ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Jan E. Guthrie, Private Radio Bureau, (202) 632-7175.

SUPPLEMENTARY INFORMATION:

Order

In the matter of editorial amendment of Part 87 of the Commission's rules to reflect a Part 1 requirement.

Adopted: April 8, 1981.

Released: April 9, 1981.

1. Section 1.924(a)(2) of the Commission's Rules states that licenses for stations in the Aviation and Marine Radio Services cannot be assigned. Whenever there is a change in ownership of one of these stations, the new owner must apply for a new license. This rule is not reflected in Part 87, the aviation rules.

2. We are therefore proposing to amend our rules by adding this restriction to Part 87 in order to clear up any misunderstanding which may have resulted from this omission.

3. Accordingly, the Commission's rules are being amended editorially. Authority for this action is contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, and in Section 0.231(d) of the Commission's Rules. Since the amendment is editorial in nature, the public notice, procedure and effective date provisions of 5 U.S.C. 553(d) do not apply.

4. In view of the above, it is ordered, that the rule amendment set forth in the attached Appendix is adopted effective April 22, 1981.

(Secs. 4, 303, 307, 48 Stat., as amended, 1066, 1082, 1083; 47 U.S.C. 154, 303, 304)

Federal Communications Commission.

Alan R. McKie,

Deputy Executive Director.

Appendix

Part 87 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 87—AVIATION SERVICES

In § 87.29, a new paragraph (a)(6) is added to read as follows:

§ 87.29 Application for aircraft radio station license.

(a) * * *

(6) An aircraft station license may not be transferred or assigned. In lieu of transfer or assignments, an application for a new station authorization shall be filed in each case, and the previous authorization shall be forwarded to the Commission for cancellation.

* * * * *

[FR Doc. 81-12556 Filed 4-24-81; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[Docket 64a]

Participation by Minority Business Enterprise in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final Rule.

SUMMARY: The Department of Transportation is publishing a final rule to make an interim amendment to its minority business enterprise regulation. This interim provision will remain in effect during the time that the Department is preparing a comprehensive revision of the entire minority business rule. The interim amendment changes the contract award mechanism of the regulation and is necessary to relieve regulatory burdens associated with the existing rule pending the completion of this comprehensive revision.

EFFECTIVE DATE: This rule is effective April 27, 1981.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Office of the Assistant General Counsel for Regulation and Enforcement, Room 10421, 400 Seventh Street SW., Washington, D.C. 20590 (202)-426-4723.

SUPPLEMENTARY INFORMATION:

Background

The Department of Transportation (DOT) published a final minority business enterprise (MBE) regulation on March 31, 1980 (49 CFR Part 23; 45 FR 21172). The regulation requires recipients of DOT financial assistance to prepare and submit for DOT approval MBE affirmative action programs. The rule requires that these programs contain several elements. These elements include requiring prospective contractors to submit the names and other information about their MBE subcontractors (§ 23.45(h)) and provisions requiring recipients to ensure that contracts are awarded to bidders that meet MBE goals or make sufficient reasonable efforts to do so (§ 23.45(i)). The latter provision establishes a conclusive presumption that, if one bidder meets the goal and offers a reasonable price, bidders that did not meet the goal did not exert sufficient reasonable efforts, and hence are ineligible to receive the contract.

Sections 23.45 (h) and (i) have been criticized as establishing an illegal quota system, conflicting with the principle of awarding contracts to the lowest bidder, and unnecessarily raising costs. A significant number of state transportation agencies and other recipients have requested exemptions from these provisions. Seventeen lawsuits have been filed in various Federal district courts challenging the regulations.

In Executive Order 12291 and other directives, President Reagan has told Federal agencies to review their existing regulations to determine which among them can be modified or rescinded to reduce regulatory burdens. The Department of Transportation has identified the MBE rule as one of the costly or controversial rules deserving priority review. After reviewing the rule and the controversy and litigation surrounding it, the Department has concluded the rule should be changed. The Department intends to publish a notice of proposed rulemaking (NPRM) to revise the rule comprehensively in the near future.

