

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 5

[Docket No. FR-4695-I-01]

RIN 2501-AC98

Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule provides for codification of the requirements of Executive Order 13202 (the Executive Order), entitled "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects." The Executive Order provides that, to the extent permitted by law, agencies may not permit inclusion of contract conditions requiring or prohibiting entering into or adhering to agreements with a labor organization, or otherwise discriminating against parties entering into or adhering to such agreements, as a condition for award of any federally funded contract or subcontract for construction. The purpose of this rule is to ensure compliance by all HUD grantees, recipients of financial assistance, parties to cooperative agreements, contractors, and subcontractors with the requirements of open competition and government neutrality in awarding federally funded contracts or subcontracts for construction.

DATES: *Effective Date:* June 23, 2003.

Comment Due Date: July 21, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Aaron Santa Anna, Assistant General Counsel for Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC

20410-8000; telephone (202) 708-3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On February 17, 2001, President George W. Bush signed Executive Order 13202, entitled "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects" (Executive Order 13202 was published in the **Federal Register** on February 22, 2001, at 66 FR 11225). The Executive Order prohibits the inclusion of requirements for affiliation with a labor organization as a condition for award of any federally funded contract or subcontract for construction.

Executive Order 13202 was amended by Executive Order 13208, issued on April 6, 2001. The amendment was to add a paragraph (c) to section 5 of Executive Order 13202. New paragraph (c) addresses exemption of a project from the provisions of sections 1 and 3 of the Executive Order. (Executive Order 13208 was published in the **Federal Register** on April 11, 2001, at 66 FR 18717.)

In issuing Executive Order 13202, the President revoked Executive Order 12836 of February 1, 1993, and the Presidential Memorandum of June 5, 1997, entitled "Use of Project Labor Agreements for Federal Construction Projects."

The purposes of Executive Order 13202 are to:

- Promote and ensure open competition on federal and federally funded or assisted construction projects;
- Maintain government neutrality toward government contractors' labor relations on federal and federally funded or assisted construction projects;
- Reduce construction costs to the federal government and to the taxpayers;
- Expand job opportunities, especially for small and disadvantaged businesses;
- Prevent discrimination against government contractors or their employees based upon labor affiliation or lack thereof; thereby promoting the economical, nondiscriminatory, and efficient administration and completion of federal and federally funded or assisted construction projects.

The Executive Order is intended to improve the internal management of the Executive Branch. The Executive Order provides that agencies may not require

or prohibit bidders, offerors, contractors, or subcontractors from entering into or adhering to agreements with one or more labor organizations. The Executive Order also permits agency heads to exempt a project from its requirements under special circumstances, but the exemption may not be related to the possibility of or an actual labor dispute.

II. This Interim Rule

This interim rule provides for the codification of the requirements of Executive Order 13202 for HUD programs. The interim rule adds a new § 5.108 to HUD's regulations in 24 CFR part 5, subpart A. The regulations in subpart A of part 5 contain the definitions and federal requirements generally applicable to all of HUD's programs. By placing the requirements of the Executive Order in those HUD regulations that contain across-the-board requirements, HUD is ensuring the broadest applicability of the requirements of Executive Order 13202. The specific regulatory amendments that are being made by this interim rule are as follows:

A. Scope of Interim Rule Limited to Federally Funded Contracts

As noted above, Executive Order 13202 applies to both construction contracts awarded by a federal agency as well as to federally funded construction contracts awarded by the recipient of federal financial assistance. This interim rule codifies the requirements for HUD-funded construction contracts, but not for construction contracts awarded by HUD. The Federal Acquisition Regulatory (FAR) Council has issued government-wide regulations implementing the requirements regarding federal construction contracts contained in Executive Order 13202 (see the final rule published on November 22, 2002, at 67 FR 70518). The regulations issued by the FAR Council apply to construction contracts awarded by federal agencies, including those awarded by HUD. Interested readers should refer to the November 22, 2002, final rule for additional information regarding the requirements applicable to federal construction contracts.

B. Neutrality Towards Government Contractors' Labor Relations on Federally Funded Construction Projects

The new § 5.108 provides that, to the extent permitted by law, the bid specifications, project agreements, or other controlling documentation for a construction contract awarded by a HUD grantee, recipient of financial assistance from HUD, or party to a cooperative agreement with HUD for a

construction project (or a construction manager acting on their behalf) shall not:

1. Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related federally funded construction project; or
2. Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories, or otherwise adhere to agreements with one or more labor organizations, on the same or other related federally funded construction project.

