

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### 48 CFR Part 470

#### Commodity Credit Corporation

### 7 CFR Parts 1496 and 1499

#### Foreign Agricultural Service

### 7 CFR Part 1599

RIN 0551-AA78

#### McGovern Dole International Food for Education and Child Nutrition Program and Food for Progress Program

**AGENCY:** Foreign Agricultural Service and Commodity Credit Corporation, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend the regulations to administer the Food for Progress (FFPr) Program and the McGovern-Dole International Food for Education and Child Nutrition Program (McGovern-Dole Program) by making revisions to provide greater clarity with respect to all aspects of the program with specific emphasis on the eligibility requirements that a participant must meet, and the actions that must be undertaken by a participant in order to receive assistance under these programs, including the reports that are filed by program participants with the Foreign Agricultural Service (FAS). This proposed rule would also amend the Agriculture Acquisition Regulation (AGAR), to specify the criteria that is used in determining whether a commodity that is procured under these programs and under domestic feeding programs administered by USDA is considered to be a commodity that is a product of the United States. The purpose of these amendments is to improve efficiency of the programs and make it more clear to participants what they must do to meet eligibility requirements.

**DATES:** We will consider comments that we receive by December 8, 2008.

**ADDRESSES:** We invite you to submit comments on this proposed rule. In your comment, include the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *E-Mail:* [PPDED@fas.usda.gov](mailto:PPDED@fas.usda.gov) and/or [Babette.Gainor@fas.usda.gov](mailto:Babette.Gainor@fas.usda.gov).

- *Fax:* (202) 690-0251.

- *Mail to:* Babette Gainor, Deputy Director, Food Assistance Division, Foreign Agricultural Service, U.S. Department of Agriculture, Stop 1034, 1400 Independence Avenue, SW., Washington, DC 20250-1034.

- *Hand Delivery or Courier:* 1250 Maryland Avenue, SW., Suite 400, Washington, DC 20024.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Comments may be inspected in Suite 400 of the Portals Building, 1250 Maryland Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. A copy of this proposed rule is available through the FAS home page at <http://www.fas.usda.gov/foodaid>.

**FOR FURTHER INFORMATION CONTACT:** Babette Gainor at (202) 720-4221, or *e-mail:* [Babette.Gainor@fas.usda.gov](mailto:Babette.Gainor@fas.usda.gov).

#### SUPPLEMENTARY INFORMATION:

#### 7 CFR Part 1496—Procurement of Commodities for Foreign Donation

This proposed rule amends the current regulations governing the procurement of commodities for use in international food assistance and developmental programs, and to move those regulations to a different section of the CFR.

Personnel of the Farm Service Agency (FSA) acquire commodities for use by the Foreign Agricultural Service (FAS) for use in international food assistance and developmental programs. These commodities are procured in conformity with the Federal Acquisition Regulation (FAR), as supplemented by the AGAR found in 48 CFR Chapter 4. In addition, regulations at 7 CFR part 1496 set forth provisions applicable to the acquisition of commodities to carry out activities under the McGovern-Dole Program, FFPr Program, and Title II of the Food For Peace Act, (Pub. L. 83-480, or referred to as Pub. L. 480). Title II procurements are done on behalf of the

U. S. Agency for International Development (USAID) by FSA. The regulations at 7 CFR part 1496 were amended at 72 FR 6450, on February 12, 2007, in order to adopt new procedures regarding the evaluation of bids submitted in the procurement of commodities. This proposed rule would move the current regulations at 7 CFR part 1496 to a new part in the AGAR, 48 CFR Chapter 4, part 470, and delete and revise obsolete provisions in 7 CFR part 1496. This rule also proposes minor “housekeeping” changes to clarify those regulations.

The substantive changes to this section of the regulations proposed in this rule are intended to make the procurement process more efficient and responsive. The U. S. Government Accountability Office (GAO) issued a report in April 2007, entitled *FOREIGN ASSISTANCE—Various Challenges Impede the Efficiency and Effectiveness of U.S. Food Aid*. Among the findings in this report is that current contracting provisions produce a “bunching of contracts” that result in increased program costs (GAO Report, pg. 23). USDA shares the overall concerns set forth in the GAO report about the need to improve efficiency in contracting to improve program delivery and is engaged in a continuing process to revise its contracting procedures to have the benefit of increased flexibility afforded under the FAR. Accordingly, this proposed rule would amend these regulations to ensure that USDA may fully utilize all types of acquisition contracts that are authorized by the FAR. And, as noted below, under this proposed rule USDA would have the option of procuring freight directly from carriers as opposed to doing so indirectly through program participants. Such procurements would be done in accordance with the FAR, including the AGAR.

#### Changes to 7 CFR Parts 1499 and 1599—Foreign Donation Programs and McGovern-Dole International Food for Education and Child Nutrition Program

The regulations in 7 CFR part 1499, Foreign Donation Programs, are used by FAS, on behalf of the Commodity Credit Corporation (CCC), in the administration of the FFPr Program. The regulations in 7 CFR part 1599, McGovern-Dole International Food for Education and Child Nutrition Program,

are used by FAS in the administration of the McGovern-Dole Program. Many of the provisions of these regulations have not been reviewed or updated since their issuance in 1996 and 2001, respectively. The changes proposed in this rule are largely technical in nature to improve the efficiency and effectiveness of the programs. The following is a discussion of the major proposed amendments.

In 2006, FAS initiated an agency-wide reorganization. Following the completion of this reorganization in 2007, FAS began to evaluate how programs are implemented in light of the organizational changes. Concurrent with this process, the GAO Report was issued. As a result of this review, taking into account the findings in the GAO Report, USDA proposed changes to these regulations that are designed to improve the delivery of assistance under these programs by removing obsolete provisions; consolidating reporting requirements applicable to participants; and providing greater flexibility in the settlement of claims that arise under the program. For example, the proposed rule would set forth with greater clarity the responsibilities of a participant in the event unanticipated actions occur that involve the protection of commodities provided to the participant by FAS or CCC and would provide

greater latitude with respect to the actions of the participant in such a situation.

One of the criticisms in the GAO report is related to the “lengthy claims process” that exists under current regulations (GAO Report, pg. 27). While the report focused on transportation claims, USDA is also concerned about the timely resolution of all claims that arise under the program. Under current regulations, generally, for cargo claims: (1) If the claim is less than \$100 no action is necessary; (2) if the claim is between \$100 and \$300, no action is necessary if the participant determines that costs of collection would exceed the likely recovery costs; (3) if the recovery on a claim is less than \$200, the participant may retain the recovery; and (4) if the recovery on a claim is more than \$200, the participant may retain either \$200 plus 10 percent of the difference between \$200 and the total amount of the claim up to \$500, or the actual amount of collection costs (excluding attorney fees and collection agency fees). Other provisions of the current regulations generally require that a participant assign all rights to a claim to FAS or CCC, as appropriate. In most instances, all recoveries are retained by one of these agencies except in cases where the participant may have expended its own funds for ocean

transportation, in which case the recovery is shared with such participant.

This process reflects neither the actual costs of collection of claims nor the logistical issues attendant to claims that occur outside of the United States. This process was instituted on the premise that carriers and other entities would be more likely to make payments to the United States if a claim had been assigned to it as opposed to requiring a participant pursue collection. Also, when this process was originally established, the vast majority of food aid shipments were in the form of bulk commodities. Now, however, a significant quantity of commodities is shipped in containers and there is a significant reduction in the dollar amount of individual losses as such losses are generally limited to one container, or a small number of containers, as opposed to losses in large bulk grain shipments. The following charts set forth cargo claim collection activity for the FFPr Program and the McGovern-Dole Program over the past four fiscal years (note the amount of recovery in a fiscal year represents amounts recovered in that year for claims established in that year and preceding years):

FOOD FOR PROGRESS PROGRAM

Fiscal year	Claims collected	Claims established (number)
2004 .....	\$313,686	\$468,747 (67)
2005 .....	64,766	20,414 (47)
2006 .....	257,832	369,215 (55)
2007 .....	65,638	126,098 (5)
4-Year Totals .....	701,922	984,474 (174)

MCGOVERN-DOLE FOOD FOR EDUCATION AND CHILD NUTRITION PROGRAM

Fiscal year	Claims collected	Claims established (number)
2004 .....	\$15,075	\$19,792 (12)
2005 .....	50,397	56,824 (32)
2006 .....	96,760	106,925 (44)
2007 .....	18,977	20,989 (8)
4-year Totals .....	181,209	204,530 (96)

Taking into account the small number of claims and the extremely small average amount of claims that were established (FFPr Program—\$5,657 and McGovern-Dole Program—\$2,230) and the costs attributable for salaries and expenses of USDA employees, this current system is not cost-effective. Further, with respect to non-cargo

claims, if such claims arise in a foreign country after the liability of the carrier ends, any litigation which may be required to effectuate collection must be brought in the country where the claim arose. In such a situation, assignment of the claim to FAS or CCC for collection is simply not feasible.

This process is predicated upon the current manner in which freight contracts are entered into for the delivery of commodities made available under FFPr Program and the McGovern-Dole Program. Generally, the current regulations envision that the program participant will be reimbursed for the cost of obtaining freight and that the

freight contract is between the program participant and the carrier. In reality, as the programs have evolved over many years, the program participant obtains potential bids from prospective carriers and these bids are provided to FSA who, as set forth in 7 CFR part 1496, utilizes a sophisticated computer program to analyze the freight bids in conjunction with the various bids obtained in the procurement of commodities to ascertain which combination of carrier bids and commodity bids produces the lowest landed cost of delivery of the commodity to a foreign destination. Thus, the selection of the carrier bid ultimately rests with USDA. Once the carrier is determined, the program participant executes, in most instances, a contract with the carrier. As the contract is between the carrier and the program participant, any claim that the participant has against the carrier is the participant's cause of action and not that of CCC or FAS. The current regulations provide that the program participant must assign this private cause of action to CCC or FAS as a condition of program participation. Questions have been raised concerning whether the freight acquisition process is compliant with the FAR and whether CCC and FAS should be accepting private causes of action for collection purposes. Accordingly, this proposed rule would provide that in obtaining freight contracts, FAS or CCC, as applicable, would obtain the freight contracts in accordance with the FAR. This would eliminate the need for any program participant to assign a claim to FAS or CCC. The regulations, as amended, would also provide for the option for FSA or CCC to allow a program participant to obtain freight but assignment of these claims would, as a general rule, be eliminated. The program participant would be responsible for claim collections and would be allowed to retain any recovery of the claim, except the expenditure of the recovered funds would be limited to carrying out an activity authorized by the program under which the commodities had been provided to the participant.

The current regulations for these programs require all participants to submit various reports to FAS on a semi-annual basis and to file other reports upon the occurrence of certain events. These reports are required to be filed in four different offices within FAS and with two different offices within FSA, and in some cases must also be filed with the Agricultural Attaché or Agricultural Counselor of FAS with

responsibility for the country where the agreement is implemented. In other cases, a report is required only to be filed with the Agricultural Attaché or Agricultural Counselor. Several of these offices referred to in the regulations have been either renamed or eliminated, so the current regulations are obsolete. Accordingly, this rule proposes to revise these regulations to remove all references to specific offices and a generic reference to either FAS or CCC would be used. The identification of the location where a report would be required to be filed would be specified in the agreement. FAS expects that in all, or substantially all, instances these reports will be filed with one office in FAS. To the extent other USDA officials need the information contained in the reports, FAS would be responsible for dissemination of the material to appropriate officials.

Further, in addition to streamlining the location for reports submission, FAS intends to incorporate a greater emphasis on performance based reporting which will allow FAS to highlight the accomplishments achieved by participants under food aid programs, which will, in turn, allow FAS to provide funding to those projects that achieve greater results.

It has been the practice of FAS, acting on behalf of CCC, to administer section 1110(h) of the Food For Progress Act which addresses the prohibitions against the resale and transshipment of donated commodities to apply only to the party with whom CCC directly enters into an agreement. This means that the participant is required to ship, distribute and/or monetize (sell) the donated commodities in the targeted country. Once the initial distribution and/or monetization transaction has taken place by the participant, FAS considers the program participant to be in compliance with section 1110(h). In accordance with section 1110(j) of this Act, it has also been the practice of FAS to permit multi-country agreements under the programs whereby CCC delivers donated commodities to one country and activities to fulfill the agreement objectives are carried out in another. This rule proposes to amend the regulations at 7 CFR part 1499 to address these types of situations.