Proposed Interim Amendment

Given the requirements of the rulemaking process, it will be a number of months before the Department can promulgate a final rule based on this planned comprehensive NPRM. The development of a proposed revision to an entire significant regulation, involving the reconsideration of all issues, of course takes much longer than making the much more narrow and limited change made by this amendment. Consequently, on March 12, 1981, the Department published a proposed interim amendment (46 FR 16282). The proposed interim amendment would alter the controversial MBE contract award mechanism of the Department's minority business rule, replacing the "conclusive presumption" approach with a provision that would allow the low bidder to receive the contact if it met the MBE contract goals or if it satisfied the recipient that it had made good faith efforts to do so. In the preamble to the proposed interim amendment, the Department provided a list of factors which recipients could take into account in determining whether a contractor had made good faith efforts.

In response to this NPRM, the Department received over 400 comments. Most of these comments took a position for or against the proposed

interim change. While the Department did not base its decision on the number of responses for and against the proposal (some of which, on both sides, appeared to be the product of concerted form letter compaigns), a numerical breakdown of comments for and against the proposal by different categories of commenters is interesting. The comments by non-minority contractors and groups representing them were heavily in favor of the change; comments from minority contractors and groups representing them were heavily against the proposal. Most, though not all, state and local government recipient agencies and officials favored the change. The distribution of comments is as follows:

	For	Against
Nonminority contractors and groups:	226	0
Minority contractors and groups	3	102
State and local agencies and officials	34	8
Members of Congress	1	4
Unaffiliated individuals and miscellaneous groups	11	9
Totals	275	123

Four non-minority contractors and four State and local agencies suggested that the interim amendment did not go far enough in eliminating regulatory requirements; some of these suggested that the Department should simply withdraw the rule altogether. Another 14 comments were not identifiable as for or against the proposed amendment or did not specifically address the interim amendment. Many commenters, in addition to stating a position on the proposed interim amendment, also made recommendations for the comprehensive revision of the entire rule. These suggestions will not be addressed in the context of the interim rulemaking; however, these comments will be taken fully into account as the Department prepares proposed revisions to the entire MBE rule.

The Comment Period Issue

The proposed interim rule was published with a two-week comment period. The NPRM cited three reasons for this shorter-than-usual comment period. These reasons were the potential adverse effect of a longer comment period on recipients' procurement processes and confusion in the administration of the program, the fact that DOT has already received a significant number of comments on the issue of the contract award mechanism during the 11 months since the original MBE rule was already published, and the existence of a significant number of ongoing lawsuits that have focused on the contract award mechanism of the existing regulation. Approximately 18 commenters, all of them minority contractors or persons sharing the minority contractors' point of view on the proposed interim amendment, requested that this comment period be extended, usually to 60 days. Some of these commenters also requested that public hearings be held concerning the proposed interim amendment.

The Department believes that the original reasons for establishing a two-week comment period remain valid. Moreover, the Department received in response to the NPRM over 400 public comments. Significant numbers of comments were received from representatives of all the major groups concerned—minority and non-minority contractors and recipients—as well as the views of a significant number of other persons. These comments make the points of view of these groups very clear. It should be pointed out that the number of comments received in response to this NPRM is significantly higher than the number of comments (approximately 260) received in response to the NPRM for the original minority business enterprise rule itself, which had a 90-day comment period.

Because the Department believes its reasons for a shorter comment period remain valid and because the Department received extensive public comments that appear to represent all major interested groups and all major points of view on the proposed interim amendment, the Department does not believe that an extended comment period or public hearings would produce significant new or different information from that which the Department has already received. Consequently, the Department has decided against extending the comment period or holding public hearings on the proposed interim amendment.

