliance with required codes or ordinances, which responsibility rests with the recipient. *See also* 2 CFR § 200.325(a), which specifies that the recipient or subrecipient must provide technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition.

(b) Review Prior to Award. As provided in 2 CFR § 200.325(b), the operating unit may also review proposed contracts and related procurement documents prior to award if:

(i) The recipient's or subrecipient's procurement procedures or operation fails to comply with the procurement standards specified in 2 CFR Part 200;

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

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

(iv) The procurement is expected to exceed the simplified acquisition threshold and a sealed bid procurement is to be awarded to an entity other than the apparent low bidder; or

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

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

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

(15) Protest Procedures. In accordance with 2 CFR § 200.318(k), the recipient or subrecipient is responsible, without recourse to DOC, in accordance with good administrative practice and sound business judgment, for the settlement and satisfaction of all contractual and administrative issues arising out of a recipient's procurement under a DOC financial assistance award. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the recipient or subrecipient of any contractual responsibilities under its contracts. The

Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. The recipient or subrecipient must report violations of law to the local, state, or Federal authority with proper jurisdiction.

F. Disbursement of Funds and Financial Administration

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

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

G. Award Amendments

In most instances, proposed modifications must be accomplished only through a formal amendment to the award. Types of amendments may include:

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

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

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

c. A budget for the remaining funds;

d. A statement, supported by documentation where appropriate, demonstrating there is still a bona fide need for the project; and

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

2. Budget Revisions and Changes to Program Plans. The recipient shall notify the operating unit and request prior approval of any proposed deviations from budget and program plans in accordance with 2 CFR § 200.308 (Revision of budgets and program plans) and the Terms and Conditions of the Award.

3. Additional Funding. In accepting an award from an operating unit, the recipient normally agrees to fund any overrun(s). Additional funding for an approved project is subject to prior approval from the Grants Officer. To be considered for approval, additional funding requests must compete with other applications for program funding. If an overrun occurs as a result of the construction contract bid opening, before the operating unit will accept a formal request for additional funds, it will be necessary for the recipient to furnish the following documentation to the operating unit:

a. A written statement from the recipient's architect/engineer giving reasons for the architect/engineer's professional opinion that redesign of the project within the approved scope or using new or additional deductive alternates cannot reasonably be expected to reduce the cost to within the available funds; and

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

The operating unit's acceptance of a request for additional funding does not indicate approval. Any further action by the recipient pending the operating unit's review of the request is at the recipient's risk and at the risk of not being reimbursed by DOC, unless and until the request is approved by the Grants Officer.

4. Enforcement and Termination.

a. Enforcement.

(1) If a recipient materially fails to comply with any Term or Condition of the award, whether stated in a Federal statute, regulation, assurance, application for Federal financial assistance, or notice of award, the operating unit may pursue all available rights and remedies available to it, including those set out in 2 CFR § 200.339 (Remedies for noncompliance).

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

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

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

(3) The remedies for noncompliance identified in 2 CFR § 200.339 (Remedies for noncompliance), including suspension and termination, do not preclude the recipient from being subject to debarment and suspension under Executive Orders 12549 and 12689 and the DOC's implementing regulations at 2 CFR Part 1326 (Non-Procurement Debarment and Suspension).

b. Termination.

(1) Terminations for a non-federal entity's material failure to comply with the terms of the award must be in accordance with 2 CFR §§ 200.340 (Termination), 200.341(b) and (c), and 200.342 (Opportunities to object, hearings, and appeals), as applicable.

(2) Terminations with the consent of the non-Federal entity (also known as terminations by mutual agreement) must comply with 2 CFR § 200.340 (Termination).

(3) Termination to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR § 200.340 (a)(2)).

H. Post-Construction Requirements

1. Audit Requirements.

a. Certain recipients are subject to the audit requirements contained in Subpart F of 2 CFR Part 200 (Audit Requirements) – referred to in this Manual as the Single Audit Requirements. The Single Audit Requirements are issued pursuant to the Single Audit Act of 1984 (Pub. L. No. 98-502), as amended by the Single Audit Act Amendments of 1996 (Pub. L. No. 104-156; 31 U.S.C. §§ 7501-7507) and require that recipients that are nonprofit organizations, government agencies, Indian tribes, and educational institutions expending Federal awards of \$1,000,000 or more during the recipient's fiscal year conduct an audit in accordance with the requirements of Subpart F of 2 CFR Part 200. If the recipient does not have a current audit performed in accordance with the Single Audit Requirements, the operating unit shall advise the recipient of the need for submitting the required audit and may also take appropriate enforcement action in accordance with 2 CFR § 200.339 (Remedies for noncompliance).

b. For profit and other organizations not subject to the Single Audit Requirements shall be subject to the audit requirements set forth in the DOC GT&Cs issued with the award, unless a different audit requirement is imposed through specific award condition(s).

c. The operating unit or the OIG may conduct audits of awards. The recipient will be notified in advance if it is selected for an audit. The recipient must permit the operating unit, the Comptroller

General of the United States, the OIG, or any of their duly authorized representatives, access to any paper or electronic documents, books, correspondence, and any records (that are pertinent to a specific award to verify the recipient's compliance with the Terms and Conditions of an award. See 2 CFR § 200.337 (Access to records).