Previously, 7 CFR part 1499 had been used to regulate and administer activities authorized by Section 416(b) of the Agricultural Act of 1949 (Section 416(b) program) in addition to the FFPr Program. Reference to the Section 416(b) Program has been removed from this part due to the fact that in order for activities to be conducted under this program the Secretary of Agriculture

must determine that commodities will be made available under Section 416(b). Accordingly, FAS has determined that it is more appropriate to announce any future availability of commodities under Section 416(b) through a **Federal Register** notice. Upon the announcement of commodity availability for Section 416(b) activities, FAS may decide to use this part to administer such availability; this decision also would be announced in the **Federal Register** notice at that time.

#### **Proposed New 48 CFR Part 470**

The acquisition by USDA of agricultural commodities and ocean freight, along with other services, is governed by procurement statutes generally applicable to all activities of USDA. The regulations used to implement these statutes are set forth in the FAR. But, there are several statutes that contain provisions that are specifically applicable to the international food assistance and development programs and domestic food assistance programs.

With respect to the international programs, section 402 of Pub. L. 480 sets forth the definition of an "agricultural commodity" for use under that Act and the FFPr Act and section 3107(a) of the Farm Security and Rural Investment Act of 2002 sets forth a similar definition of an "agricultural commodity." Generally, these two provisions require the use of commodities produced in the United States. A similar approach has historically been used in the acquisition of commodities for use in domestic feeding programs. In some instances, additives such as vitamins and spices are not available from U.S. sources and in some instances the commodity which is being procured is normally stored in a commingled manner without any way to ascertain the country of origin. Accordingly, this rule proposes that the AGAR would be revised to set forth in 48 CFR part 470 the definition of an agricultural commodity and would reflect the current practices of USDA in this regard.

Commodities provided under the FFPr Program and the McGovern-Dole Program are delivered to foreign destinations through the acquisition of freight which is ultimately paid for from funds from these programs. The regulations at 7 CFR part 1496 require that the government will determine which combination of commodity bids and bids for ocean freight rates results in the lowest-landed cost of delivery of the commodity to the foreign destination. The government generally will award the contract for the purchase of the commodity that results in the

lowest-landed cost and would be transported in compliance with cargo preference requirements under regulations prescribed by the Maritime Administration. "Lowest landed cost" refers to the requirement that, in the delivery of U.S. agricultural commodities under international food assistance and developmental programs, the United States shall generally use the combination of ocean freight contracts and commodity acquisition contracts that results in the lowest cost of delivery of the product to the desired destination. This requirement is based upon provisions in section 901(b) of the Merchant Marine Act, 1936. Accordingly, this specific provision of law is used in the procurement of freight and agricultural commodities and, to the extent the provisions of this section conflict with the more general provisions of the Competition in Contracting Act, the provisions of section 901(b) of the Merchant Marine Act, 1936 prevail.

The application of section 901(b) of the Merchant Marine Act, 1936, when considered with other provisions of that Act, results in a complex review of numerous offers for freight and commodities. In a very simple example, in the shipment of commodities, several U.S. port locations may provide viable services and the ocean freight contract cost from one port may be less costly than the cost of using two other U.S. ports. However, the cost of delivery of U.S. agricultural product to the U.S. port with the lowest attendant freight cost may be considerably greater than the costs of delivery of the commodities to other U.S. ports. Thus, in order to ensure that the lowest total cost is obtained, USDA reviews a myriad of potential freight and commodity contract costs for each delivery of commodities to a foreign destination. In order to have all USDA acquisition related regulations in one location, 48 CFR Chapter 4, this proposed rule would move the current regulations at 7 CFR part 1496 to 48 CFR part 470 but the regulations would not be amended regarding the current process used to ascertain the lowest landed cost for these contracts. Only the removal of obsolete references and editorial changes would be made.

#### *Executive Order 12866*

This proposed rule has been determined to be not significant under E.O. 12866, as amended by E.O. 13422, and was therefore not reviewed by the Office of Management and Budget (OMB).

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act does not apply to this rule because FAS is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking with respect to the subject of this.

#### *Environmental Assessment*

FAS has determined that this proposed rule does not constitute a major State or Federal action that would significantly affect the human or natural environment consistent with the National Environmental Policy Act (NEPA) 40 CFR part 1502.4, Major Federal actions requiring the preparation of Environmental Impact Statements; and Compliance with NEPA implementing the regulations of the Council on Environmental Quality, 40 CFR parts 1500–1508. Therefore no environmental assessment or environmental impact statement will be prepared.

#### *Executive Order 12988*

This rule has been reviewed under E.O. 12988. This rule is not retroactive and it does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. This rule would not be retroactive.

#### *Executive Order 12372*

This program is not subject to E. O. 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

#### *Executive Order 13132*

The policies contained in this rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

#### *Unfunded Mandates*

Although we are publishing this as a proposed rule, Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because FSA and FAS are not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject of this rule. Further, this rule contains no unfunded mandates as defined in sections 202 and 205 of UMRA.

#### *Paperwork Reduction Act of 1995*

In accordance with the Paperwork Reduction Act of 1995, FAS has previously received approval from the Office of Management and Budget (OMB) with respect to the information collection required to support these programs. The Information Collection is described below:

*Title:* Food Donation Programs (Food for Progress, Section 416(b), and McGovern-Dole International Food for Education and Child Nutrition).

*OMB Control Number:* 0551–0035.

#### *E-Government Act Compliance*

FAS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes. The forms, regulations, and other information collection activities required to be utilized by a person subject to this rule are available at <http://www.fas.usda.gov>.

#### **List of Subjects**

##### *7 CFR Part 1496*

Agricultural commodities, Food assistance programs, Foreign aid, Government procurement.

##### *7 CFR Part 1499*

Agricultural commodities, Food assistance programs, Foreign aid.

##### *7 CFR Part 1599*

Agricultural commodities, Exports, Foreign aid.

##### *48 CFR Part 470*

Government procurement, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, under the authority of 5 U.S.C. 553; 15 U.S.C. 714b and 714c, 7 CFR parts 1496, 1499, 1599 and 48 CFR part 470 are proposed to be amended as follows:

#### **PART 1496—[REMOVED]**

1. 7 CFR part 1496 is removed.
2. Revise part 1499 to read as follows:

#### **PART 1499—FOOD FOR PROGRESS PROGRAM**

##### **Sec.**

- |        |                                    |
|--------|------------------------------------|
| 1499.1 | General statement.                 |
| 1499.2 | Definitions.                       |
| 1499.3 | Eligibility determination.         |
| 1499.4 | Application process.               |
| 1499.5 | Agreements.                        |
| 1499.6 | Payments.                          |
| 1499.7 | Transportation of goods.           |
| 1499.8 | Entry and handling of commodities. |

- 1499.9 Damage to and loss of commodities.  
 1499.10 Claims for damage to or loss of commodities.  
 1499.11 Use of commodities and sales proceeds.  
 1499.12 Subrecipients.  
 1499.13 Recordkeeping and reporting requirements.  
 1499.14 Noncompliance with an agreement.  
 1499.15 Suspension, termination, and closeout of agreements.  
 1499.16 Appeals.  
 1499.17 Paperwork Reduction Act.

**Authority:** 7 U.S.C. 1736o; and 15 U.S.C. 714b and 714c.

#### § 1499.1 General Statement.

(a) This part sets forth the general terms and conditions governing the donation of commodities by the Commodity Credit Corporation (CCC) to participants in the Food for Progress Program (FFPr). Under FFPr, participants use the donated commodities or proceeds from the sale of such commodities to implement activities in a foreign country pursuant to an agreement with CCC. The Foreign Agricultural Service (FAS) of the Department of Agriculture (USDA) administers FFPr on behalf of CCC.

(b) In addition to the provisions of this part, other regulations of general application issued by USDA, including the regulations set forth in Chapter 30 of this title, are applicable to the FFPr. All provisions of the CCC Charter Act (15 U.S.C. 714 *et seq.*) and any other statutory provisions that are generally applicable to CCC are applicable to FFPr and the regulations set forth in this part.

(c) This part shall not apply to a donation by CCC to a foreign government or an intergovernmental agency or organization (such as the United Nations' World Food Program) under FFPr.

#### § 1499.2 Definitions.

The following definitions are applicable to this part:

*Activity* mean a project to be carried out by a participant, directly or through a subrecipient, to fulfill the objectives of an agreement.

*Agreement* mean a legally binding agreement entered into between CCC and a participant to implement activities under FFPr.

*CCC* mean the Commodity Credit Corporation and includes any official of the United States delegated the responsibility to act on behalf of CCC.

*Commodities* mean U.S. agricultural commodities or products of U.S. agricultural commodities.

*CCC-provided funds* means U.S. dollars provided under an agreement to a participant for expenses for the internal transportation, storage and

handling of the donated commodities, expenses involved in the administration and monitoring of the activities under the agreement, and technical assistance related to the monetization of donated commodities.

*Donated commodities* means the commodities donated by CCC to a participant under an agreement. The term may include donated commodities that are used to produce a further processed product for use under the agreement.

*FAS* means the Foreign Agricultural Service acting on behalf of CCC.

*FFPr* means the Food for Progress Program.

*Force majeure* is a common clause in contracts, exempting the parties for non-fulfillment of their obligations as a result of conditions beyond their control, such as earthquakes, floods or war.

*Income* means interest earned on sale proceeds and other resources received by a participant, other than sale proceeds, as a result of carrying out an agreement. The term may include resources from VAT refunds, activity fees, interest on loans, and others.

*Participant* means an entity with which CCC has entered into an agreement.

*Subrecipient* means a legal entity that receives donated commodities, income, sale proceeds or other resources from a participant for the purpose of implementing in the targeted country activities described in a FFPr agreement and that is accountable to such participant for the use of such commodities, funds, or resources. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of FAS.

*Sale proceeds* mean funds received by a participant from the sale of donated commodities.

*Targeted country* means the country in which activities are implemented under an agreement.

#### § 1499.3 Eligibility determination.

(a) An entity will be eligible to become a participant only after FAS determines that the entity has:

(1) Organizational experience in implementing and managing grants, and the capability and personnel to develop, implement, monitor, report on, and provide accountability for activities in accordance with this part;

(2) Experience working in the proposed targeted country;

(3) Adequate financial framework to implement the activities the entity proposes to carry out under FFPr. In order to determine whether the entity is

financially responsible, FAS may require it to submit corporate policies and financial materials that have been audited or otherwise reviewed by a third party;

(4) A person or agent located in the United States with respect to which service of judicial process may be obtained by FAS on behalf of the entity; and

(5) An operating financial account in the proposed targeted country, or a satisfactory explanation for not having such an account and a description of how a FFPr agreement would be administered without such an account.

(b) In determining whether an entity will be eligible to be a participant, FAS may consider the entity's previous compliance or noncompliance with the provisions of this part and part 1599 of this title. FAS may consider matters such as whether the entity corrected deficiencies in the implementation of an agreement in a timely manner and whether the entity has timely and accurately filed reports and other submissions that are required to be filed with FAS and other agencies of the United States.

#### § 1499.4 Application process.

(a) An entity seeking to enter into an agreement with CCC shall submit an application, in accordance with this section, that sets forth its proposal to carry out activities under FFPr in the proposed target country. An application shall contain the items specified in paragraph (b) of this section and shall be submitted electronically to FAS at the address set forth at <http://www.fas.usda.gov>. An entity that has not yet met the eligibility requirements in § 1499.3 may submit an application, but FAS will not enter into an agreement with an entity until FAS had made a determination of eligibility under § 1499.3.

(b) An applicant shall include the following items in its application:

(1) A completed Form SF-424, which is a standard application for Federal assistance;

(2) An introduction that contains the elements specified in paragraph (c) of this section; and

(3) A plan of operation that contains the elements specified in paragraph (d) of this section.