Suggestions for More Sweeping Change

Eight comments, four from non-minority contractors and four from recipients, requested that the Department make more radical changes in the rule than those proposed by the NPRM or withdraw the rule altogether. These comments asserted, in effect, that it is inappropriate, illegal, or both, for the Department to establish even the kind of requirements pertaining to the use of minority businesses proposed by the NPRM. It should be emphasized that a strong majority both of recipients and non-minority contractors and their groups did not take this position, and supported the proposed change.

The Department will consider a full range of possible alternatives as it comprehensively reviews the regulation. However, this NPRM had a narrow purpose; namely, to change the single most troublesome portion of the regulation while the comprehensive revision process was underway. The Department wishes to permit recipients' MBE programs to continue to exist with as little disruption as possible during this interim period. In addition, more radical changes could exceed the scope of the March 12 NPRM, making questionable the procedural propriety of such changes. For these reasons, the Department will not make additional changes to the regulation as part of this interim rule.

Section-by-Section Analysis

The Department has decided to adopt the proposed interim amendment. However, the Department has made a number of refinements and technical changes in the language of the proposed interim amendment in response to comments.

Section 23.45(h)(1). The Department has rewritten this paragraph for greater clarify. Some commenters believed that the relationship of this paragraph to the requirement of § 23.45(g) with respect to setting of contract goals was confusing. As it is now written, the paragraph provides that, in all contracts for which contract goals have been established, the recipient shall, in the solicitation, inform competitors that the apparent successful competitor will be required to submit MBE participation information to the recipient and that award of the contract will be conditioned upon satisfaction of the requirements established by the recipient pursuant to this subsection. This paragraph does not in any way change the circumstances under which recipients are to set contract goals. The circumstances under which contract goals are set are governed by § 23.45(g), and recipients should continue to comply with paragraph (g) as they have in the past.

Subparagraph (i). This subparagraph, which describes the information concerning MBE participation that contractors must submit to a recipient, is unchanged from the NPRM. Recipients are free to specify the format in which this information is submitted. One recipient pointed out that it had asked for, and received from the Department, permission to require contractors to submit the aggregate dollar amount of MBE participation rather than the amount of MBE participation for each named firm. This recipient may continue to follow the same practice under the interim amendment.

Subparagraph (ii). This subparagraph sets forth with greater clarity and

specificity the interim amendment's requirements for the timing of the submission of the MBE information to recipients. Several recipients commented that, in their own procurement practices, it made better sense to require the submission of this information at a time other than before the "award" of the contract. One State's DOT, for example, said that in its procurement process, the appropriate time to require submission of the information was not "award" but rather "execution," the time at which the state made its binding commitment to the contractor. The Department believes that these recipients' requests for greater flexibility in the timing of the submission of MBE information have merit. Therefore, this subparagraph permits recipients to select the time at which they require MBE information to be submitted, so long as the time of submission is before the recipient binds itself to the performance of the contract by the apparent successful competitor.

The Department did not adopt a comment by several other commenters that MBE information should be permitted to be submitted, and compliance with good faith efforts determined, after the recipient has awarded and signed the contract and a contractor's performance has already begun. While provisions that permit this approach are among those that the Department may wish to consider as part of its comprehensive revision of the rule, the Department does not believe that it is necessary or appropriate to make this more fundamental change in its approach at this time. The determination by the recipient that the contractor has met the goal or made good faith efforts, under this interim amendment, continues to be made before the recipient commits itself to the performance of the contract by the apparent successful bidder. This interim amendment, again, was intended to correct an immediate problem with respect to the contract award mechanism while creating as little disruption as possible in recipients' existing MBE programs.