C. Definitions

The Executive Order defines several of the terms used throughout the Order, such as "construction contract" and "labor organization," and the interim rule adopts these definitions. Accordingly, the new § 5.108 provides that the term "construction contract" means a contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property, including any subcontracts awarded pursuant to such a contract. The interim rule also provides, in accordance with the Executive Order, that the term "labor organization" has the same meaning it has in 42 U.S.C. 2000e(d).

The Executive Order, however, does not establish a definition of the term "financial assistance." The term "financial assistance" is a key term used throughout the Executive Order, and HUD believes that a definition is required to ensure the clarity and uniform enforcement of the new § 5.108. HUD is adopting, for purposes of § 5.108, a definition of the term "financial assistance" that is based on the definition of that term contained in other HUD regulations. These other regulations include 24 CFR part 1, regarding nondiscrimination in HUD programs under title VI of the Civil Rights Act of 1964 (*see* 24 CFR 1.2), 24 CFR part 3, regarding nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance (*see* 24 CFR 3.105), and 24 CFR part 8, regarding nondiscrimination based on handicap in federally assisted HUD programs and activities (*see* 24 CFR 8.3). HUD believes that the adoption of a similar definition will help to ensure consistency throughout HUD's programs and facilitate compliance with the new regulatory requirements.

The interim rule defines the term "financial assistance" to include:

1. Grants, loans, and advances of federal funds; or
2. Proceeds from loans guaranteed under section 108 of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301 *et seq.*) and title VI of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*). The term "financial assistance" does not include any other contract of insurance or guaranty.

Under the section 108 and Title VI loan guarantee programs, recipients must pledge a portion of their block grant formula allocations as security for the guaranteed loans. Accordingly, the proceeds from the loan guarantees are appropriately considered part of the recipient's grant, and within the scope of the definition of "financial assistance." Other HUD loan insurance programs (such as those of the Federal Housing Administration) are not dependent on the provision of a HUD grant, and therefore not considered to be "financial assistance" for purposes of this interim rule.

D. Exemptions

As noted above in this preamble, the Executive Order authorizes HUD to exempt a construction project from the requirements under certain circumstances, and the interim rule contains comparable provisions tracking this language.

E. Sanctions

The interim rule provides that if HUD determines that a HUD grantee, recipient of financial assistance from HUD, or party to a cooperative agreement with HUD (or a construction manager acting on their behalf), performs in a manner contrary to the requirements of the Executive Order, HUD will take such action, consistent with law and regulations, as HUD determines appropriate.

F. Voluntary Project Labor Agreements

In accordance with the Executive Order, the interim rule specifies that nothing in § 5.108 prohibits contractors or subcontractors from voluntarily entering into project labor agreements.

III. Justification for Interim Rulemaking

HUD generally publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking in 24 CFR part 10. However, part 10 provides for exceptions to the general rule if the agency finds good cause to omit advanced notice and public participation. The good cause

requirement is satisfied when prior public procedure is "impractical, unnecessary, or contrary to the public interest" (*see* 24 CFR 10.1). For the following reasons, HUD has determined that it is unnecessary to delay the effectiveness of this rule in order to solicit prior public comments.

To a large extent, the new § 5.108 repeats the language of Executive Order 13202, and does not elaborate on or modify these provisions. The Executive Order contains specific and detailed requirements concerning the use of project labor agreements in federally funded construction projects, leaving few areas to the discretion of individual federal agencies. Accordingly, HUD's authority to revise these provisions of the interim rule in response to public comment would be limited. Where Executive Order 13202 provides room for agency flexibility (such as, for example, in the definition of the term "financial assistance"), HUD has exercised its discretion narrowly, in order to ensure consistency throughout its programs and facilitate compliance with the new regulatory requirements. For example, the interim rule contains a definition of "financial assistance" that is based on the definition of that term contained in other HUD program regulations.

