

to determine that consideration, as well as the schedule for payment of consideration must be agreed upon in writing before transfer under this authority.

Dated: December 15, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97-33109 Filed 12-18-97; 8:45 am]

BILLING CODE 5000-04-M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

41 CFR Parts 51-2, 51-4, and 51-6

Miscellaneous Amendments to Committee Regulations

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Final rule.

SUMMARY: The Committee is changing five sections of its regulations to clarify them and improve the efficiency of operation of the Committee's Javits-Wagner-O'Day (JWOD) Program. The changes are necessary to clarify and expand earlier regulation changes and to eliminate unnecessary regulatory language.

EFFECTIVE DATE: January 20, 1998.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, Virginia 22202-4302.

FOR FURTHER INFORMATION CONTACT: G. John Heyer (703) 603-0665. Copies of this notice will be made available on request in computer diskette format.

SUPPLEMENTARY INFORMATION: The Committee is amending § 51-2.4 of its regulations to clarify further that its authorizing statute, the JWOD Act, 41 U.S.C. 46-48c, treats addition of commodities and services to the Procurement List and the establishment by the Committee of a fair market price as two separate functions and applies the requirement for notice and comment rulemaking only to the addition function. This area was first addressed in 1994 (59 FR 59338, Nov. 16, 1994) with the removal of fair market price from the list of suitability criteria for Procurement List additions, in accordance with a 1992 court decision, *McGregor Printing Corporation v. Kemp*, 802 F. Supp. 519, 527 (D.D.C.), *rev'd on other grounds*, 20 F.3d 1188 (D.C. Cir. 1994). The amendment states that the Committee does not consider comments

on proposed fair market prices for commodities and services proposed for addition to the Procurement List to be pertinent to a suitability determination. Accordingly, they will not be addressed when the Committee makes an addition decision. This amendment will not affect the ability of Government and other appropriate parties to comment on proposed fair market prices and price changes in connection with the Committee's fair market pricing process. The Committee is also removing paragraph 51-2.4(a)(4)(C) of its regulations to eliminate one of two essentially redundant statements in § 51-2.4 to the effect that the Committee considers pertinent comments when making its addition decisions.

The Committee also amended paragraphs (b)(6) and (c)(1) of § 51-4.3 of its regulations in 1994 (59 FR 59343) to allow the acceptance of State certifications of blindness or other severe disabilities as documentation of disability, in addition to reports by individual health professionals. Many of these certifications, however, are done by health professionals at local governmental bodies, such as public schools. The new amendment to this section will allow acceptance of these certifications.

Paragraph (c) of § 51-4.4 of the Committee's regulations permits nonprofit agencies participating in the JWOD Program to subcontract a portion of the process for providing a commodity on the Procurement List. The amendment will extend this permission to services on the Procurement List, and would specify how the Committee will oversee routine subcontracting of a part of the production process.

Paragraph (c) of § 51-6.12 of the Committee's regulations requires Government contracting activities to provide a 90-day notice when changing the scope of work of a service on the Procurement List. The amendment will make it clear that this notice requirement also applies to situations where the contracting activity converts a service to performance by Government personnel.

Prior to the 1991 revision of the Committee's regulations (56 FR 48974, Sept. 26, 1991), the matters contained in current parts 51-5 and 51-6 were in a single part 51-5, which had a disputes provision applicable to the entire part of the Committee's regulations. The amendment clarifies the disputes provision, § 51-6.14, to state its applicability to both parts 51-5 and 51-6.

Public Comments on the Proposed Rule

The Committee published the proposed rule in the **Federal Register** of September 26, 1997 (62 FR 50547). One comment was received, from counsel for a manufacturer which is objecting to a recently proposed addition to the Procurement List. The comment addressed only the proposed changes to 41 CFR 51-2.4, which contains the Committee's criteria for making additions to the Procurement List. No comments were received on the other proposed regulatory changes announced by the Committee at that time.

As noted above, the changes to 41 CFR 51-2.4 were intended to emphasize the Committee's conclusion that its authorizing statute treats the Committee's addition of commodities and services to the Procurement List and its establishment of fair market prices for these commodities and services as two separate Committee functions. The statutory requirement for notice and comment rulemaking, in the Committee's view, applies only to the first of these functions.

The commenter challenged the Committee's conclusion that the holding cited from the 1992 *McGregor* decision in support of the Committee's view was not reversed by the 1994 appeals court decision. While unable to point to specific language in the later decision reversing the lower court's holding, the commenter indicated that the holding was reversed "by implication" because the later decision discussed the Committee's shortcomings on its fair market price determination in the rulemaking at issue. If the appeals court did not intend to reverse the lower court's holding, the commenter argued, this discussion would be a mere waste of space in the appeals court's opinion.