Paragraph (h)(2). This paragraph is adopted, with one substantive change, from § 23.45(h)(1)(ii) of the NPRM. It provides that if the MBE participation submitted does not meet MBE contract goals (including separate goals for women-owned businesses), the apparent successful competitor must satisfy the recipient that the competitor made good faith efforts to meet the goals. This section is at the heart of the change made by the interim amendment. As previously noted, different categories of commenters had widely divergent views on the wisdom of adopting this amendment. The Department is persuaded that the change is advisable. As a matter of policy, this Department, and the entire Administration, are committed to achieving legitimate regulatory objectives with the least possible burden on affected parties.

The Department believes that prohibiting discrimination against minority and women-owned businesses and ensuring that such businesses have full opportunity to participate in DOT-assisted programs are legitimate government objectives.

The Department has also concluded, however, that requiring recipients to use the contract award mechanism in the existing § 23.45(i) is an unduly burdensome means of achieving this objective. In addition, the uncertainty surrounding the legal validity of the existing contract award mechanism has made rational and consistent administration of the Department's MBE program difficult. In the interim period to be covered by this amendment, the Department believes that changing the regulation's requirements to make them less burdensome will not adversely affect the Department's ability to carry out the objectives described above.

Subparagraph (i). The preamble to the NPRM stated that recipients who wished to continue using MBE programs employing the contract award mechanism of the existing § 23.45 (h) and (i) could continue to do so. Several recipients commented that they wanted a provision to be inserted in the text of the amendment itself ensuring that they could continue to use mechanisms of their own choice that differ from or went beyond the good faith efforts approach of the interim amendment. These commenters were concerned that, in the absence of such language, the amendment could be read as limiting them to the good faith efforts approach. A few non-minority contractors commented to the opposite effect; that is, they believed that the interim amendment should explicitly prohibit recipients from going beyond the good faith efforts approach.

In the Department's view, this interim amendment—which is to be in effect only until a comprehensive revision of the rule is completed—should permit recipients the maximum degree of flexibility and confront them with the minimum possible disruption. In addition, some recipients who commented on this issue noted that they had MBE programs that differed both from the contract award mechanism of the existing DOT regulation and from the good faith efforts approach of the interim amendment. We agree with these recipients that they should be permitted to use the mechanism of the original § 23.45 (h) and (i) or another system of their own choice, as long as it is as effective or more effective in achieving the regulatory objectives as the good faith efforts approach. The good faith efforts approach of the interim amendment is designed to establish a minimum, not a maximum, level of recipient program strength. The funding that DOT recipients receive for DOT-assisted programs and projects will not be adversely affected in any way by the choice the recipient makes under this paragraph.

This subparagraph also provides that if a recipient intends to use a mechanism other than the good faith efforts mechanism set forth in this amendment, it must write a letter to the appropriate DOT office concerning the content of the requirements it has prescribed within a month of this amendment's effective date. The DOT office concerned, for these purposes, is the same DOT office to which the recipient submitted its MBE program under 49 CFR Part 23. DOT approval of requirements differing from those set forth in this amendment is not necessary.

Subparagraph (ii). If DOT determines that alternative requirements established by a recipient are not as or more effective than the good faith efforts requirement of this interim amendment, DOT may subsequently direct the recipient to award contracts according to the good faith efforts requirement of the interim amendment in place of the recipient's own procedure. This determination is not a finding of noncompliance with the regulation, but merely an administrative decision that the recipient's chosen mechanism will be less effective in ensuring opportunities for MBE participation in DOT-assisted contracts.

Effect on Pending Procurements

Solicitations issued on or after the effective date of this amendment may employ the amendment's good faith efforts mechanism. Solicitations issued before this amendment's effective date, however, were required to comply with the requirements of former § 23.45(h) and (i). It is likely that, in a number of cases, recipients will have issued solicitations before the effective date of this amendment, with contract award scheduled for after the effective date.