(c) The introduction shall include:

(1) An explanation of the need for the food aid in the targeted country and how the applicant's proposed activities would address that need;

(2) Information regarding the applicant's ability to become registered and operate in the targeted country;

(3) Information about the applicant's past food aid projects; and

(4) A budget that details the amount of any sale proceeds, income, and CCC-provided funds that the applicant proposes to use to fund:

(i) Administrative costs;

(ii) Inland transportation, storage and handling costs; and

(iii) Activity costs.

(d) A plan of operation shall include:

(1) The name of the targeted country where the proposed activities would be implemented;

(2) The kind, quantity, and proposed use of the commodities requested, and any commodities that would be acceptable substitutions therefore, and the proposed delivery schedule;

(3) If monetization or barter is proposed:

(i) The quantity of the requested commodities that would be sold or bartered;

(ii) The amount of sale proceeds anticipated;

(iii) The amount of income expected to be generated;

(iv) The anticipated monetization completion date;

(v) The goods or services to be generated from the barter of the requested commodities; and

(vi) The value of the goods or services anticipated to be generated from the barter of the requested commodities.

(4) A list of each of the activities that would be implemented, with a brief statement of the objectives to be accomplished under each activity;

(5) For each proposed activity, the targeted geographic area, anticipated beneficiaries, and methods that the applicant would use to choose such beneficiaries, including obtaining and considering statistics on poverty levels, food deficits, and any other required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

(6) For each proposed activity:

(i) An explanation of whether the activity would be carried out through the distribution of the requested commodities or funded by sale proceeds, income, or a combination thereof; and

(ii) The amount of commodities, sale proceeds, or income requested to carry out such activity; and

(iii) A detailed description of the activity, including the steps involved in its implementation and the anticipated completion date;

(7) Any cash or non-cash contributions that the applicant expects to receive from non-CCC sources that:

(i) Are critical to the implementation of the proposed activities; or

(ii) Enhance the implementation of the activities;

(8) Any subrecipient that would be involved and a description of each subrecipient's responsibilities and its capability to perform responsibilities;

(9) Any governmental or nongovernmental entities that would be involved and the extent to which FFPr will strengthen or increase the capabilities of such entities to further economic development in the targeted country;

(10) The method by which the applicant intends to inform beneficiaries of an activity about the source of the requested commodities or funding for the activity and, where the beneficiaries will be receiving the commodities directly, how to prepare and use them properly;

(11) Established baselines, a timeline, and proposed outcomes that would enable FAS to measure the applicant's progress towards achieving the objectives of proposed activities;

(12) If the proposed activities would involve the use of sale proceeds or income:

(i) The process that the applicant would use to sell the requested commodities, including steps the applicant would take to use, to the extent possible, the private sector in the monetization process; and

(ii) The procedures that the applicant would use to assure that sale proceeds and income are received and deposited into a separate, interest-bearing account and disbursed from such account for use only in accordance with the agreement;

(13) A description of how the requested commodities would be transported from the receiving port to the point at which distribution is made to the beneficiaries and a description of any port, transportation, storage, and warehouse facilities that would be used with sufficient detail to demonstrate that they would be adequate to handle the requested commodities without undue spoilage or waste;

(14) Any reprocessing or repackaging of the requested commodities that would take place prior to the distribution, sale or barter by the participant;

(15) The action the applicant would take to ensure that any commodities to be distributed to beneficiaries, rather than sold, would be imported and distributed free from all customs, duties, tolls, and taxes;

(16) A plan that shows how the requested commodities could be imported and distributed without a disruptive impact upon production, prices and marketing of the same or like products in the country where they will be delivered, and the extent to which any sale or barter of the requested

commodities would displace or interfere with any sales that may otherwise be made by the applicant or any other entity in the country where they will be delivered; and

(17) Any additional required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

#### § 1499.5 Agreements.

(a) After FAS approves an applicant's proposal, FAS will develop an agreement in consultation with the applicant. The agreement will set forth the obligations of CCC and the participant. A participant must comply with the terms of the agreement to receive assistance.

(b) A participant shall not use donated commodities, sale proceeds, income or CCC-provided funds for any activity or any expenses incurred by the participant prior to the date of the agreement or after the agreement is suspended or terminated.

(c) The agreement will include a budget that sets forth the maximum amounts of sale proceeds and CCC-provided funds that may be expended for various purposes under the agreement. A participant may make adjustments to this budget without prior approval from FAS only as specified in the agreement.

(d) Prior to providing any donated commodities or CCC-provided funds to a participant under an agreement, FAS may require the participant to complete a training program administered by FAS that is designed to ensure that the participant is aware of, and has the capacity to complete all required reporting and audit functions set forth in this part.

(e) A participant will be prohibited from using CCC-provided funds to acquire goods and services either directly or indirectly through another party from certain countries that will be specified in the agreement. Any violation of this provision of the agreement will be a basis for immediate termination by CCC of the agreement in addition to the imposition of any other applicable civil and criminal penalties.

(f) The agreement will prohibit the sale or transshipment of the donated commodities to a country not specified in the agreement for so long as such donated commodities are controlled by the participant.

(g) CCC may enter into a multicountry agreement in which donated commodities are delivered to one country and activities are carried out in another.

(h) CCC may provide donated commodities and CCC-provided funds under a multiyear agreement contingent

upon the availability of commodities and funds.

#### § 1499.6 Payments.

(a) If the participant arranges for transportation in accordance with § 1499.7(b)(2), and the participant seeks payment directly, the participant shall submit the following documents to FAS in the manner set forth in the agreement:

(1) A signed copy of the completed Form CCC-512;

(2) The original on-board bills of lading indicating the freight rate and signed by the originating carrier;

(3) For all non-containerized cargoes:

(i) A signed copy of the Federal Grain Inspection Service (FGIS) Official Stowage Examination Certificate (Vessel Hold Certificate);

(ii) A signed copy of the National Cargo Bureau Certificate of Readiness (Vessel Hold Inspection Certificate); and

(iii) A signed copy of the National Cargo Bureau Certificate of Loading;

(4) For all containerized cargoes a copy of the FGIS Container Condition Inspection Certificate;

(5) A signed copy of liner booking note or charter party covering ocean transportation of cargo;

(6) In the case of charter shipments, a signed notice of arrival at first discharge port, unless FAS has determined that circumstances of force majeure have prevented the vessel's arrival at the first port of discharge;

(7) A request by the participant for reimbursement of freight, survey costs, and other expenses approved by CCC indicating the amount due and accompanied by a certification from the carrier or other parties that payments have been received from the participant; and

(8) A document on letterhead and signed by an officer or agent of the participant specifying the name of the entity to receive payment; the bank ABA number to which payment is to be made; the account number for the deposit at the bank; the participant's taxpayer identification number; and the type of the account into which the payment will be deposited.

(b) If the participant arranges for transportation in accordance with § 1499.7(b)(2), and the participant has used a freight forwarder, the participant shall cause the freight forwarder to submit the documents specified in § 1499.6(a) in order to receive payment from CCC.

(c) In no case will CCC reimburse a participant for demurrage costs or pay demurrage to any other entity.

(d) If FAS has agreed to pay the costs of transporting, storing, and distributing

the donated commodities from the designated port or point of entry, the participant will be reimbursed in the manner as set forth in the agreement.

(e) If the agreement authorizes the payment of CCC-provided funds, CCC will pay this to the participant on a reimbursement for expenses basis, except as provided in paragraph (f)(1) of this section. The participant shall request the payment of CCC-provided funds to reimburse it for authorized expenses in the manner set forth in the agreement.

(f)(1) A participant may request an advance of the amount of funds specified in the agreement. FAS will not approve any request for an advance:

(i) Received earlier than 60 days after the date of a previous advance made in connection with the same agreement, and

(ii) If any required reports, as specified in § 1499.13 and in the agreement, are more than six months in arrears.

(2) Except as may otherwise be provided in the agreement, the participant shall deposit and maintain in a bank account located in the United States all funds advanced by CCC. The account shall be interest-bearing, unless the exceptions in § 3019.22(k) of this title apply, or FAS determines that this requirement would constitute an undue burden. The participant shall remit semi-annually to CCC any interest earned on the advanced funds. The participant shall, no later than 10 days after the end of each calendar quarter, submit a financial statement to FAS accounting for all funds advanced and all interest earned.

(3) The participant shall return to CCC any funds that are advanced by CCC if such funds have not been obligated as of the 180th day after the advance was made. Such funds and interest shall be transferred to FAS within 30 days of such date.

(g) If a participant is required to pay funds to CCC in connection with an agreement, the participant shall make such payment in U.S. dollars, unless otherwise approved in advance by FAS.

(h) Suppliers of commodities shall seek payment for goods according to the purchase contract with CCC.

#### § 1499.7 Transportation of goods.

(a) Shipments of donated commodities are subject to the requirements of 46 U.S.C. 55305 and 55314, regarding carriage on U.S.-flag vessels.

(b) Transportation of donated commodities and other goods such as bags that may be provided by CCC under FFPr will be acquired under a

specific agreement in the manner determined by FAS. Such transportation will be acquired by:

(1) CCC in accordance with the Federal Acquisition Regulations (FAR), USDA's procurement regulations set forth in chapter 4 of title 48 of the Code of Federal Regulations (the AGAR) and directives issued by the Director, Office of Procurement and Property Management, USDA; or

(2) The participant, with reimbursement by CCC, in the manner specified in the agreement.

(c) Participants that acquire transportation in accordance with paragraph (b)(2) of this section, may use the services of a licensed freight forwarder that:

(1) Demonstrates at least three years experience in freight forwarding and booking services;

(2) Is accredited or authorized to act as a licensed freight forwarder;

(3) Has the capability to work with the participant to plan, implement, and monitor the logistics involved in transporting the donated commodities;

(4) Provides three years of audited financial statements to the participant that demonstrates sound financial standing; and

(5) Would not have a conflict of interest in carrying out the freight forwarder duties. To assist FAS in determining whether there is a potential conflict of interest, the participant must submit to FAS a certification indicating that the freight forwarder:

(i) Is not engaged in, and will not engage in, supplying commodities or furnishing ocean transportation or ocean transportation-related services for commodities provided under the participant's Food for Progress program; and

(ii) Is not affiliated with and not made arrangements to give or receive any payment, kickback, or illegal benefit in connection with its selection as an agent of the participant.

(d) Participants responsible for transportation under § 1499.7(b)(2) shall declare in the transportation contract the point at which the ocean carrier to take custody of commodity to be transported.

#### § 1499.8 Entry and handling of commodities.

(a) The participant shall make all necessary arrangements for receiving the donated commodities in the targeted country, including obtaining appropriate approvals for entry and transit. The participant shall store and maintain the donated commodities in good condition from the time of delivery at the port of entry or the point of

receipt from the originating carrier until their distribution, sale or barter.

(b) The participant shall, as provided in the agreement, arrange for transporting, storing, and distributing the donated commodities from the designated point and time where title to the commodity passes to the participant by contracting directly with suppliers of services, as set forth in the agreement.

(c)(1) If a participant arranges for the packaging or repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the donated commodities;

(iii) Includes a statement indicating that the donated commodities are furnished by the people of the United States of America; and

(iv) Includes a statement indicating that the donated commodities shall not be sold, exchanged or bartered.

(2) If a participant arranges for the reprocessing and repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the reprocessed product;

(iii) Includes a statement indicating that the reprocessed product was made with commodities furnished by the people of the United States of America; and,

(iv) Includes a statement indicating that the reprocessed product shall not be sold, exchanged or bartered;

(3) If a participant distributes donated commodities that are not packaged, the participant shall, to the extent practicable, display:

(i) Banners, posters or other media informing the public of the name and source of the donated commodities; and

(ii) A statement that the donated commodities may not be sold, exchanged, or bartered.

(d) A participant shall arrange with the government of the targeted country that all donated commodities to be distributed will be imported and distributed free from all customs, duties, tolls, and taxes. A participant is encouraged to make similar arrangements, where possible, with the government of the country where donated commodities to be sold or bartered are delivered.

#### **§ 1499.9 Damage to or loss of commodities.**

(a) FAS will be responsible for the donated commodities prior to the

transfer of title to the commodities to the participant. The participant will be responsible for the donated commodities following the transfer of title to the commodities to the participant. The title will transfer at the time and place specified in the agreement.