The *McGregor* appellate decision set aside the Committee's rulemaking, and reversed the lower court, because the appellate court concluded that the Committee's rulemaking record did not support the Committee's conclusions and the Committee did not adequately explain the basis for its conclusions. The regulation stating the Committee's criteria for Procurement List additions which was in effect when the contested rulemaking took place included fair market price among the criteria. Accordingly, the discussion cited by the commenter from the appellate court opinion noted the shortcomings in the Committee's administrative record and **Federal Register** notice which pertained to the Committee's explanation of its rationale for deciding that the pricing criterion had been met, as a part of its longer discussion of the Committee's

shortcomings in documenting and explaining its conclusions on all the addition criteria. Because the regulation made fair market price an addition criterion, and thus subject to the rulemaking requirement, the appellate court did not have to address the lower court's holding that pricing determinations are reserved to the Committee alone because the JWOD Act makes price determinations a separate function from additions to the Procurement List.

The Committee's 1994 regulatory change (59 FR 59338, Nov. 16, 1994) removed fair market price from the addition criteria to restore the separation of functions established by the JWOD Act. The current revisions to 41 CFR 51-2.4 merely make the separation clearer, in light of subsequent failures by commenting parties, notably this commenter, to see the distinction. The Committee does not believe that the current revision to this regulation, and the 1994 revision, which the commenter also challenged, are legally improper, as the commenter claimed.

The commenter also objected to the Committee's reliance on the lower court opinion in *McGregor* on the grounds that the *McGregor* decisions did not address a situation in which a commenter made specific allegations about information supporting proposed prices submitted for Committee consideration by central nonprofit agencies. Because *McGregor* did not address this situation, the commenter claims that it cannot be used as a basis for excluding comments on a proposed addition merely because they concern pricing issues.

The Committee does not believe that the commenter's claim on this point is relevant to the Committee's legal authority to revise 41 CFR 51-2.4 as it did in 1994 and is doing now. As noted below, the Committee does not intend to ignore significant comments on its fair market prices. It will consider them in connection with the process for establishing a fair market price, not in connection with the rulemaking process required for a Procurement List addition.

The commenter also advanced several legal and policy arguments for his position that comments on a fair market price must be addressed in connection with a Procurement List addition. The commenter claimed that a fair market price is set before the corresponding addition decision is made, so if the price is incorrect, the addition would be legally defective unless the price is corrected. The commenter also claimed that a correct fair market price is the only restraint on addition to the

Procurement List of commodities and services on which little direct labor is performed by people with severe disabilities, and that it would do no good for a commenter to question a fair market price after the decision is made, because the Government would contract for the commodity or service and the price could not be corrected. The commenter indicated that resolving these price questions at the time of addition would not be unduly burdensome for the Committee staff.

The Committee does not agree with the commenter's contention that a fair market price is established before a commodity or service is added to the Procurement List. While a proposed fair market price is calculated in accordance with the Committee's pricing policies, and the nonprofit agency agrees to produce at that price, before the proposal is sent to the Committee for an addition decision, the Committee must make the actual pricing decision once it has made its addition decision. The Committee may exercise its discretion to reject the proposed price and set another which falls within its pricing guidelines. The addition decision function, including the rulemaking requirement, precedes the pricing function in the JWOD Act, and the Committee's decision format was revised in 1994 to be consistent with the statute.

The Committee also disagrees with the commenter's contention that a fair market price ensures that sufficient qualifying direct labor is being performed by the nonprofit agency. Direct labor was a separate addition criterion from fair market price before the 1994 regulatory revision, and the two had to be independently satisfied before a commodity or service could be added to the Procurement List. Direct labor remains an addition criterion since the removal of fair market price from the criteria list.

The commenter's contention that fair market price cannot be changed after a Procurement List addition is made is not consistent with either the Committee's pricing policy or its practice in the pricing area. The Committee has a long history of making price changes as appropriate, including changes made as a result of informed comments. The very document in which the commenter made his comments on this rulemaking also contains information submitted to demonstrate to the Committee that some of its prices are not correct, and this document supplements earlier and more detailed information on that same subject which the Committee staff is analyzing with a

view toward correcting the prices at issue if appropriate.

The burden on the Committee staff of reviewing comments on prices as part of an addition would not greatly exceed the burden of considering them as part of the pricing process. The Committee believes, however, that it would not be appropriate to burden the addition process with a matter more logically belonging to the pricing process. As indicated above, there is now no statutory or regulatory requirement to confuse these two processes as the commenter would have the Committee do.

Finally, the commenter claimed that the Committee must allow comments on fair market price "at some point in the process." That point is the pricing process, which includes both the establishment of an initial fair market price and changes in the price. As indicated above, the Committee will entertain significant comments on specific prices from affected parties in connection with that process. The Committee will not, however, allow commenters to use the addition process to raise issues not covered by the addition criteria, or to delay the addition process with larger policy questions such as the nature of a fair market price, as has occurred in the past.

Regulatory Flexibility Act

I certify that this revision of the Committee regulations will not have a significant economic impact on a substantial number of small entities because the revision clarifies program policies and does not essentially change the impact of the regulations on small entities.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply to this rule because it contains no new information collection or recordkeeping requirements as defined in that Act and its regulations.

Executive Order No. 12866

The Committee has been exempted from the regulatory review requirements of the Executive Order by the Office of Information and Regulatory Affairs. Additionally, the rule is not a significant regulatory action as defined in the Executive Order.