The Department intends that recipients may use the good faith efforts approach with respect to any contract award that occurs on or after the

amendment's effective date. Consequently, insofar as compliance with DOT regulatory requirements is concerned, a recipient may use the good faith efforts approach to award such a contract even though the solicitation was issued before the effective date of the amendment. Of course, recipients' actions must also conform to their own procurement laws, rules and practices. Where a recipient issued a solicitation saying that the contract would be awarded according to the "conclusive presumption" mechanism of the original § 23.45 (h) and (i), the recipient may need to amend the solicitation or take other action in order to award the contract under this amendment's good faith efforts approach.

Effect on MBE Programs Approvals

The Department has rejected, or has withheld approval of, a number of recipients' MBE programs because these programs do not conform to the requirements of § 23.45 (h) and (i) of the original MBE regulation. The Department is now in the position to be able to approve any recipient's MBE program the contract award mechanism of which is consistent with the terms of this interim amendment, as long as all other portions of the MBE program are also acceptable. Approval of MBE programs may still be withheld pending resolution of problems in other areas of programs, however. Also, the Department will accept modifications of previously approved programs that conform to this interim amendment.

Paragraph (h)(3). This paragraph is substantively unchanged from the NPRM, except that, to be consistent with paragraph (h)(2), language has been inserted to recognize that recipients may establish requirements in lieu of the good faith efforts approach. Where a recipient does so, receiving a contract is conditioned on meeting the recipient's requirements.

Appendix A. A number of commenters complained that the discussion of the "good faith efforts" in the preamble to the NPRM was not sufficiently explicit. To some extent, this criticism was of the concept of the good faith efforts itself. That is, some commenters felt that "good faith efforts" is an inherently subjective, judgmental term that makes adequate evaluations of contractor efforts difficult. Some of these commenters recommended that the regulation include a specific and explicit set of criteria for what constitutes a good faith effort. The Department did not adopt this recommendation. In the Department's view, determinations concerning good faith efforts inherently involve the exercise of discretion and judgment. An attempt to provide a specific and explicit set of criteria, sufficient to cover all situations with precision, could produce a document that would be too large and complex. This is not a desirable result. However, the Department did adopt the suggestion that guidance concerning good faith efforts should be attached to the regulation.

For this reason, the Department has expanded its guidance on this subject and transferred it from the preamble to Appendix A. As Appendix A states, the contractor's efforts, in order to be viewed as good faith efforts, must be those that one could reasonably expect a contractor to take if the contractor were actively and aggressively seeking to meet the MBE goals. The level of efforts required is a level that could be expected to meet the MBE goals, not merely to obtain some MBE participation. *Pro forma* efforts, of course, do not constitute good faith efforts.

In looking at a contractor's efforts, the recipient should focus not on the contractor's state of mind or sincerity but rather upon whether the efforts the contractor actually made could reasonably be expected to produce a level of MBE participation sufficient to meet the goals. It is this kind of effort that represents the "good hard try" spoken of in the preamble to the NPRM.

Appendix A includes a list of types of efforts by contractors through which they could obtain MBE participation and meet contract goals. Despite the statement in the preamble to the NPRM that the list was not intended to be a mandatory checklist, some commenters were still concerned that recipients would view the items on the list as mandatory. The Department reiterates that it does not intend to require recipients to require contractors to make any one or any combination of the kinds of efforts set forth in the list. The use of this list, or items on it, by recipients is discretionary. Nor is the list intended to be exhaustive or exclusive.

A number of commenters, particularly among non-minority contractors, expressed concern about the language of one or another of the items on the list. In most cases, the concern was that if a recipient insisted that a contractor make a certain kind of effort, contractors would be adversely affected. Because the items on the list are merely suggestions of things at which recipients may look, and are not being mandated by the Department, the Department is satisfied that it is not imposing unrealistic or unworkable requirements through this guidance. If recipients exercise their discretion, with respect to the efforts they demand of contractors, in a way that the contractors believe is adverse to their interests, the contractors and recipients involved should resolve the differences among themselves. Consistent with the Department's desire to permit flexibility to recipients in the implementation of the regulation, we do not believe that it is appropriate for the Department to assume an overly prescriptive role in this area.