Although HUD believes that good cause exists to publish this rule for effect without prior public comment, HUD recognizes the value of public comment in the development of its regulations. HUD has, therefore, issued these regulations on an interim basis and has provided the public with a 60-day comment period. HUD welcomes comments on the regulatory amendments made by this interim rule. The public comments will be addressed in the final rule.

IV. Findings and Certifications

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The interim rule implements Executive Order 13202, which revokes previous requirements encouraging the inclusion of project labor agreements as a condition for award of federally funded contracts or subcontracts on construction projects. The Executive Order directs government neutrality towards the use of such agreements, thus placing the decision of whether to enter into a project labor

agreement with individual contractors and subcontractors.

This applies equally to large and small entities that seek federally funded construction contracts and does not establish requirements applicable to entities based on their size. Further, HUD neither requires nor prohibits the use of project labor agreements on HUD-funded construction projects. Although some HUD-funded construction projects are subject to project labor agreements, in many instances this is due to the voluntary decision of individual contractors and subcontractors. Therefore, the interim rule will not significantly revise existing practices or hiring costs for small contractors and subcontractors participating in HUD's construction programs. To the extent the rule has an impact on small entities, it should be a positive economic impact on those small entities that are not union shops, because the rule may provide additional opportunities to work on federally funded construction projects by non-union small businesses.

Notwithstanding HUD's determination that this rule will not have a significant economic effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This interim rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the UMRA.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

List of Subjects in 24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 5 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for 24 CFR part 5 continues to read as follows:

Authority: 42 U.S.C. 3535(d), unless otherwise noted.

■ 2. Add § 5.108 to read as follows:

§ 5.108 Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federally Funded Construction Projects.

(a) *Purpose.* This section implements Executive Order 13202 (issued on February 17, 2001), as amended by Executive Order 13208 (issued on April 6, 2001), entitled "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects."

(b) *Definitions.* For purposes of this section:

Construction contract means a contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property, including any subcontracts awarded pursuant to such a contract.

Financial assistance includes:

(i) Grants, loans, and advances of federal funds; or

(ii) Proceeds from loans guaranteed under section 108 of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301 *et seq.*) and title VI of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*). The term "financial assistance" does not include any other contract of insurance or guaranty.

Labor organization has the same meaning it has in 42 U.S.C. 2000e(d).

(c) *Neutrality towards government contractors' labor relations.* To the extent permitted by law, the bid specifications, project agreements, or other controlling documents for a construction contract awarded on or after June 23, 2003, by a HUD grantee, recipient of financial assistance from HUD, or party to a cooperative agreement with HUD, for a construction project (or a construction manager acting on their behalf) shall not:

(1) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related federally funded construction project; or

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

(d) *Exemptions—(1) Exemptions due to special circumstances.* HUD may exempt a particular construction project, construction contract, subcontract, grant, or cooperative agreement from any requirement of this section, if HUD determines that special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security. HUD will not base a finding of "special circumstances" on the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are non-signatories to, or otherwise do not adhere to, agreements with one or more labor organizations, or concerning employees on the construction project who are not members of, or affiliated with, a labor organization.

(2) *Exemption of construction projects subject to project labor agreements entered into as of June 23, 2003.* HUD may exempt a particular construction project from any requirement of this section upon written request from the HUD grantee, recipient of financial assistance from HUD, or party to a cooperative agreement with HUD (or a

construction manager acting on their behalf), if HUD determines that:

(i) The HUD grantee, recipient of financial assistance from HUD, or party to the cooperative agreement with HUD (or a construction manager acting on their behalf) issued, or was a party to, as of June 23, 2003, bid specifications, project agreements, agreements with one or more labor organizations, or other controlling documents with respect to a particular construction project, that contain any of the requirements or

prohibitions contained in paragraph (c) of this section; and

(ii) One or more construction contracts subject to such requirements or prohibitions was awarded as of June 23, 2003.

(e) *Sanctions.* If HUD determines that a HUD grantee, recipient of financial assistance from HUD, or party to a cooperative agreement with HUD (or a construction manager acting on their behalf) performs in a manner contrary to the requirements of this section, HUD

will take such action, consistent with law and regulations, as HUD determines appropriate.

(f) Voluntarily entering into project labor agreements. Nothing in this section prohibits contractors or subcontractors from voluntarily entering into project labor agreements.

Dated: April 30, 2003.

Mel Martinez,

Secretary.

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