

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

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

### C. Definitions

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

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

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

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

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

### D. Exemptions

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

### E. Sanctions

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

### F. Voluntary Project Labor Agreements

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

### III. Justification for Interim Rulemaking

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

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

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

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

### IV. Findings and Certifications

#### Regulatory Flexibility Act

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