The Department did make a few minor changes to the list of kinds of efforts as the result of comments. In item number 1, the Department added the word "contracting" to ensure that the Department was not misunderstood to focus its program solely on subcontracting. In item 3, language was added relating to the timeliness of notice provided to MBEs concerning contracting opportunities. In item 5, the Department added language to specify that one type of effort that could be included was breaking down contracts into economically feasible units to facilitate MBE participation. In item number 8, the Department added assistance with lines of credit to the kinds of assistance which contractors might provide MBEs. Finally, the Department added a new number 9 to the list, concerning the use by the contractor of minority organizations and other resources to obtain MBE participation.

Effective Date

The Department of Transportation is making this rule effective immediately. This rule involves matters relating to public grants. Consequently, because of the exception of matters relating to public grants from the rulemaking requirements of the Administrative Procedure Act (5 U.S.C. 553(a)(2)), the Act's requirement that a rule be published 30 days before its effective date (5 U.S.C. 553(d)) does not apply to this rule.

Under the Department's Regulatory Policies and Procedures, the Department may make a rule effective upon publication if it publishes a statement of its reasons for the action. The Department believes that it would be impracticable or contrary to the public interest to delay the effective date of this rule for the following reasons:

1. Recipients are delaying procurements in order that solicitations can be issued under the terms of this amendment. Other recipients are intending to amend solicitations or resolicit contracts under the amendment's provisions. To delay the effective date of the rule for 30 days

would delay procurements, cause confusion among recipients and contractors, and potentially hold up work on DOT-assisted projects.

2. This amendment is designed to relieve a regulatory burden by eliminating a requirement that the Department has concluded should no longer be in effect. If, as the Department believes, it is in the public interest to effect regulatory relief with respect to the MBE contract award mechanism, then it is clearly contrary to the public interest to postpone the implementation of this relief.

3. A significant number of lawsuits are still pending with respect to the MBE regulation. It is in the public interest to resolve expeditiously the issues in these lawsuits. The final interim amendment is expected to facilitate this process, and consequently should be made effective as soon as possible.

The policy official responsible for making the determination concerning the effective date of the rule is John Fowler, General Counsel of the Department of Transportation.

Regulatory Evaluation

Consistent with the Department of Transportation's Regulatory Policies and Procedures, the Department has prepared a Regulatory Evaluation in connection with this rulemaking. The Regulatory Evaluation is on file in the office of the Assistant General Counsel for Regulation and Enforcement, Department of Transportation, Room 10421, 400 7th Street SW., Washington D.C. The phone number of this office is 202–426–4723. The public may review the Regulatory Evaluation at this office from 9:00 a.m. to 5:00 p.m. Monday—Friday, or may call the office and request that a copy be mailed.

Regulatory Flexibility Act Determination

The Department has determined that this interim amendment will not have significant economic effects on a significant number of small entities. The regulation is essentially a relaxation of a regulatory burden that many business and recipient organizations believed that the existing regulation imposed. By ensuring that the low bidder will have a full opportunity to obtain contracts in all cases, so long as that bidder makes good faith efforts to meet MBE contract goals, the regulation may reduce potential costs to business and government. Any impact that the regulation has with respect to small businesses and other small entities, therefore, is likely to be a positive impact.

Issued in Washington, D.C. on April 22, 1981.

Drew Lewis,

Secretary of Transportation.

Accordingly, 49 CFR Part 23 is amended by revising § 23.45 (h); removing paragraph (i); and adding Appendix A to the section to read as follows:

§ 23.45 [Amended]

* * * * *

(h) *A means to ensure that competitors make good faith efforts to meet MBE contract goals:*

(1) For all contracts for which contract goals have been established, the recipient shall, in the solicitation, inform competitors that the apparent successful competitor will be required to submit MBE participation information to the recipient and that the award of the contract will be conditioned upon satisfaction of the requirements established by the recipient pursuant to this subsection.

