

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Part 5

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

RIN 2501-AC98

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

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Interim rule.

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

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

*Comment Due Date:* July 21, 2003.

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

#### FOR FURTHER INFORMATION CONTACT:

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

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

#### SUPPLEMENTARY INFORMATION:

##### I. Background

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

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

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

The purposes of Executive Order 13202 are to:

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

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

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

##### II. This Interim Rule

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

##### A. Scope of Interim Rule Limited to Federally Funded Contracts

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

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

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