2. Property Management.

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

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

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

The estimated useful life should be determined from the date of acquisition, date of certificate of occupancy for building or improvement, filing of the notice of federal interest, or other appropriate date as provided in the terms and conditions of an award FALD should be consulted to the extent that a Grants Officer or operating unit has questions concerning the date upon which the estimated useful life in a specific project or asset should commence.

c. Notice of Federal Interest. Section E of this chapter provides that certain DOC construction awards include a term requiring the recipient to file or record a covenant, mortgage, or other statement of the operating unit's interest in the property (the "Federal Interest"), acceptable in form and substance to the operating unit, that must be placed of record in accordance with local law, with continuances re-filed as appropriate (for fixture filings). The Federal Interest notice provides public notice of that interest and helps to ensure compliance with matters such as the purpose, scope, and use of a project; it should be reflected by a recorded notice in appropriate form and substance (e.g., a mortgage, covenant, or other statement) setting forth the operating unit's interest in real property or other improvements in the case of a project involving the acquisition, construction, or improvement of real property and/or buildings, signed by an authorized official of the recipient. It should specify the estimated useful life of the property and should include but not be limited to the use requirements applicable to the property and the procedure for disposition of the property when it is no longer needed for the originally authorized purpose. The notice of the DOC operating unit's interest must be recorded or filed in the real property records of the jurisdiction in which the real property is located, in accordance with applicable law. In view of the complexities and varying requirements for perfecting interests in real property from jurisdiction to jurisdiction, DOC requires a written statement from a licensed attorney in the jurisdiction where the property is located, certifying that the Federal Interest has been protected as required under the award and in accordance with this general policy. A copy of the recorded lien, statement, or other recordable instrument must be attached to the attorney's certification.

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

d. Type of Federal Interest. Operating units should consider the nature of the recipient and the asset and the potential risk of loss to the government when determining the type of instrument that the recipient should be required to execute and record reflecting the Federal Interest therein. State or local law may prescribe the form, means and location of filing or recording an appropriate notice. Operating units are encouraged to consult with FALD counsel concerning the form and content of recipient documentation and public filings.

3. Closeout Procedures.

a. After construction is complete and the project is closed out financially, the recipient has an ongoing responsibility to properly operate and maintain the project for its estimated useful life in accordance with its original purpose. The recipient also must comply with all applicable requirements including but not limited to ongoing compliance with Federal statutes, regulations, and Executive Orders prohibiting discrimination; applicable Federal laws prohibiting inherently religious activity; applicable environmental law and performance measures; and maintaining records to document such compliance which shall be made available for inspection by the operating unit or other government officials as required. When project construction and final inspection have been completed, and the recipient has accepted the project from the contractor, the recipient may begin the closeout process in accordance with 2 CFR § 200.344 (Closeout) and the Terms and Conditions of the Award. The recipient should furnish the following to the operating unit:

(1) Confirmation of compliance with all Terms and Conditions of the Award, including all specific award conditions;

(2) All required financial and progress reports;

(3) A properly completed Form SF-429, including applicable attachments and supporting documentation;

(4) Confirmation of appropriate insurance coverage for aboveground facilities in accordance with 2 CFR § 200.310 (Insurance coverage) and the Terms and Conditions of the Award;

(5) Confirmation that all changes to the project have been brought to the attention of the operating unit and approved as necessary by the Grants Officer;

(6) Confirmation that provisions have been made for the retention of records pertaining to the award in accordance with the 2 CFR § 200.334 (Record retention requirements) and the Terms and Conditions of the Award;

(7) A copy of the executed Certificate of Final Completion, Certificate of Occupancy, or similar documentation;

(8) Confirmation that as-built drawings have been received from the contractor or the architect/engineer;

(9) Confirmation that a copy of the recipient's currently valid audit under the Single Audit Requirements has been submitted to the Federal Audit Clearinghouse and, if required, furnished to the operating unit. If an audit under the Single Audit Requirements is required, but not available, the recipient must submit a plan to secure the required audit to the operating unit. The recipient must advise the operating unit if an audit under the Single Audit Requirements is not required. If the recipient is not subject to the Single Audit Requirements, the operating unit must confirm the recipient has submitted all required project-specific audits;

(10) Confirmation that no Davis-Bacon (if applicable) or local labor employment violations exist;

(11) Notification of any change, lien, mortgage, or other encumbrance relating to the ownership of the project;

(12) Notification of any unresolved contract/contractor disputes;

(13) Execution and recordation of a lien, mortgage, or covenant of purpose, use, and ownership in favor of the operating unit, if this is required under the Terms and Conditions of the award and has not already been accomplished; and

(14) Confirmation that the recipient will maintain project facilities for the estimated useful life of the facility as determined by the operating unit, during which period the recipient may not alienate its ownership or change the use and purpose of the assisted facility without prior written approval of the Grants Officer;

b. Within 120 calendar days of project completion (which may be extended by the Grants Officer upon written request by the recipient), the recipient shall submit all financial, performance, and other reports as required by 2 CFR § 200.344 (Closeout) and by the Terms and Conditions of the Award. The subrecipient is required to submit its final performance report to the pass-through entity within 90 calendar days unless an extension has been granted.

c. Unless the operating unit authorizes an extension, the recipient shall liquidate all obligations incurred under the award no later than 120 calendar days after the acceptance of the project from the contractor or before the end of the budget period, whichever occurs earlier, as specified in 2 CFR § 200.344 (Closeout) and in the Terms and Conditions of the Award.

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

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

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

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

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

(5) Specifics of any administrative costs being claimed.

e. In accordance with 2 CFR § 200.345 (Post-closeout adjustments and continuing responsibilities), the closeout of an award does not affect any of the following:

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

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

(3) Property management, property disposition, and records retention requirements; and

(4) Audit requirements set forth in 2 CFR Part 200, Subpart F, and in the Terms and Conditions of the Award.