(i) The apparent successful competitor's submission shall include the following information:

(A) The names and addresses of MBE firms that will participate in the contract;

(B) A description of the work each named MBE firm will perform;

(C) The dollar amount of participation by each named MBE firm.

(ii) The recipient may select the time at which it requires MBE information to be submitted. *Provided,* that the time of submission shall be before the recipient commits itself to the performance of the contract by the apparent successful competitor.

(2) If the MBE participation submitted in response to paragraph (h)(1) of this section does not meet the MBE contract goals, the apparent successful competitor shall satisfy the recipient that the competitor has made good faith efforts to meet the goals.

(i) The recipient may prescribe other requirements of equal or greater effectiveness in lieu of good faith efforts. Any recipient choosing alternative requirements shall inform the DOT office concerned by letter of the content of the requirements it has prescribed within 30 days of the effective date of this subsection. The recipient may put these alternative requirements into effect immediately and prior DOT approval of alternative requirements is not necessary.

(ii) If the Department determines that the alternative requirements are not as or more effective than the good faith efforts provisions of this subsection, the Department may require the recipient to use the good faith efforts requirements of this subsection instead of the requirements it has prescribed.

(3) Meeting MBE contract goals, making good faith efforts as provided in paragraph (h)(2) of this section, or meeting requirements established by recipients in lieu of good faith efforts, is a condition of receiving a DOT-assisted contract for which contract goals have been established.

(i) (Reserved)

* * * * *

Appendix A—Guidance Concerning Good Faith Efforts

To determine whether a competitor that has failed to meet MBE contract goals may receive the contract, the recipient must decide whether the efforts the competitor made to obtain MBE participation were "good faith efforts" to meet the goals. Efforts that are merely *pro forma* are not good faith efforts to meet the goals. Efforts to obtain MBE participation are not good faith efforts to meet the goals, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation sufficient to meet the goals. In order to award a contract to a competitor that has failed to meet MBE contract goals, the recipient must determine that the competitor's efforts were those that, given all relevant circumstances, a competitor actively and aggressively seeking to meet the goals would make.

To assist recipients in making the required judgment, the Department has prepared a list of the kinds of efforts that contractors may make in obtaining MBE participation. It is not intended to be a mandatory checklist; the Department does not require recipients to insist that a contractor do any one, or any particular combination, of the things on the list. Nor is the list intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases. In determining whether a contractor has made good faith efforts, it will usually be important for a recipient to look not only at the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts.

The Department offers the following list of kinds of efforts that recipients may consider:

(1) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform MBEs of contracting and subcontracting opportunities;

(2) Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;

(3) Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the contract was being solicited, in sufficient time to allow the MBEs to participate effectively;

(4) Whether the contractor followed up initial solicitations of interest by contacting MBEs to determine with certainty whether the MBEs were interested;

(5) Whether the contractor selected portions of the work to be performed by MBEs in order to increase the likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);

(6) Whether the contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;

(7) Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;

(8) Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor; and

(9) Whether the contractor effectively used the services of available minority community organizations; minority contractors' groups; local, state and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.

(Title VI of the Civil Rights Act of 1964; Section 30 of the Airport and Airway Development Act of 1970, as amended; Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976; Section 19 of the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 324; Executive Order 11625; Executive Order 12138)

[FR Doc. 81-12620 Filed 4-24-81; 8:45 am]

BILLING CODE 4910-62-M

Research and Special Programs Administration

49 CFR Parts 171 and 178

[Docket No. HM163E; Amdt. Nos. 171-61, 173-146,177-54, 178-66]

Withdrawal of Bureau of Explosives Delegations of Authority and Miscellaneous Amendments

Correction

In FR Doc. 81-11604, published at page 22194 in the issue of Thursday, April 16, 1981, make the following corrections:

1. on page 22195, second column, the section heading now reading

§ 171.6 Matter incorporated by reference

should read

§ 171.7 Matter incorporated by reference.

2. On page 22196, first column, the section heading now reading

§ 17859-16 Porous filling

should read

§ 178.59-16 Porous filling.

BILLING CODE 1505-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 671

Commercial Tanner Crab Fishery off the Coast of Alaska

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: The Director, Alaska Region, (Regional Director), National Marine Fisheries Service (NMFS), closes by field order the North Mainland Section of the Kodiak District in Registration Area J to fishing for Tanner crab (*Chionoecetes* spp) by vessels of the United States. This action is necessary because the desired harvest level in this section of the Kodiak District has been reached. The action will prevent overfishing on localized stocks of Tanner crab.

DATES: Effective date: April 22, 1981 until 11:59 p.m., Alaska Daylight Time, April 30, 1981. Comment date: Public Comments must be received on or before May 7, 1981.

ADDRESS: Comments may be sent to Robert W. McVey, Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802.

FOR FURTHER INFORMATION CONTACT: Robert McVey, 907-586-7221.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for the Commercial Tanner Crab Fishery off the Coast of Alaska (FMP) provides for in-season adjustments to fishing seasons and areas. Implementing rules in 50 CFR Part 671 specify in § 671.27(b) that these decisions shall be made by the Regional Director under the criteria set out in that section. On June 17, 1980, the Assistant Administrator for Fisheries, NOAA, delegated to the Regional Director authority to promulgate field orders making in-season adjustments.

50 CFR 671.26(f) creates four districts within Registration Area J. One of these is the Kodiak District which is managed by the Alaska Department of Fish and Game (ADF&G) as eight separate sections. The Tanner crab stock in each section is evaluated individually to determine its abundance and status. Amendment 6 to the FMP will establish the same eight sections to be consistent with the State's management regime; final rules to this effect have not yet been promulgated.

The sections were created, in part, to prevent overfishing of individual Tanner crab stocks by allowing closure of a particular section when the desired harvest level in that section is reached. The optimum yield is nine to fifteen million pounds for the entire Kodiak District: a guideline harvest level of 1.1 million pounds for the North Mainland Section was adopted by the Alaska Board of Fisheries in December 1980. This harvest level was based on a 40 percent exploitation of the legal size crabs determined to be present following the 1980 indexing survey conducted by ADF&G.

Although the 1981 season opened January 22, active fishing has occurred only since February 25 due to delays in arriving at a price settlement between the fishermen and the processors. The average number of crabs caught per pot has declined from 45 to about 28 since fishing commenced. Catch per unit of effort is less, therefore, than in 1980 when the number of crabs caught per pot started at 70 and declined to 30 by the end of the season. The smaller number of crabs caught per pot this year compared to last year indicates the population size is indeed smaller as predicted by the 1980 survey.

Based on fishery performance and the estimate of stock size the harvest level should be held to 1.1 million pounds. This amount will be harvested by March 12, 1981.

In light of this information, the Regional Director has found that the condition of Tanner crab stocks in the North Mainland Section is substantially different from that anticipated at the beginning of the fishing year, and that this circumstance reasonably supports the closure of the North Mainland Section for the rest of the 1980-81 fishing year rather than at 11:59 p.m., Alaska Daylight Time, on April 30, 1981. Tanner crab may still be taken from January 5 until April 30 in the Kodiak District unless closed by field order, except in that portion of the Kodiak District between 156°20'13"W. longitude (Kilokak Rocks) and 157°35"W. longitude (Cape Kumlik) where Tanner crab may be taken from January 5 through May 15.

Because the information upon which the Regional Director based his finding has only recently become available, it would be impracticable to provide a meaningful opportunity for prior public notice and comment on this field order and still impose the prompt closure which sound conservation of the resource and the prevention of overfishing appear at this point to demand. The Regional Director therefore finds, under 5 USC § 553(b)(B) and (d)(3), and under 50 CFR 671.27(b)(4)(i)