(b) A participant shall immediately inform FAS, in the manner set forth in the agreement, of any damage to or loss of the donated commodities that occurs following the transfer of title to the commodities to the participant. The participant shall take all steps necessary to protect its interests and the interests of CCC with respect to any damage to or loss of the donated commodities that occurs after title has been transferred to the participant.

(c) If the donated commodities are damaged or lost during the time that they are in the care of the carrier:

(1) And either FAS or the participant engages the services of an independent cargo surveyor, the surveyor will provide to FAS and the participant any report, narrative chronology or other commentary that it prepares;

(2) FAS and the participant will provide to each other the names and addresses of any individuals known to be present at the time of discharge or during the survey who can verify the quantity of damaged or lost commodities;

(3) And the participant engages the services of the surveyor, CCC will reimburse the participant for the reasonable costs, as determined by FAS, of the survey, unless:

(i) The participant was required by the agreement to pay for the survey;

(ii) The survey was a delivery survey and the surveyor did not also prepare a discharge survey; or

(iii) The survey was not conducted contemporaneously with the discharge of the vessel, unless FAS determines that such action was justified under the circumstances;

(4) Any survey obtained by the participant shall, to the extent practicable, be conducted jointly by the surveyor, the participant, the carrier, and the survey report shall be signed by all parties;

(5) And the damage or loss occurred with respect to a bulk grain shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall obtain the services of an independent cargo surveyor to:

(i) Observe the discharge of the cargo;

(ii) Report on discharging methods, including scale type, calibrations and any other factor that may affect the accuracy of scale weights, and, if scales

are not used, state the reason therefore and describe the actual method used to determine weight;

(iii) Estimate the quantity of cargo, if any, lost during discharge through carrier negligence;

(iv) Advise on the quality of sweepings;

(v) Obtain copies of port or vessel records, if possible, showing the quantity discharged; and

(vi) Notify the participant immediately if the surveyor has reason to believe that the correct quantity was not discharged or if additional services are necessary to protect the cargo; and,

(6) And the damage or loss occurred with respect to a container shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall obtain the services of an independent cargo surveyor to list the container numbers and seal numbers shown on the containers, indicate whether the seals were intact at the time the containers were opened, and note whether the containers were in any way damaged.

(d) If the value of any damaged donated commodities is in excess of \$1,000, the participant shall immediately arrange for an inspection by a public health official or other competent authority approved by FAS and provide to FAS a certification by such public health official or other competent authority regarding the exact quantity and condition of the damaged commodities. The participant shall inform FAS of the results of the inspection and indicate whether the damaged commodities are:

(1) Fit for the use authorized in the agreement and, if so, whether there has been a diminution in quality; or

(2) Unfit for the use authorized in the agreement.

(e)(1) If the participant has title to the donated commodities, the participant shall arrange for the recovery of that portion of the donated commodities designated as suitable for the use authorized in the agreement. The participant shall dispose of donated commodities that are unfit for such use in the following order of priority:

(i) Sale for the most appropriate use, i.e., animal feed, fertilizer, industrial use, or another use approved by FAS, at the highest obtainable price;

(ii) Donation to a governmental or charitable organization for use as animal feed or for other non-food use; or

(iii) Destruction of the commodities if they are unfit for any use, in such manner as to prevent their use for any purpose.



(2) The participant shall arrange for all U.S. Government markings to be obliterated or removed before the donated commodities are transferred by sale or donation.

(f) A participant may retain any proceeds generated by the disposal of the donated commodities in accordance with paragraph (e)(1) of this section, and shall use the proceeds for expenses related to the disposal of the donated commodities and for activities specified in the agreement.

(g) The participant shall notify FAS immediately and provide detailed information about the actions taken in accordance with paragraph (e)(1) of this section, including the quantities, values and dispositions used to handle commodities determined to be unfit.

**§ 1499.10 Claims for damage to or loss of commodities.**

(a) FAS will be responsible for claims arising out of damage to or loss of a quantity of the donated commodities prior to the transfer of title to the commodities to the participant.

(b) If the value of the damaged or lost donated commodities is estimated to be \$20,000 or more and the title to the commodities has transferred to the participant, the participant will be responsible for:

(1) Initiating a claim arising out of such damage or loss, including actions relating to collections pursuant to commercial insurance contracts; and

(2) Notifying FAS immediately and providing detailed information about the circumstances surrounding such damage or loss, the quantity of damaged or lost donated commodities, and the value of the damage or loss.

(c) If the value of the damaged or lost donated commodities is estimated to be less than \$20,000, the participant will be responsible for providing detailed information about the damage or loss in the next report required to be filed under § 1499.13(c) and shall not be required to initiate a claim collection action.

(d)(1) The value of a claim for lost donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities.

(2) The value of a claim for damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities, less any funds generated if such commodities are sold in accordance with § 1499.9(e)(1).

(e) If FAS determines that a participant is not exercising due

diligence in the pursuit of a claim, FAS may require the participant to assign its rights to pursue the claim to FAS.

(f)(1) The participant may retain any funds obtained as a result of a claims collection action initiated by it in accordance with this section, or recovered pursuant to any insurance policy or other similar form of indemnification, but such funds shall only be expended for purposes approved in advance by FAS.

(2) FAS will retain any funds obtained as a result of a claims collection action initiated by it under this section; provided, however, that if the participant paid for the freight or a portion thereof, FAS will use a portion of such funds to reimburse the participant for such expense on a prorated basis.

**§ 1499.11 Use of commodities and sale proceeds.**

(a) A participant must use the donated commodities in accordance with the agreement.

(b) A participant shall not permit the distribution, handling, or allocation of donated commodities on the basis of political affiliation, geographic location, or the ethnic, tribal or religious identity of affiliation of the potential consumers or beneficiaries.

(c) A participant shall not permit the distribution, handling, or allocation of donated commodities by the military forces or any government or insurgent group without the specific authorization of FAS.

(d) A participant may sell or barter donated commodities only if such sale or barter is provided for in the agreement or the participant is disposing of damaged commodities as specified in § 1499.9. The participant shall sell the donated commodities at a reasonable market price in the economy where the sale occurs. The participant shall use any sale proceeds, income, or goods or services derived from the sale or barter of the donated commodities only as provided in the agreement.

(e) The participant shall retain copies of and make available to FAS all barter receipts, contracts or other documents related to the barter of the donated commodities and the services or goods derived from such barter, for a minimum of 24 months after the agreement has been terminated or closed out.

(f) The participant shall deposit all sale proceeds and income into a separate, interest-bearing account unless the exceptions in § 3019.22(k) of this title apply, the account is in a country where the laws or customs prohibit the payment of interest, or FAS determines

that this requirement would constitute an undue burden.

(g) A participant may use sale proceeds or income to purchase real or personal property only if local law permits the participant to retain title to such property. However, the participant shall not use sale proceeds or income to pay for the acquisition, development, construction, alteration or upgrade of real property that is:

(1) Owned or managed by a church or other organization engaged exclusively in religious pursuits; or

(2) Used in whole or in part for sectarian purposes, except that a participant may use sale proceeds or income to pay for repairs to or rehabilitation of a structure located on such real property to the extent necessary to avoid spoilage or loss of donated commodities, but only if such structure is not used in whole or in part for any religious or sectarian purposes while the donated commodities are stored in it. If such use is not specifically provided for in the agreement, such use may only occur after receipt of written approval from FAS.

(h) A participant shall endeavor to comply with §§ 3019.41 through 3019.43 of this title when procuring goods and services and when engaging in construction work to implement the agreement. The participant shall also establish procedures to prevent fraud. The participant shall enter into a written contract with each provider of goods, services or construction work that requires the provider to maintain adequate records to account for all donated commodities or funds or both provided to the provider by the participant and to submit periodic reports to the participant. The participant shall submit a copy of the signed contracts to FAS.

**§ 1499.12 Subrecipients.**

(a) If provided for in the agreement, a participant may utilize the services of a subrecipient to implement activities under this agreement. The participant shall enter into a written subagreement with the subrecipient, and provide a copy of such subagreement to FAS, in the manner set forth in the agreement, prior to the transfer of any donated commodities, sale proceeds, income or CCC-provided funds to the subrecipient. Such written subagreement shall require the subrecipient to pay to the participant the value of any donated commodities, sale proceeds, income, or CCC-provided cash funds that is not used in accordance with the subagreement, or are lost, damaged, or

misused as a result of the subrecipient's failure to exercise reasonable care.

(b) If a participant demonstrates to FAS that it is not feasible to enter into a subagreement with a subrecipient, FAS may grant approval to proceed without a subagreement; provided, however, that the participant must obtain such approval from FAS prior to transferring any donated commodities, sale proceeds, income, or CCC-provided funds to the subrecipient.

(c) The participant shall monitor the actions of a subrecipient as necessary to ensure that donated commodities or funds provided to the subrecipient are used for authorized purposes in compliance with applicable laws and regulations and the agreement and that performance goals are achieved. The participant shall provide in the subagreement that the subrecipient must comply with applicable provisions of the regulations set forth in Chapter 30 of this title.

**§ 1499.13 Recordkeeping and reporting requirements.**

(a) A program participant shall retain records and permit access to records in accordance with the requirements of § 3019.53 of this title. The date of submission of the final expenditure report, as referenced in § 3019.53(b) of this title, shall be the final date of submission of the forms required by paragraphs (c)(1) and (2) of this section as prescribed by FAS.

(b) A participant shall, within 30 days after export of all or a portion of the donated commodities, submit evidence of such export to FAS, in the manner set forth in the agreement. The evidence may be submitted through an electronic media approved by FAS or by providing the carrier's on board bill of lading. The evidence of export must show the kind and quantity of commodities exported, the date of export, and the country where commodities were delivered.

(c)(1) A participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt, handling and disposition of the donated commodities. Such report shall be submitted to FAS, by the dates and for the reporting periods specified in the program agreement, until all of the donated commodities have been distributed, sold or bartered and such disposition has been reported to FAS.

(2) If the agreement authorizes the sale or barter of donated commodities, the participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt and use of sale proceeds and income, and in the case of bartered commodities, covering the services and goods derived from the

barter of donated commodities. Such reports shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the generated sales proceeds and income have been disbursed and reported to FAS. When reporting financial information, the participant shall include the amounts in U.S. dollars and the exchange rate.

(3) The participant shall provide to FAS additional information or reports relating to the agreement if requested by FAS.

(4) The participant shall report, in the manner specified in the agreement, its progress, measured against established baselines, towards achieving the objectives of the activities under the agreement.

(d) A participant shall submit to FAS, in the manner specified in the agreement, an annual audit in accordance with § 3019.26 of this title. If FAS requires an audit with respect to a particular agreement, and CCC provides funds for this purpose, participant shall arrange for such audit and shall submit to FAS, in the manner specified in the agreement, an annual financial audit of the agreement.

(e)(1) A participant shall, as provided in the agreement, submit to FAS interim and final evaluations of the implementation of the agreement. Unless otherwise provided in the agreement, the evaluations shall be submitted at the mid-point and end-point of the implementation period. The participant shall arrange for the evaluations to be conducted by an independent third party that:

(i) Is financially and legally separate from the participant's organization;

(ii) Has staff with demonstrated knowledge, analytical capability, language skills and experience in conducting evaluations of development programs involving agriculture, education, and nutrition;

(iii) Uses acceptable analytical frameworks such as comparison with non-project areas, surveys, involvement of stakeholders in the evaluation, and statistical analyses;

(iv) Uses local consultants, as appropriate, to conduct portions of the evaluation;

(v) Provides a detailed outline of the evaluation, major task, and specific schedules prior to initiating the evaluation.

(2) Receipt by FAS of the evaluations referred to in paragraph (1) of this section, is a condition of retaining funds received to carry out the evaluations.

(f) Participants shall submit to FAS the financial reports and information outlined in § 3019.52 of this title. The

agreement will specify the acceptable forms and time requirements for submission.

**§ 1499.14 Noncompliance with an agreement.**

If a participant fails to comply with a term of an agreement, FAS may take one or more of the enforcement actions set forth in § 3019.62 of this title and, if appropriate, initiate a claim against the participant. FAS may also initiate a claim against a participant if the donated commodities are damaged or lost or the sale proceeds, income, of CCC-provided funds are lost due to an action or omission of the participant.

**§ 1499.15 Suspension, termination, and closeout of agreements.**

(a) An agreement may be suspended or terminated by CCC if it determines that:

(1) The continuation of the assistance provided under this agreement is no longer necessary or desirable; or

(2) Storage facilities are inadequate to prevent spoilage or waste, or distribution of the donated commodities will result in substantial disincentive to, or interference with, domestic production or marketing in the targeted country.

(b) An agreement may be terminated in accordance with § 3019.61 of this title. If an agreement is terminated, the participant shall:

(1) Be responsible for the safety of any undistributed donated commodities and dispose of such commodities only as agreed to by FAS; and

(2) Follow the closeout procedures in §§ 3019.71 through 3019.73 of this title will apply to the closeout of an agreement.

(c) An agreement will be considered completed when CCC and the participant have fulfilled their responsibilities under the agreement or the agreement has been terminated. The procedures in §§ 3019.71 through 3019.73 of this title will apply to the closeout of an agreement.

**§ 1499.16 Appeals**

A participant may appeal a determination arising under this part to FAS. Such appeal will be in writing and submitted to the FAS official and in the manner set forth in the agreement. The participant will be given an opportunity to have a hearing before a final decision is made regarding its appeal.

**§ 1499.17 Paperwork Reduction Act.**

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of 44 U.S.C. Chapter 35 and

have been assigned OMB Numbers 0551-0035.

3. Revise part 1599 to read as follows:

**PART 1599—McGOVERN-DOLE INTERNATIONAL FOOD FOR EDUCATION AND CHILD NUTRITION PROGRAM**

Sec.

- 1599.1 General statement.
- 1599.2 Definitions.
- 1599.3 Eligibility determination.
- 1599.4 Application process.
- 1599.5 Agreements.
- 1599.6 Payments.
- 1599.7 Transportation of goods.
- 1599.8 Entry and handling of commodities.
- 1599.9 Damage to and loss of commodities.
- 1599.10 Claims for damage to or loss of commodities.
- 1599.11 Use of commodities and sales proceeds.
- 1599.12 Subrecipients.
- 1599.13 Recordkeeping and reporting requirements.
- 1599.14 Noncompliance with an agreement.
- 1599.15 Suspension, termination, and closeout of agreements.
- 1599.16 Appeals.
- 1599.17 Paperwork Reduction Act.

**Authority:** 7 U.S.C. 1736o-1.

**§ 1599.1 General Statement.**

(a) This part sets forth the general terms and conditions governing the donation of commodities by the Foreign Agricultural Service (FAS) to participants in the McGovern-Dole International Food for Education and Child Nutrition Program (McGovern-Dole Program). Under the McGovern-Dole Program, participants use the donated commodities, FAS-provided funds, and/or proceeds from the sale of donated commodities to implement activities in a foreign country pursuant to an agreement with FAS. In cases where the agreement is funded with Commodity Credit Corporation (CCC) resources, the Foreign Agricultural Service (FAS) of the Department of Agriculture (USDA) will administer the McGovern-Dole Program on behalf of CCC.

(b) In addition to the provisions of this part, other regulations of general application issued by USDA, including the regulations set forth in Chapter 30 of this title, are applicable to the McGovern-Dole Program.

(c) This part shall not apply to a donation by FAS to a foreign government or an intergovernmental agency or organization (such as the United Nations' World Food Program) under the McGovern-Dole Program.

**§ 1599.2 Definitions.**

The following definitions are applicable to this part:

*Activity* means a project to be carried out by a participant, directly or through a subrecipient, to fulfill the objectives of an agreement.

*Agreement* means a legally binding agreement entered into between FAS and a participant to implement activities under the McGovern-Dole Program.

*CCC* means the Commodity Credit Corporation and includes any official of the United States delegated the responsibility to act on behalf of CCC.

*Commodities* mean U.S. agricultural commodities or products of U.S. agricultural commodities.

*FAS-provided funds* mean U.S. dollars provided under an agreement to a participant for expenses for the internal transportation, storage and handling of the donated commodities, expenses involved in the administration and monitoring of the activities under the agreement, expenses to carry out activities that enhance the effectiveness of the commodities, and technical assistance to develop school feeding programs and determine nutritional composition of school meals.

*Donated commodities* mean the commodities donated by FAS to a participant under an agreement. The term may include donated commodities that are used to produce a further processed product for use under the agreement.

*FAS* means the Foreign Agricultural Service of the United States Department of Agriculture.

*Force majeure* is a common clause in contracts, exempting the parties for non-fulfillment of their obligations as a result of conditions beyond their control, such as earthquakes, floods or war.

*Income* means interest earned on sale proceeds and other resources received by a participant, other than sale proceeds, as a result of carrying out an agreement. The term may include resources from VAT refunds, activity fees, interest on loans, and others.

*McGovern-Dole Program* means the McGovern-Dole International Food for Education and Child Nutrition Program.

*Participant* means an entity with which FAS has entered into an agreement.

*Sale proceeds* mean funds received by a participant from the sale of donated commodities.

*Subrecipient* means a legal entity that receives donated commodities, income, sale proceeds or other resources from a participant for the purpose of implementing in the targeted country activities described in a McGovern-Dole Program agreement and that is accountable to such participant for the

use of such commodities, funds, or resources. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of FAS.

*Targeted country* means the country in which activities are implemented under an agreement.

**§ 1599.3 Eligibility determination.**

(a) An entity will be eligible to become a participant only after FAS determines that the entity has:

(1) Organizational experience in implementing and managing grants, and the capability and personnel to develop, implement, monitor, report on, and provide accountability for activities in accordance with this part;

(2) Experience working in the proposed targeted country;

(3) Adequate financial framework to implement the activities the entity proposes to carry out under McGovern-Dole Program. In order to determine whether the entity is financially responsible, FAS may require it to submit corporate policies and financial materials that have been audited or otherwise reviewed by a third party;

(4) A person or agent located in the United States with respect to which service of judicial process may be obtained by FAS on behalf of the entity; and

(5) An operating financial account in the proposed targeted country, or a satisfactory explanation for not having such an account and a description of how a McGovern-Dole Program agreement would be administered without such an account.

(b) In determining whether an entity will be eligible to be a participant, FAS may consider the entity's previous compliance or noncompliance with the provisions of this part and part 1499 of this title. FAS may consider matters such as whether the entity corrected deficiencies in the implementation of an agreement in a timely manner and whether the entity has timely and accurately filed reports and other submissions that are required to be filed with FAS and other agencies of the United States.

**§ 1599.4 Application process.**

(a) An entity seeking to enter into an agreement with FAS shall submit an application, in accordance with this section, that sets forth its proposal to carry out activities under the McGovern-Dole Program in the proposed target country. An application shall contain the items specified in paragraph (b) of this section, and shall be submitted electronically to FAS at the address set forth at <http://www.fas.usda.gov>. An

entity that has not yet met the eligibility requirements in § 1599.3 may submit an application, but FAS will not enter into an agreement with an entity until FAS had made a determination of eligibility under § 1599.3.

(b) An applicant shall include the following items in its application:

(1) A completed Form SF-424, which is a standard application for Federal assistance;

(2) An introduction that contains the elements specified in paragraph (c) of this section; and

(3) A plan of operation that contains the elements specified in paragraph (d) of this section.

(c) The introduction shall include:

(1) An explanation of the need for the food aid in the targeted country and how the applicant's proposed activities would address that need;

(2) Reasons for the need for a school feeding program in the targeted country, including the following:

(i) Country's current school feeding operations, if they exist, length and sessions of a typical school year, along with current funding resources;

(ii) Any information regarding teacher training, community infrastructure (PTAs), health, nutrition, and water and sanitation information;

(3) Information regarding the applicant's ability to become registered and operate in the targeted country;

(4) Information about the applicant's past food aid projects;

(5) Methods used to involve indigenous institutions as well as local communities and governments in the development and implementation of the programs and activities to foster local capacity building and leadership;

(6) A budget that details the amount of any sale proceeds, income, and FAS-provided funds that the applicant proposes to use to fund:

(i) Administrative costs;

(ii) Inland transportation, storage and handling costs; and

(iii) Activity costs;

(7) Provide a statement verifying the government's commitment to work toward, through a national action plan, the goals of the World Declaration on Education for All convened in 1990 in Jomtien, Thailand, and the follow-up Dakar Framework for Action of the World Education Forum, convened in 2000; and,

(8) Steps that will be taken to continue the program activities after termination of the program agreement to address sustainability of all, or portions of the program, including a description of:

(i) How the program participant or another entity will sustain the benefits

of education, enrollment, and attendance of children in schools in the targeted communities; and

(ii) The estimated time necessary for the program to graduate and be sustained by the recipient country or other organizations without additional assistance under the program.

(d) A plan of operation shall include:

(1) The name of the targeted country where the proposed activities would be implemented;

(2) The kind, quantity, and proposed use of the commodities requested, and any commodities that would be acceptable substitutions therefore, and the proposed delivery schedule;

(3) If monetization or barter is proposed:

(i) The quantity of the requested commodities that would be sold or bartered;

(ii) The amount of sale proceeds anticipated;

(iii) The amount of income expected to be generated;

(iv) The anticipated monetization completion date;

(v) The goods or services to be generated from the barter of the requested commodities;

(vi) The value of the goods or services anticipated to be generated from the barter of the requested commodities; and

(vii) A justification of why monetization provides a greater benefit to the program than the receipt of FAS-provided funds to carry out activities.

(4) A list of each of the activities that would be implemented, with a brief statement of the objectives to be accomplished under each activity;

(5) For each proposed activity, the targeted geographic area, anticipated beneficiaries, and methods that the applicant would use to choose such beneficiaries, including obtaining and considering statistics on poverty levels, food deficits, literacy rates, and any other required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

(6) For each proposed activity:

(i) An explanation of whether the activity would be carried out through the distribution of the requested commodities or funded by FAS-provided funds, sale proceeds, income, or a combination thereof; and

(ii) The amount of commodities, FAS-provided funds, sale proceeds, or income requested to carry out such activity; and

(iii) A detailed description of the activity, including the steps involved in its implementation and the anticipated completion date;

(7) Any cash or non-cash contributions that the applicant expects to receive from non-FAS sources that:

(i) Are critical to the implementation of the proposed activities; or

(ii) Enhance the implementation of the activities;

(8) Any subrecipient that would be involved and a description of each subrecipient's responsibilities and its capability to perform responsibilities;

(9) Any governmental or nongovernmental entities that would be involved and the extent to which the McGovern-Dole Program will strengthen or increase the capabilities of such entities to further educational and economic development in the targeted country;

(10) The method by which the applicant intends to inform beneficiaries of an activity about the source of the requested commodities or funding for the activity and, where the beneficiaries will be receiving the commodities directly, how to prepare and use them properly;

(11) Established baselines, a timeline, and proposed outcomes that would enable FAS to measure the applicant's progress towards achieving the objectives of proposed activities and the McGovern-Dole Program objective that include:

(i) Increased enrollment and attendance rates, especially for girls;

(ii) Improved student achievement levels through improvements in the learning environment;

(iii) Improved maternal, child and student health and nutrition;

(iv) Attracting non-FAS contributions to development activities;

(v) Enabling community support for infrastructure development; and

(vi) Increased government and community support in education;

(12) If the proposed activities would involve the use of sale proceeds or income:

(i) The process that the applicant would use to sell the requested commodities, including steps the applicant would take to use, to the extent possible, the private sector in the monetization process; and

(ii) The procedures that the applicant would use to assure that sale proceeds and income are received and deposited into a separate, interest-bearing account and disbursed from such account for use only in accordance with the agreement;

(13) A description of how the requested commodities would be transported from the receiving port to the point at which distribution is made to the beneficiaries and a description of any port, transportation, storage, and warehouse facilities that would be used

with sufficient detail to demonstrate that they would be adequate to handle the requested commodities without undue spoilage or waste;

(14) Any reprocessing or repackaging of the requested commodities that would take place prior to the distribution, sale or barter by the participant;

(15) The action the applicant would take to ensure that any commodities to be distributed to beneficiaries, rather than sold, would be imported and distributed free from all customs, duties, tolls, and taxes;

(16) A plan that shows how the requested commodities could be imported and distributed without a disruptive impact upon production, prices and marketing of the same or like products in the country where they will be delivered, and the extent to which any sale or barter of the requested commodities would displace or interfere with any sales that may otherwise be made by the applicant or any other entity in the country where they will be delivered; and

(17) Any additional required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

#### **§ 1599.5 Agreements.**

(a) After FAS approves an applicant's proposal, FAS will develop an agreement in consultation with the applicant. The agreement will set forth the obligations of FAS and the participant. A participant must comply with the terms of the agreement to receive assistance.

(b) A participant shall not use donated commodities, sale proceeds, income or FAS-provided funds for any activity or any expenses incurred by the participant prior to the date of the agreement or after the agreement is suspended or terminated.

(c) The agreement will include a budget that sets forth the maximum amounts of sale proceeds and FAS-provided funds that may be expended for various purposes under the agreement. A participant may make adjustments to this budget without prior approval from FAS only as specified in the agreement.

(d) Prior to providing any donated commodities or FAS-provided funds to a participant under an agreement, FAS may require the participant to complete a training program administered by FAS that is designed to ensure that the participant is aware of, and has the capacity to complete all required reporting and audit functions set forth in this part.

(e) A participant will be prohibited from using FAS-provided funds to

acquire goods and services either directly or indirectly through another party from certain countries that will be specified in the agreement. Any violation of this provision of the agreement will be a basis for immediate termination by FAS of the agreement in addition to the imposition of any other applicable civil and criminal penalties.

(f) The agreement will prohibit the sale or transshipment of the donated commodities to a country not specified in the agreement for so long as such donated commodities are controlled by the participant.

(g) FAS may enter into a multicountry agreement in which donated commodities are delivered to one country and activities are carried out in another.

(h) FAS may provide donated commodities and FAS-provided funds under a multiyear agreement contingent upon the availability of commodities and funds.

#### **§ 1599.6 Payments.**

(a) If the participant arranges for transportation in accordance with § 1599.7(b)(2), and the participant seeks payment directly, the participant shall submit the following documents to FAS in the manner set forth in the agreement:

(1) A signed copy of the completed Form CCC-512;

(2) The original on-board bills of lading indicating the freight rate and signed by the originating carrier;

(3) For all non-containerized cargoes:

(i) A signed copy of the Federal Grain Inspection Service (FGIS) Official Stowage Examination Certificate (Vessel Hold Certificate);

(ii) A signed copy of the National Cargo Bureau Certificate of Readiness (Vessel Hold Inspection Certificate); and,

(iii) A signed copy of the National Cargo Bureau Certificate of Loading;

(4) For all containerized cargoes a copy of the FGIS Container Condition Inspection Certificate;

(5) A signed copy of liner booking note or charter party covering ocean transportation of cargo;

(6) In the case of charter shipments, a signed notice of arrival at first discharge port, unless FAS has determined that circumstances of force majeure have prevented the vessel's arrival at the first port of discharge;

(7) A request by the participant for reimbursement of freight, survey costs, and other expenses approved by FAS indicating the amount due and accompanied by a certification from the carrier or other parties that payments have been received from the participant; and

(8) A document on letterhead and signed by an officer or agent of the participant specifying the name of the entity to receive payment; the bank ABA number to which payment is to be made; the account number for the deposit at the bank; the participant's taxpayer identification number; and the type of the account into which the payment will be deposited.

(b) If the participant arranges for transportation in accordance with § 1599.7(b)(2), and the participant has used a freight forwarder, the participant shall cause the freight forwarder to submit the documents specified in § 1599.6(a) in order to receive payment from FAS.

(c) In no case will FAS reimburse a participant for demurrage costs or pay demurrage to any other entity.

(d) If FAS has agreed to pay the costs of transporting, storing, and distributing the donated commodities from the designated port or point of entry, the participant will be reimbursed in the manner as set forth in the agreement.

(e) If the agreement authorizes the payment of FAS-provided funds, FAS will pay this to the participant on a reimbursement for expenses basis, except as provided in paragraph (f)(1) of this section. The participant shall request the payment of FAS-provided funds to reimburse it for authorized expenses in the manner set forth in the agreement.

(f)(1) A participant may request an advance of the amount of funds specified in the agreement. FAS will not approve any request for an advance:

(i) Received earlier than 60 days after the date of a previous advance made in connection with the same agreement, and

(ii) If any required reports, as specified in § 1499.13 and in the agreement, are more than six months in arrears.

(2) Except as may otherwise be provided in the agreement, the participant shall deposit and maintain in a bank account located in the United States all funds advanced by FAS. The account shall be interest-bearing, unless the exceptions in § 3019.22(k) of this title apply, or FAS determines that this requirement would constitute an undue burden. The participant shall remit semi-annually to FAS any interest earned on the advanced funds. The participant shall, no later than 10 days after the end of each calendar quarter, submit a financial statement to FAS accounting for all funds advanced and all interest earned.

(3) The participant shall return to FAS any funds that are advanced by FAS if such funds have not been obligated as

of the 180th day after the advance was made. Such funds and interest shall be transferred to FAS within 30 days of such date.

(g) If a participant is required to pay funds to FAS in connection with an agreement, the participant shall make such payment in U.S. dollars, unless otherwise approved in advance by FAS.

(h) Suppliers of commodities shall seek payment for goods according to the purchase contract.

#### **§ 1599.7 Transportation of goods.**

(a) Shipments of donated commodities are subject to the requirements of 46 U.S.C. 55305 and 55314, regarding carriage on U.S.-flag vessels.

(b) Transportation of donated commodities and other goods such as bags that may be provided by FAS under the McGovern-Dole Program will be acquired under a specific agreement in the manner determined by FAS. Such transportation will be acquired by:

(1) FAS in accordance with the Federal Acquisition Regulations (FAR), USDA's procurement regulations set forth in chapter 4 of title 48 of the Code of Federal Regulations (the AGAR) and directives issued by the Director, Office of Procurement and Property Management, USDA; or

(2) The participant, with reimbursement by FAS, in the manner specified in the agreement.

(c) Participants that acquire transportation in accordance with paragraph (b)(2) of this section, may use the services of a licensed freight forwarder that:

(1) Demonstrates at least three years experience in freight forwarding and booking services;

(2) Is accredited or authorized to act as a licensed freight forwarder;

(3) Has the capability to work, with the participant to plan, implement, and monitor the logistics involved in transporting the donated commodities;

(4) Provides three years of audited financial statements to the participant that demonstrates sound financial standing; and

(5) Would not have a conflict of interest in carrying out the freight forwarder duties. To assist FAS in determining whether there is a potential conflict of interest, the participant must submit to FAS a certification indicating that the freight forwarder:

(i) Is not engaged in, and will not engage in, supplying commodities or furnishing ocean transportation or ocean transportation-related services for commodities provided under the participant's McGovern-Dole program; and

(ii) Is not affiliated with and not made arrangements to give or receive any payment, kickback, or illegal benefit in connection with its selection as an agent of the participant.

(d) Participants responsible for transportation under § 1599.7(b)(2) shall declare in the transportation contract the point at which the ocean carrier is to take custody of commodity to be transported.

#### **§ 1599.8 Entry and handling of commodities.**

(a) The participant shall make all necessary arrangements for receiving the donated commodities in the targeted country, including obtaining appropriate approvals for entry and transit. The participant shall store and maintain the donated commodities in good condition from the time of delivery at the port of entry or the point of receipt from the originating carrier until their distribution, sale or barter.

(b) The participant shall, as provided in the agreement, arrange for transporting, storing, and distributing the donated commodities from the designated point and time where title to the commodity passes to the participant or by contracting directly with suppliers of services, as set forth in the agreement.

(c)(1) If a participant arranges for the packaging or repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the donated commodities;

(iii) Includes a statement indicating that the donated commodities are furnished by the people of the United States of America; and

(iv) Includes a statement indicating that the donated commodities shall not be sold, exchanged or bartered.

(2) If a participant arranges for the reprocessing and repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the reprocessed product;

(iii) Includes a statement indicating that the reprocessed product was made with commodities furnished by the people of the United States of America; and

(iv) Includes a statement indicating that the reprocessed product shall not be sold, exchanged or bartered;

(3) If a participant distributes donated commodities that are not packaged, the participant shall, to the extent practicable, display:

(i) Banners, posters or other media informing the public of the name and source of the donated commodities; and

(ii) A statement that the donated commodities may not be sold, exchanged, or bartered.

(e) A participant shall arrange with the government of the targeted country that all donated commodities to be distributed will be imported and distributed free from all customs, duties, tolls, and taxes. A participant is encouraged to make similar arrangements, where possible, with the government of the country where donated commodities to be sold or bartered are delivered.

#### **§ 1599.9 Damage to or loss of commodities.**

(a) FAS will be responsible for the donated commodities prior to the transfer of title to the commodities to the participant. The participant will be responsible for the donated commodities following the transfer of title to the commodities to the participant. The title will transfer at the time specified in the agreement.

(b) A participant shall immediately inform FAS, in the manner set forth in the agreement, of any damage to or loss of the donated commodities that occurs following the transfer of title to the commodities to the participant. The participant shall take all steps necessary to protect its interests and the interests of FAS with respect to any damage to or loss of the donated commodities that occurs after title has been transferred to the participant.

(c) If the donated commodities are damaged or lost during the time that they are in the care of the carrier:

(1) And either FAS or the participant engages the services of an independent cargo surveyor, the surveyor will provide to FAS and the participant any report, narrative chronology or other commentary that it prepares;

(2) FAS and the participant will provide to each other the names and addresses of any individuals known to be present at the time of discharge or during the survey who can verify the quantity of damaged or lost commodities;

(3) And the participant engages the services of the surveyor; FAS will reimburse the participant for the reasonable costs, as determined by FAS, of the survey, unless:

(i) The participant was required by the agreement to pay for the survey;

(ii) The survey was a delivery survey and the surveyor did not also prepare a discharge survey; or

(iii) The survey was not conducted contemporaneously with the discharge

of the vessel, unless FAS determines that such action was justified under the circumstances;

(4) Any survey obtained by the participant shall, to the extent practicable, be conducted jointly by the surveyor, the participant, the carrier, and the survey report shall be signed by all parties;

(5) And the damage or loss occurred with respect to a bulk grain shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall obtain the services of an independent cargo surveyor to:

(i) Observe the discharge of the cargo;

(ii) Report on discharging methods, including scale type, calibrations and any other factor that may affect the accuracy of scale weights, and, if scales are not used, state the reason therefore and describe the actual method used to determine weight;

(iii) Estimate the quantity of cargo, if any, lost during discharge through carrier negligence;

(iv) Advise on the quality of sweepings;

(v) Obtain copies of port or vessel records, if possible, showing the quantity discharged; and

(vi) Notify the participant immediately if the surveyor has reason to believe that the correct quantity was not discharged or if additional services are necessary to protect the cargo; and

(6) And the damage or loss occurred with respect to a container shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall obtain the services of an independent cargo surveyor to list the container numbers and seal numbers shown on the containers, indicate whether the seals were intact at the time the containers were opened, and note whether the containers were in any way damaged.

(d) If the value of any damaged donated commodities is in excess of \$1,000, the participant shall immediately arrange for an inspection by a public health official or other competent authority approved by FAS and provide to FAS a certification by such public health official or other competent authority regarding the exact quantity and condition of the damaged commodities. The participant shall inform FAS of the results of the inspection and indicate whether the damaged commodities are:

(1) Fit for the use authorized in the agreement and, if so, whether there has been a diminution in quality; or

(2) Unfit for the use authorized in the agreement.

(e)(1) If the participant has title to the donated commodities, the participant shall arrange for the recovery of that portion of the donated commodities designated as suitable for the use authorized in the agreement. The participant shall dispose of donated commodities that are unfit for such use in the following order of priority:

(i) Sale for the most appropriate use, i.e., animal feed, fertilizer, industrial use, or another use approved by FAS, at the highest obtainable price;

(ii) Donation to a governmental or charitable organization for use as animal feed or for other non-food use; or

(iii) Destruction of the commodities if they are unfit for any use, in such manner as to prevent their use for any purpose.

(2) The participant shall arrange for all U.S. Government markings to be obliterated or removed before the donated commodities are transferred by sale or donation.

(f) A participant may retain any proceeds generated by the disposal of the donated commodities in accordance with paragraph (e) of this section, and shall use the proceeds for expenses related to the disposal of the donated commodities and for activities specified in the agreement.

(g) The participant shall notify FAS immediately and provide detailed information about the actions taken in accordance with paragraph (e) of this section, including the quantities, values and dispositions used to handle commodities determined to be unfit.

#### **§ 1599.10 Claims for damage to or loss of commodities.**

(a) FAS will be responsible for claims arising out of damage to or loss of a quantity of the donated commodities prior to the transfer of title to the commodities to the participant.

(b) If the value of the damaged or lost donated commodities is estimated to be \$20,000 or more and the title to the commodities has transferred to the participant, the participant will be responsible for:

(1) Initiating a claim arising out of such damage or loss, including actions relating to collections pursuant to commercial insurance contracts; and

(2) Notifying FAS immediately and providing detailed information about the circumstances surrounding such damage or loss, the quantity of damaged or lost donated commodities, and the value of the damage or loss.

(c) If the value of the damaged or lost donated commodities is estimated to be less than \$20,000, the participant will be responsible for providing detailed information about the damage or loss in

the next report required to be filed under § 1599.13(c) and shall not be required to initiate a claim collection action.

(d)(1) The value of a claim for lost donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities.

(2) The value of a claim for damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities, less any funds generated if such commodities are sold in accordance with § 1599.9(e)(1).

(e) If FAS determines that a participant is not exercising due diligence in the pursuit of a claim, FAS may require the participant to assign its rights to pursue the claim to FAS.

(f)(1) The participant may retain any funds obtained as a result of a claims collection action initiated by it in accordance with this section, or recovered pursuant to any insurance policy or other similar form of indemnification, but such funds shall only be expended for purposes approved in advance by FAS.

(2) FAS will retain any funds obtained as a result of a claims collection action initiated by it under this section; provided, however, that if the participant paid for the freight or a portion thereof, FAS will use a portion of such funds to reimburse the participant for such expense on a prorated basis.

#### **§ 1599.11 Use of commodities and sale proceeds.**

(a) A participant must use the donated commodities in accordance with the agreement.

(b) A participant shall not permit the distribution, handling, or allocation of donated commodities on the basis of political affiliation, geographic location, or the ethnic, tribal or religious identity of affiliation of the potential consumers or beneficiaries.

(c) A participant shall not permit the distribution, handling, or allocation of donated commodities by the military forces or any government or insurgent group without the specific authorization of FAS.

(d) A participant may sell or barter donated commodities only if such sale or barter is provided for in the agreement or the participant is disposing of damaged commodities as specified in § 1599.9. The participant shall sell the donated commodities at a reasonable market price in the economy where the sale occurs. The participant

shall use any sale proceeds, income, or goods or services derived from the sale or barter of the donated commodities only as provided in the agreement.

(e) The participant shall retain copies of and make available to FAS all barter receipts, contracts or other documents related to the barter of the donated commodities and the services or goods derived from such barter, for a minimum of 24 months after the agreement has been terminated or closed out.

(f) The participant shall deposit all sale proceeds and income into a separate, interest-bearing account unless the exceptions in § 3019.22(k) of this title apply, the account is in a country where the laws or customs prohibit the payment of interest, or FAS determines that this requirement would constitute an undue burden.

(g) A participant may use sale proceeds or income to purchase real or personal property only if local law permits the participant to retain title to such property. However, the participant shall not use sale proceeds or income to pay for the acquisition, development, construction, alteration or upgrade of real property that is:

(1) Owned or managed by a church or other organization engaged exclusively in religious pursuits; or

(2) Used in whole or in part for sectarian purposes, except that a participant may use sale proceeds or income to pay for repairs to or rehabilitation of a structure located on such real property to the extent necessary to avoid spoilage or loss of donated commodities, but only if such structure is not used in whole or in part for any religious or sectarian purposes while the donated commodities are stored in it. If such use is not specifically provided for in the agreement, such use may only occur after receipt of written approval from FAS.

(h) A participant shall endeavor to comply with §§ 3019.41 through 3019.43 of this title when procuring goods and services and when engaging in construction work to implement the agreement. The participant shall also establish procedures to prevent fraud. The participant shall enter into a written contract with each provider of goods, services or construction work that requires the provider to maintain adequate records to account for all donated commodities or funds or both provided to the provider by the participant and to submit periodic reports to the participant. The participant shall submit a copy of the signed contracts to FAS.

#### **§ 1599.12 Subrecipients.**

(a) If provided for in the agreement, a participant may utilize the services of a subrecipient to implement activities under this agreement. The participant shall enter into a written subagreement with the subrecipient, and provide a copy of such subagreement to FAS, in the manner set forth in the agreement, prior to the transfer of any donated commodities, sale proceeds, income or FAS-provided funds to the subrecipient. Such written subagreement shall require the subrecipient to pay to the participant the value of any donated commodities, sale proceeds, income, or FAS-provided cash funds that is not used in accordance with the subagreement, or are lost, damaged, or misused as a result of the subrecipient's failure to exercise reasonable care.

(b) If a participant demonstrates to FAS that it is not feasible to enter into a subagreement with a subrecipient, FAS may grant approval to proceed without a subagreement; provided, however, that the participant must obtain such approval from FAS prior to transferring any donated commodities, sale proceeds, income, or FAS-provided funds to the subrecipient.

(c) The participant shall monitor the actions of a subrecipient as necessary to ensure that donated commodities or funds provided to the subrecipient are used for authorized purposes in compliance with applicable laws and regulations and the agreement and those performance goals are achieved. The participant shall provide in the subagreement that the subrecipient must comply with applicable provisions of the regulations set forth in Chapter 30 of this title.

#### **§ 1599.13 Recordkeeping and reporting requirements.**

(a) A program participant shall retain records and permit access to records in accordance with the requirements of § 3019.53 of this title. The date of submission of the final expenditure report, as referenced in § 3019.53(b) of this title, shall be the final date of submission of the forms required by paragraphs (c)(1) and (2) of this section, as prescribed by FAS.

(b) A participant shall, within 30 days after export of all or a portion of the donated commodities, submit evidence of such export to FAS, in the manner set forth in the agreement. The evidence may be submitted through an electronic media approved by FAS or by providing the carrier's on board bill of lading. The evidence of export must show the kind and quantity of commodities exported, the date of export, and the country where commodities were delivered.

(c)(1) A participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt, handling and disposition of the donated commodities. Such report shall be submitted to FAS, by the dates and for the reporting periods specified in the program agreement, until all of the donated commodities have been distributed, sold or bartered and such disposition has been reported to FAS.

(2) If the agreement authorizes the sale or barter of donated commodities, the participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt and use of sale proceeds and income, and in the case of bartered commodities, covering the services and goods derived from the barter of donated commodities. Such reports shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the generated sales proceeds and income have been disbursed and reported to FAS. When reporting financial information, the participant shall include the amounts in U.S. dollars and the exchange rate.

(3) The participant shall provide to FAS additional information or reports relating to the agreement if requested by FAS.

(4) The participant shall report, in the manner specified in the agreement, its progress, measured against established baselines, towards achieving the objectives of the activities under the agreement.

(d) A participant shall submit to FAS, in the manner specified in the agreement, an annual audit in accordance with § 3019.26 of this title. If FAS requires an audit with respect to a particular agreement, and FAS provides funds for this purpose, participant shall arrange for such audit and shall submit to FAS, in the manner specified in the agreement, an annual financial audit of the agreement.

(e)(1) A participant shall, as provided in the agreement, submit to FAS interim and final evaluations of the implementation of the agreement. Unless otherwise provided in the agreement, the evaluations shall be submitted at the mid-point and end-point of the implementation period. The participant shall arrange for the evaluations to be conducted by an independent third party that:

(i) Is financially and legally separate from the participant's organization;

(ii) Has staff with demonstrated knowledge, analytical capability, language skills and experience in conducting evaluations of development programs involving agriculture, education, and nutrition;



(iii) Uses acceptable analytical frameworks such as comparison with non-project areas, surveys, involvement of stakeholders in the evaluation, and statistical analyses;

(iv) Uses local consultants, as appropriate, to conduct portions of the evaluation;

(v) Provides a detailed outline of the evaluation, major task, and specific schedules prior to initiating the evaluation.

(2) Receipt by FAS of the evaluations referred to in paragraph (e)(1) of this section, is a condition of retaining funds received to carry out the evaluations.

(f) Participants shall submit to FAS the financial reports and information outlined in § 3019.52 of this title. The agreement will specify the acceptable forms and time requirements for submission.

#### § 1599.14 Noncompliance with an agreement.

If a participant fails to comply with a term of an agreement, FAS may take one or more of the enforcement actions set forth in § 3019.62 of this title and, if appropriate, initiate a claim against the participant. FAS may also initiate a claim against a participant if the donated commodities are damaged or lost or the sale proceeds, income, or FAS-provided funds are lost due to an action or omission of the participant.

#### § 1599.15 Suspension, termination, and closeouts of agreements.

(a) An agreement may be suspended or terminated by FAS if it determines that:

(1) The continuation of the assistance provided under this agreement is no longer necessary or desirable; or

(2) Storage facilities are inadequate to prevent spoilage or waste, or distribution of the donated commodities will result in substantial disincentive to, or interference with, domestic production or marketing in the targeted country.

(b) An agreement may be terminated in accordance with § 3019.61 of this title. If an agreement is terminated, the participant shall:

(1) Be responsible for the safety of any undistributed donated commodities and dispose of such commodities only as agreed to by FAS; and

(2) Follow the closeout procedures in §§ 3019.71 through 3019.73 of this title, which will apply to the closeout of an agreement.

(c) An agreement will be considered completed when FAS and the participant have fulfilled their responsibilities under the agreement or the agreement has been terminated. The

procedures in §§ 3019.71 through 3019.73 of this title will apply to the closeout of an agreement.

#### § 1599.16 Appeals

A participant may appeal a determination arising under this part to FAS. Such appeal will be in writing and submitted to the FAS official and in the manner set forth in the agreement. The participant will be given an opportunity to have a hearing before a final decision is made regarding its appeal.

#### § 1599.17 Paperwork Reduction Act.

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Numbers 0551-0035.

4. Amend 48 CFR Chapter 4 by adding part 470 to read as follows:

#### CHAPTER 4—DEPARTMENT OF AGRICULTURE

#### PART 470—COMMODITY ACQUISITIONS

Sec.

470.000 Scope of part.

470.101 Definitions.

470.102 Policy.

470.103 United States origin of agricultural products.

470.200 [Reserved]

470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service programs.

470.202. Acquisition of commodities for United States Agency for International Development (USAID) programs.

470.203 Cargo preference.

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1691 through 1726b; 1731 through 1736g-3; 1736o; 1736o-1; 40 U.S.C. 121(c); 46 U.S.C. 53305, 53314 and 53316.

#### 470.000 Scope of part.

This part sets forth the policies, procedures and requirements governing the procurement of agricultural commodities by the Department of Agriculture for use:

(a) Under any domestic feeding and assistance program administered by the Food and Nutrition Service; and

(b) Under Title II of the Food For Peace Act (7 U.S.C. 1721 *et seq.*); the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

#### 470.101 Definitions.

*Additives* means spices, vitamins, micronutrients, desiccants, and preservatives when added to an agricultural commodity product.

*Commingled product* means grains, oilseeds, rice, pulses, other similar commodities and the products of such commodities, when such commodity or product is normally stored on a commingled basis in such a manner that the commodity or product produced in the United States can not be readily distinguished from a commodity or product not produced in the United States.

*Department* means the Department of Agriculture.

*Food and Nutrition Service* means such agency located within the Department of Agriculture.

*Foreign Agriculture Service* means such agency located within the Department of Agriculture.

*Free alongside ship (f.a.s.)* means delivery free of expense to the Government delivered alongside the ocean vessel and within reach of its loading tackle at the specified location of shipment.

*Grantee organization* means an organization which will receive commodities from the United States Agency for International Development under Title II of the Food for Peace Act (7 U.S.C. 1721 *et seq.*) or from the Foreign Agricultural Service under the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

*Intermodal bridge-point* means an inland location where cargo is received by a carrier and is then moved to a coastal port for loading.

*Last contract lay day* means the last day specified in an ocean freight contract by which the carriage of goods must start for contract performance.

*Lowest landed cost* means, as authorized by 46 U.S.C. 55314(c), with respect to an agricultural product acquired under this part, the lowest aggregate cost for the acquisition of such product and the shipment of such product to a foreign destination.

*Multi-trip voyage charter* means the charter of an ocean carrier in which the carrier will stop at two or more ports to discharge cargo.

#### 470.102 Policy.

(a) It is the policy of the Department to follow the policies and procedures set forth in the Federal Acquisition Regulation (FAR) as supplemented by the Agriculture Acquisition Regulation, including this part, in the procurement of agricultural commodities and products of agricultural commodities that are used in domestic feeding and international feeding and development programs.

(b) To the maximum extent possible, the use of electronic submission of solicitation-related documents shall be used with respect to the acquisition of agricultural commodities and related freight; however, to the extent that a solicitation allows for the submission of written information in addition to information in an electronic format and there is a discrepancy in such submissions, the information submitted in a written format shall prevail unless the electronic submission states that a specific existing written term is superseded by the electronic submission.

(c) With respect to the acquisition of freight for the shipment of agricultural commodities and products of agricultural commodities, the provisions of the FAR, including part 47, shall be utilized and various types of services to be obtained may include multi-trip voyage charters.

**470.103 United States origin of agricultural products.**

(a) As provided by 7 U.S.C. 1732(2) and 17360–1(a) commodities and the products of agricultural commodities acquired for use in international feeding and development programs shall be products of United States origin.

(b) Commodities and the products of agricultural commodities acquired for use by the Food and Nutrition Service shall be a product of the United States, except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to additives. Additives from non-domestic sources will be allowed to be utilized as a United States product if such additives are not otherwise:

(1) Produced in the United States; or

(2) Commercially available at fair and reasonable prices in the United States from domestic sources.

(c) A commingled product shall be considered to be a product of the United States if, during the contract performance period specified in a solicitation, the contractor procures a quantity of the product that is of United States origin in a quantity equal to or more than the quantity to be delivered under the solicitation.

(d) With respect to the procurement of products derived from animals, such products shall not be considered products of the United States if the animal from which the product was obtained:

(1) Entered the United States from a foreign country; and

(2) Was delivered directly to a processing plant for processing.

**470.200 [Reserved]**

**470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service programs.**

(a) *Lowest Landed Cost and Delivery Considerations.*

(1) Except as provided in paragraphs (a)(3) and (4) of this section, in contracts for the Foreign Agricultural Service for commodities and related freight shipment for delivery to foreign destinations, the contracting officer shall consider the lowest landed cost of delivering the commodity to the intended destination. This lowest landed cost determination will be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet 46 U.S.C. 55314(c)(3) and cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement or a related freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or related freight, when combined with other offers for commodities or related freight, results in a lower landed cost to the Department.

(2) The Department may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors considered in this determination may include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. The Department may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of the Department to have the commodity delivered in a safe and timely manner. Such situations include:

(i) A port is congested;

(ii) Port facilities are overloaded;

(iii) A vessel would not be able to dock and load cargo without delay;

(iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or

(v) Other similar situation that may adversely affect the ability of the

Department to have the commodity delivered in a timely manner.

(3) *Use of Other Than Lowest Landed Cost.* In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the contracting officer may award an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section, if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors may adversely affect the delivery of such commodities through damage or untimely delivery. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels not being able to dock and load cargo without delay due to conditions at the port; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the ability of the Department to achieve timely delivery of the commodity;

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured; or

(E) The contracting officer determines that extenuating circumstances preclude awards on the basis of lowest-landed cost, or that efficiency and cost-savings justify use of types of ocean service that would not involve an analysis of freight. However, in all such cases, commodities would be transported in compliance with cargo preference requirements. Examples of extenuating circumstances are events such as internal strife at the foreign destination or urgent humanitarian conditions threatening the lives of persons at the foreign destination. Other types of services may include, but are not limited to, multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery cost and freight (C & F), delivery cost insurance and freight (CIF), and indexed ocean freight costs.

(4) If a contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer will provide to the Head of Contracting Activity Designee a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis consistent with Title 48 of the Code of Federal Regulations. This request shall include a statement of the reasons for not using lowest landed cost basis. The Head of the Contracting Activity Designee, or the designee one level above the contracting officer, may either accept or reject this request and shall document this determination.

(b) *Multiple Offers or Delivery Points.* If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(c) *Freight Shipping and Rates.* (1) In determining the lowest-landed cost, the Department shall use the freight rates offered in response to solicitations issued by the Department or, if applicable, the grantee organization.

(2) Freight rates offered must be submitted as specified in the solicitation issued by the Department or, if applicable, the grantee organization. Any such solicitation issued by a grantee organization must contain the following elements:

(i) If directed by the Department, include a closing time for the receipt of written freight offers and state that late written freight offers will not be considered;

(ii) Provide that freight offers are required to have a canceling date no later than the last contract lay day specified in the solicitation;

(iii) Provide the same deadline for receipt of written freight offers from both U.S. flag vessel and non-U.S. flag vessels; and

(iv) Be received and opened prior to any related offer for acquisition of commodities to be shipped.

(3) The Department may require organizations that will receive commodities from the Department to submit information relating to the capacity of a United States port, or, if applicable, a terminal, prior to the

acquisition of such commodities or freight.

(d) If the Department is not the party procuring freight with respect to a shipment of an agricultural commodity for delivery to a foreign destination, the organization that will receive commodities from the Department, or its shipping agent, shall be notified by the Department of the vessel freight rate used in determining the commodity contract award and the organization will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate.

**470.202 Acquisition of commodities for United States Agency for International Development (USAID) programs.**

(a) *Lowest Landed Cost and Delivery Considerations.* (1) Except as provided in paragraphs (a)(3) and (e)(2) of this section, with respect to the acquisition of agricultural commodities for delivery to foreign destinations and related freight to transport such commodities under Title II of Pub. L. 480, contracts will be entered into in a manner that will result in the lowest landed cost of such commodity delivery to the intended destination. This lowest landed cost determination shall be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined to be necessary and practicable to meet 46 U.S.C. 55314(c)(3) and cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement or a freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or freight, when combined with other offers for commodities or freight, results in a lower landed cost to USAID.

(2) The Department may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors which will be considered in this determination will include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. The Department may consider the use of another coastal range or port if a situation exists at a port that may

adversely affect the ability of the Department of Agriculture to have the commodity delivered in a safe and/or timely manner. Such situations include:

- (i) A port is congested;
- (ii) Port facilities are overloaded;
- (iii) A vessel would not be able to dock and load cargo without delay;
- (iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or
- (v) Other similar situation that may adversely affect the ability of the Department of Agriculture to have the commodity delivered in a timely manner.

(3) *Use of Other than Lowest Landed Cost.* In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the Department of Agriculture may complete an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section, if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors will adversely affect the delivery of such commodities without damage or in a timely manner. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels would not be able to dock and load cargo without delay; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the ability of the Department of Agriculture to achieve timely delivery of the commodity; or

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured.

(4) If the contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer shall provide to the head of contracting activity designee and to

USAID, a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis. This request shall include a statement of the reasons for not using lowest landed cost basis. The head of contracting authority designee, or one level above the contracting officer, with the concurrence of USAID, shall, on an expedited basis, either accept or reject this request and shall document this determination in writing and provide a copy to USAID.

(b) *Freight Shipping and Rates.* (1) In determining lowest-landed cost as specified in paragraph (a) of this section, the Department shall use vessel rates offered in response to solicitations issued by USAID or grantee organizations receiving commodities under 7 U.S.C. 1731 *et seq.*

(2) USAID may require, or direct a grantee organization to require, an ocean carrier to submit offers electronically through a Web-based system maintained by the Department. If electronic submissions are required, the Department may, at its discretion, accept corrections to such submissions that are submitted in a written form other than by use of such Web-based system.

(c) The contracting officer shall consider total transit time, as it relates to a final delivery date, in order to satisfy Title II program requirements.

(d)(1) Commodities offered for delivery free alongside ship to Great Lakes port range or intermodal bridge-point Great Lakes port range that represent the overall (foreign and U.S. flag) lowest landed cost will be awarded on a lowest landed cost basis. Tonnage allocated on this basis will not be reevaluated on a lowest landed cost U.S.-flag basis unless the contracting officer determines that 25 percent of the total annual tonnage of bagged, processed or fortified commodities furnished under 7 U.S.C. 1731 *et seq.* has been, or will be, transported from the Great Lakes port range during that fiscal year.

(2) The contracting officer shall consider commodity offers as offers for delivery "intermodal bridge-point Great Lakes port range" only if:

(i) The offer specifies delivery at a marine cargo-handling facility that is capable of loading ocean going vessels at a Great Lakes port, as well as loading ocean going conveyances such as barges and container vans, and

(ii) The commodities will be moved from one transportation conveyance to another at such a facility.

(e) *Multiple Awards or Delivery Points.* (1) If more than one offer for the sale of commodities is received or more

than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(2) The contracting officer may determine that extenuating circumstances preclude awards on the basis of lowest landed cost. However, in all such cases, commodities may be transported in compliance with cargo preference requirements as determined by USAID.

(3) The contracting officer shall notify USAID or, if applicable, the grantee organization, that its shipping agent will be notified of the vessel freight rate used in determining the commodity contract award. The grantee organization or USAID will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate so used.

#### 470.203 Cargo preference.

An agency having responsibility under this subpart shall administer its programs, with respect to this subpart, in accordance with regulations prescribed by the Secretary of the Department of Transportation.

**Michael W. Yost,**

*Executive Vice President, Commodity Credit Corporation, and Administrator, Foreign Agricultural Service.*

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## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 360

#### Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure and Large-Bank Deposit Insurance Determination Modernization; Limited Opportunity To Resubmit Comment

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice of limited opportunity to resubmit comment.

**SUMMARY:** The FDIC invites the commenter who filed a public comment at <http://www.regulations.gov> on April 14, 2008, relating to the FDIC's Notice of Proposed Rulemaking involving "Processing of Deposit Accounts in the

Event of an Insured Depository Institution Failure and Large-Bank Deposit Insurance Determination Modernization" to resubmit to the FDIC his or her comment relating to this action. We are taking this action because due to a technical software error, a public comment submitted via <http://www.regulations.gov> was not transmitted to the FDIC. Therefore, the FDIC will provide this commenter with a limited opportunity to resubmit his or her comment to the FDIC on or before November 24, 2008.

**DATES:** The commenter whose comment was not transmitted to the FDIC in accordance with the situation described above may resubmit his or her comment on or before November 24, 2008.

**ADDRESSES:** The affected commenter may submit his or her comment by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Agency Web Site:* <http://www.FDIC.gov/regulations/laws/federal>. Follow instructions for submitting comments on the FDIC's Web Site.

- *E-mail:* [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include "Resubmitted Comments" in the subject line of the message.

- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429

- *Hand Delivery/Courier:* Guard Station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).

- *Public Inspection:* All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/> including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275-3342 or (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:** A. Ann Johnson, Counsel, Legal Division, (202) 898-3573 or [aaajohnson@fdic.gov](mailto:aaajohnson@fdic.gov).

**SUPPLEMENTARY INFORMATION:** In January 2003, the interagency eRulemaking Program launched <http://www.regulations.gov> to provide citizens with an online portal to learn about proposed regulations and to submit their comments on the rulemaking process. For the first time, American citizens could access and comment on all proposed Federal regulations from a single Web site.

A software problem that <http://www.regulations.gov> resulted in the non-transmittal of public comments to some federal agencies from March 22,