List of Subjects

41 CFR Part 51-2

Organization and functions (Government agencies).

41 CFR Part 51-4

Reporting and recordkeeping requirements.

41 CFR Part 51-6

Government procurement, Handicapped.

For the reasons set out in the preamble, Parts 51-2, 51-4, and 51-6 of Title 41, Chapter 51 of the Code of Federal Regulations are amended as follows:

1. The authority citation for Parts 51-2, 51-4, and 51-6 continues to read as follows:

Authority: 41 U.S.C. 46-48c.

PART 51-2—COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

2. Section 51-2.4 is amended by removing paragraph (a)(4)(C) and adding a sentence to paragraph (b), to read as follows:

§ 51-2.4 Determination of suitability.

* * * * *

(b) * * * Because the Committee's authority to establish fair market prices is separate from its authority to determine the suitability of a commodity or service for addition to the Procurement List, the Committee does not consider comments on proposed fair market prices for commodities and services proposed for addition to the Procurement List to be pertinent to a suitability determination.

PART 51-4—NONPROFIT AGENCIES

3. Section 51-4.3 is amended by revising paragraphs (b)(6) and (c)(1), to read as follows:

§ 51-4.3 Maintaining qualification.

* * * * *

(b) * * *
(6) Maintain a file for each blind individual performing direct labor which contains a written report reflecting visual acuity and field of vision of each eye, with best correction, signed by a person licensed to make such an evaluation, or a certification of blindness by a State or local governmental entity.

* * * * *

(c) * * *
(1) A written report signed by a licensed physician, psychiatrist, or qualified psychologist, reflecting the nature and extent of the disability or disabilities that cause such person to qualify as a person with a severe disability, or a certification of the disability or disabilities by a State or local governmental entity.

* * * * *

4. Section 51-4.4 is amended by revising paragraph (c), to read as follows:

§ 51-4.4 Subcontracting.

* * * * *

(c) Nonprofit agencies may subcontract a portion of the process for producing a commodity or providing a service on the Procurement List provided that the portion of the process retained by the prime nonprofit agency generates employment for persons who are blind or have other severe disabilities. Subcontracting intended to be a routine part of the production of a commodity or provision of a service shall be identified to the Committee at the time the commodity or service is proposed for addition to the Procurement List and any significant changes in the extent of subcontracting must be approved in advance by the Committee.

* * * * *

PART 51-6—PROCUREMENT PROCEDURES

5. Section 51-6.12 is amended by revising paragraph (c), to read as follows:

§ 51-6.12 Specification changes and similar actions.

* * * * *

(c) For services on the Procurement List, the contracting activity shall notify the nonprofit agency furnishing the service and the central nonprofit agency concerned at least 90 days prior to the date that any changes in the statement of work or other conditions of performance will be required, including assumption of performance of the service by the contracting activity.

* * * * *

6. Section 51-6.14 is revised to read as follows:

§ 51-6.14 Disputes.

Disputes between a nonprofit agency and a contracting activity arising out of matters covered by parts 51-5 and 51-6 of this chapter shall be resolved, where possible, by the contracting activity and the nonprofit agency, with assistance from the appropriate central nonprofit agency. Disputes which cannot be resolved by these parties shall be referred to the Committee for resolution.

Dated: December 16, 1997.

Beverly L. Milkman,
Executive Director.

[FR Doc. 97-33200 Filed 12-18-97; 8:45 am]

BILLING CODE 6353-01-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES**Institute of Museum and Library Services****45 CFR Chapter XI, Subchapter E****Change of Code of Federal Regulations Subchapter Heading To Reflect New Name of Institute**

AGENCY: Institute of Museum and Library Services (IMLS), NFAH.

ACTION: Final rule.

SUMMARY: This final rule implements The Museum and Library Services Act of 1996, which expanded the functions of the existing Institute of Museum Services to create The Institute of Museum and Library Services (the "Institute"), by amending the title of the Institute of Museum Services regulations to reflect the new name of the agency.

DATES: This final rule is effective December 19, 1997.

FOR FURTHER INFORMATION CONTACT:

Mary Ann Bittner, Director of Legislative and Public Affairs, Institute of Museum and Library Services, 1100 Pennsylvania Avenue, NW., Washington, DC 20405. Telephone: (202) 606-8536.

SUPPLEMENTARY INFORMATION: The Museum and Library Services Act of 1996 (the "Act"), set forth at 20 U.S.C. 961 *et seq.*, expanded the functions of the existing Institute of Museum Services to create The Institute of Museum and Library Services. This rule implements the Act, by amending the title of the Institute of Museum Services regulations to reflect the new name of the agency.

The Institute of Museum and Library Services considers this rule to be a technical amendment which is exempt from notice-and-comment under 5 U.S.C. 533(b)(3)(A). This rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget. As required by the Regulatory Flexibility Act, the Institute certifies that these regulatory amendments will not have a significant impact on small business entities.

For the reasons stated in the preamble and under the authority of 20 U.S.C. 961 *et seq.*, the Institute of Museum and Library Services amends 45 CFR, Chapter XI, Subchapter E as follows:

1. Revise the heading for Subchapter E to read as follows: