United States Department of Agriculture
Food and Consumer Service
Mountain Plains Region
1244 Speer Boulevard
Denver, CO
80204-2581

Reply to Attn of: SP-01-01
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DEC 06 2000

Subject: Final Grants Management Regulations for USDA Entitlement Programs

To: State Agency Directors - (Child Nutrition Programs)

Colorado ED, Colorado DPH, Iowa, Kansas, Missouri DH, Missouri ED, Montana PI, Montana DPHHS, Nebraska, North Dakota, South Dakota, Utah ED, Wyoming ED

On August 14, 2000, the Department issued final regulations (7 CFR Part 3016 and 7 CFR Part 3019) on grants management requirements for USDA entitlement programs. These changes, which were proposed on February 17, 1998, bring the Department's entitlement programs under the same regulations that already apply to nonentitlement programs and identify exceptions that only apply to entitlement programs. Attached is a copy of these regulatory changes and a memorandum with question and answers explaining the effect of this rulemaking.

for Randall R Shaffer

RAFAEL ZAMBRANO
Acting Regional Director
Child Nutrition Programs

Attachments

Final Regulations on USDA Entitlement Programs
Questions and Answers

Attached is a *Federal Register* notice, published August 14, 2000, in which the Department issued final regulations on grants management requirements for USDA entitlement programs. These changes, which were proposed on February 17, 1998, bring the Department's entitlement programs under the same regulations that already apply to nonentitlement programs and identify exceptions that only apply to entitlement programs. The following text outlines the principal effects of these final rules.

What regulations are changed?

In 1988, the Department joined other Federal agencies in issuing a final grant management regulation at 7 CFR Part 3016 to implement the government wide Common Rule. This rulemaking applied to programs operated by State and local governments, but excluded the Department's entitlement programs. On November 29, 1993, the Department codified OMB's revisions to Circular A-110 for institutions of higher education, hospitals, and other nonprofit organizations in Departmental regulation 7 CFR Part 3019. As with 7 CFR Part 3016, entitlement programs were also excluded from 7 CFR Part 3019.

Under these final regulations, a single set of rules will now apply to USDA entitlement and nonentitlement programs. Entitlement and nonentitlement programs operated by State and local governments are subject to 7 CFR Part 3016, while 7 CFR Part 3019 applies to institutions of higher education, hospitals and other nonprofit organizations.

What entitlement programs are affected?

The USDA entitlement programs are identified at 7 CFR sections 3016.4(b) and 3019.1(b)(1), respectively. They include: the Food Stamp Program, the Child Nutrition Programs (including related commodities), and the Food Distribution Program on Indian Reservations (FDPIR).

What is the final rule's effective date?

The preamble states that "implementation shall be phased in by incorporating the provisions into awards made after the start of the next Federal entitlement program year." This means the final rule takes effect on October 1, 2000, except for public and nonpublic school food authorities operating the school nutrition programs. Because the school nutrition programs operate according to a school year cycle, State administering agencies may permit these program operators to delay implementation until the beginning of the next school year (July 1, 2001).

How will the final rule affect USDA entitlement programs?

The final rule does two things. As noted above, it brings the entitlement programs under the same grants management rules that already applied to non-entitlement programs. In addition, it establishes certain exceptions to the general rules that apply solely to entitlement programs. These exceptions are set out in Subpart E to Part 3016. They are:

1. Financial Reporting.

Section 3016.61 excludes entitlement programs, other than the FDPIR, operated by State and local governments from the general financial reporting rules at 7 CFR section 3016.41. Instead, these grantees will continue to follow the financial reporting requirements contained in their respective program regulations. For example, State agencies administering the National School Lunch Program will follow financial reporting requirements at 7 CFR Part 210.

2. Procurement Standards.

a. 7 CFR section 3016.60(a) gives States conducting procurements under USDA entitlement programs the option to follow either State procurement rules or the Federal rules at 7 CFR sections 3016.36(b) through (i).

Regardless of the option chosen, States must also comply with the additional exceptions at §§3016.60(b) and (c). These exceptions also apply to local governments conducting procurements under USDA entitlement programs.

b. Section 3016.60(b) excludes any person that develops or drafts specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions, or other documents for use by a grantee or subgrantee in conducting a procurement under USDA entitlement programs from competing for contract awards resulting from that procurement, regardless of the procurement method used. This provision generated considerable controversy during the development of the final rule. Accordingly, the preamble gives extensive guidance on how program operators should apply it.

c. Section 3016.60(c) prohibits the use of statutorily or administratively imposed in-State or local geographical preferences, except when procuring certain architectural or engineering services.

In addition to the exceptions identified at §§3016.60(b) and (c), where can local governments find the procurement rules that apply to the USDA entitlement program they operate?

All local governments operating USDA entitlement programs must follow 7 CFR Part 3016.36(b)-(i). Local governments include county and municipal agencies, public school

districts, public residential institutions, public Summer Food Service Program sponsors, etc. Since most local governments already have a set of procurement requirements in place, §3016.36(b)(1) instructs a local government to use its own State or local procurement procedures as long as those procedures conform to applicable Federal law and the requirements of §§3016.36(b) through (i). If these procurement rules do not conform to Federal requirements, the local government must follow §§3016.36(b)(2)-(i). In all cases, local governments must also follow the provisions of §§ 3016.60(b) and (c).

Where are the procurement rules for nonprofit organizations operating USDA entitlement programs found?

Non-governmental, not-for-profit organizations, including public and private universities, public and private hospitals, community action agencies, private schools, private residential institutions, and other charitable organizations follow 7 CFR Part 3019. The procurement methods and practices used by organizations subject to Part 3019 must not be inconsistent with §§3019.40-48.

How do the new procurement rules differ from the old ones?

We cannot discuss every nuance between the old and new rules in a document this size, but believe entitlement program grantees and subgrantees should be made aware of the final rule's treatment of small purchase thresholds. As you know, formal advertising requirements applied to procurements of $10,000 or more under the old rules.

Sections 3016.36(b) and Section 3019.44(e)(2) set the small purchase threshold at the level established by 41 U.S. C. 403(11). The Federal Acquisition Streamlining Act of 1994 raised the small purchase threshold from $25,000 to $100,000. This increase is currently reflected in the text of Part 3016, but not Part 3019. Nonetheless, the small purchase threshold for all non-governmental, not-for-profit organizations operating USDA entitlement programs has been increased to $100,000.

However, since section 3016.36(b) instructs a governmental entity to use its own procurement rules to the extent they are not inconsistent with the Federal rules, the small purchase threshold actually available to a governmental program operator is the lower of $100,000 or the threshold set by State or local laws and regulations. We are not aware of any State or local laws or regulations that currently set a threshold as high as $100,000. Therefore, we anticipate that governmental program operators will be unable to fully realize the benefits of this change until their governing bodies take action to raise their respective thresholds.

What is the status of 7 CFR Part 3015 now that the final rule is published?

The final rule eliminated USDA entitlement programs operated by State and local governments and not-for-profit organizations from the scope of Part 3015. However, Part 3015 still contains some departmental policies applicable to all USDA programs. For example, Subpart T (Cost Principles) gives departmental guidance on implementing the Federal cost principles; and Subpart U (Miscellaneous) sets out policies on such subjects as the use of consultants and the acknowledgment of USDA support on publications and audiovisuals produced under USDA awards.

equivalent of kiwifruit. Therefore, the estimated assessment revenue for the 2000–2001 fiscal period as a percentage of total grower revenue is estimated at 0.2 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

In addition, the Committee's July 11, 2000, meeting was widely publicized throughout the California kiwifruit industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 11, 2000, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

Additionally, all attendees were advised of the telephone conference call to be conducted on July 13, 2000. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large California kiwifruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: http://www.ams.usda.gov/fv/moab.html. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2000–2001 fiscal period begins on August 1, 2000, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable kiwifruit handled during such fiscal period; (2) this action decreases the assessment rate for assessable kiwifruit beginning with the 2000–2001 fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee during a telephone conference meeting and is similar to other assessment rate actions issued in past years; and (4) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 920.213 is revised to read as follows:

§ 920.213 Assessment rate.

On and after August 1, 2000, an assessment rate of $0.03 per 22-pound volume fill container or equivalent is established for kiwifruit grown in California.

Dated: August 8, 2000.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

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DEPARTMENT OF AGRICULTURE

7 CFR Parts 3015, 3016 and 3019

RIN 0503–AA16

Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments and Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

AGENCY: Department of Agriculture

ACTION: Final rule.

SUMMARY: The United States Department of Agriculture (USDA) is revising its grants management regulations in order to bring the entitlement programs it administers under the same regulations that already apply to nonentitlement programs and to identify exceptions to these general rules that apply only to entitlement programs

DATES: This rule is effective August 14, 2000. Implementation shall be phased in by incorporating the provisions into awards made after the start of the next Federal entitlement program year.

FOR FURTHER INFORMATION CONTACT: Gerald Miske, Supervisory Management Analyst, Fiscal Policy Division, Office of the Chief Financial Officer, USDA, Room 5411 South Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250; FAX (202) 690–1529; telephone (202) 720–1553.

SUPPLEMENTARY INFORMATION:

Background

The administrative requirements for awards and subawards under all USDA entitlement programs are currently in 7 CFR part 3015, "Uniform Federal Assistance Regulations." The corresponding requirements for awards and subawards to State and local governmental organizations under USDA nonentitlement programs are in subparts A through D of 7 CFR part 3016, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments." The administrative requirements for awards and subawards to nongovernmental, non-profit organizations are in 7 CFR part 3019, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations." This final rule expands the scope of parts 3016 and 3019 to include entitlement programs, and deletes administrative requirements for awards and subawards under such programs from the scope of part 3015. It also establishes, in subpart E to part 3016, certain exceptions to the general administrative requirements that will apply only to the entitlement programs. The following text outlines the evolution of these changes.

On March 11, 1988, USDA joined other Federal agencies in publishing a final grants management common rule applicable to assistance relationships established by grants and cooperative agreements, and by subawards thereunder, to State and local governments (53 FR 8044). Prior to that date, administrative requirements for awards and subawards under all USDA

programs were codified at 7 CFR part 3015. The USDA implemented the common rule at 7 CFR part 3016 . At that time, the common rule did not apply to entitlement programs such as the Food Stamp and Child Nutrition Programs administered by the Food and Nutrition Service, USDA, and the entitlement grant programs administered by the Department of Health and Human Services (DHHS). However, subpart E of part 3016 was reserved with the express intention of including provisions specifically tailored to the entitlement programs. Pending the publication of subpart E to part 3016, the USDA entitlement programs have remained under part 3015. These programs included:

(1) *Entitlement grants* under the following programs authorized by the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 *et seq*): (a) National School Lunch Program, General and Special Meal Assistance (sections 4 and 11 of the Act, respectively), (b) Commodity Assistance (section 6 of the Act), (c) Summer Food Service Program for Children (section 13 of the Act), and (d) Child and Adult Care Food Program (section 17 of the Act);

(2) Entitlement grants under the following programs authorized by the Child Nutrition Act of 1966 (42 U.S.C. 1771 *et seq*), (a) Special Milk Program for Children (section 3 of the Act), (b) School Breakfast Program (section 4 of the Act), and (c) State Administrative Expense Funds (section 7 of the Act); and

(3) Entitlement grants for State Administrative Expenses under the Food Stamp Act of 1977 (7 U.S.C. 2011 *et seq*) (sections 4(b) and 16 of the Act).

The exclusion of these programs from the scope of part 3016 caused that regulation to apply only to USDA's nonentitlement programs. The principal nonentitlement programs administered by the Food and Nutrition Service include the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Commodity Supplemental Food Program (CSFP), the WIC Farmers' Market Nutrition Program (FMNP), the Nutrition Education and Training Program (NET), and the Emergency Food Assistance Program (TEFAP).

On August 24, 1995, USDA published an interim final rule at 7 CFR part 3019 in order to implement the revised Office of Management and Budget (OMB) Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations" (60 FR 44122). As with part 3016, USDA did not include entitlement programs in the scope of part 3019. In excluding entitlements from the scope of part 3019 at the time of its initial publication, USDA anticipated issuing a document that would provide a single set of grant and subgrant administrative rules for all types of organizations operating USDA entitlement programs.

On February 17, 1998, USDA published a Notice of Proposed Rulemaking (Proposed Rule) (63 FR 7734) as the first step in developing such a document. USDA received six requests for additional time for comment. Accordingly, on May 22, 1998, USDA published a 30 day extension to the initial 90 day comment period (63 FR 28294). Excluding the time extension requests, USDA received comments within the time period from 45 interested parties.

Comments on Proposed Rule and Responses

In publishing the proposed rule, USDA specifically solicited comments on: (1) Applying the provisions of part 3016 to USDA entitlement program awards and subawards to State and local governmental organizations; (2) applying the provisions of part 3019 to USDA entitlement program awards and subawards to nongovernmental Non-Profit Organizations; and (3) adopting proposed exceptions to be included in subpart E of part 3016. The exceptions proposed for subpart E included: (1) Requiring States and other governmental program operators to conduct procurements under USDA entitlement programs in accordance with § 3016.36(b) through (i); (2) requiring governmental grantees and subgrantees to adopt the requirement in § 3019.43 which prohibits the award of a contract under a Federal program to a firm that had performed certain services to orchestrate that procurement; and (3) establishing program regulations as the authoritative source for financial reporting requirements under the Food Stamp and Child Nutrition Programs.

Applying the Provisions of 7 CFR Parts 3016 and 3019 to Entities Operating USDA Entitlement Programs.

Eight of the commenters were in favor of the proposal to provide a single set of regulations governing the administration of grants and subgrants. Conversely, six commenters stated that no change to the current regulation should be made. However, further review of the underlying basis for opposing change disclosed that the comments were more specifically related to contracting provisions proposed for subpart E to part 3016, as opposed to the overall concept of applying parts 3016 and 3019 to USDA's entitlement program awards and subawards.

Therefore, in the absence of any specific objections to the proposal, USDA is amending parts 3016 and 3019 to apply those provisions to entitlement awards and subawards.

Adopting Proposed Exceptions to be Included in Subpart E of Part 3016

By far, the largest number of the comments received were related to this issue. The USDA had proposed to depart from the Federalism principle set out in § 3016.36(a) with respect to State grantee and governmental subgrantee procurements under entitlement programs by requiring States to follow the rules set out in § 3016.36(b) through (i). The USDA made this proposal primarily to strengthen competition in grantee and subgrantee procurements under entitlement programs. While State rules generally contain detailed competition requirements, USDA had sought to ensure a minimum, uniform level of competition in procurements under its entitlement programs. In doing so, USDA recognized that the rules stated at § 3016.36(b) through (i) did not comprise a complete procurement system but rather formed an outline in which each State's own procurement regulations must provide the details. Under the proposed rule, therefore, Federal rules would have taken precedence over State rules only where the latter failed to provide for such minimum requirements.

One commenter agreed with the proposal on the basis that it would simplify administrative oversight and reduce uncertainty in grants management. However, thirteen of the commenters strongly opposed the departure from Federalism. These commenters pointed out that the approach could result in disparate treatment of procurements under entitlement programs versus those under other programs. Several commenters also argued that USDA had not provided sufficient justification for such a broad approach. Upon further review, USDA agrees that its concerns for competition in procurements under its entitlement programs can be resolved without mandating specific Federal requirements on such a global scale. Therefore, USDA has revised the final rule to remove the requirement in the proposed § 3016.60(a) which would have required States to follow the procurement rules set out in § 3016.36(b) through (i). As an alternative, the final rule authorizes

States to use either State rules, in accordance with § 3016.36(a), or to adopt the requirements in § 3016.36(b) through (i). It should be noted that USDA does not intend that these revisions change the longstanding relationships between States and subrecipients. Some of the interpretive language in the Proposed Rule preamble may have resulted in a misunderstanding of current practice with regard to State oversight of subrecipient procurements. The USDA's position continues to be that as part of their oversight responsibilities, States are to require that local governments follow the requirements in § 3016.36(b) through (i) and that non-profit organizations follow the requirements in part 3019. Section 3016.37 still governs relationships other than procurements.

The Federal government's interest in ensuring maximum competition dictates that certain practices cannot be allowed. Increasing and ensuring competition provides the greatest opportunity to procure the highest quality goods and services at the lowest possible cost. Lower costs, in turn, help extend the purchasing power of grants under the nutrition-assistance programs vital to the health of vulnerable populations such as children and the needy. Therefore, regardless of whether States choose to follow State rules or the requirements in § 3016.36(b) through (i), States must ensure that the requirements set out in subpart E of this final rule are followed.

The USDA has addressed below the special provisions in subpart E of part 3016 that will apply to entitlement programs and the related comments.

Prohibiting Geographical Preference in Procurements Under USDA Entitlement Programs

As explained in the preamble to the proposed rule, the USDA is concerned about the effects of geographical preference in procurements under the entitlement programs it administers. Geographical preference in procurement entails the use of procedures that give bidders and offerors a competitive advantage based solely on their location within the territory of the procuring entity. For example, a State's procurement rules may require that an out-of-state bidder's bid be surcharged a prescribed percentage, or that a bid submitted by a firm located within the state be discounted a prescribed percentage, for price comparison purposes. Such practices are inherently anti-competitive. Indeed, the preamble to the March 11, 1988, grants management common rule expressed governmentwide policy on this matter by identifying "* * * the application of unreasonably restrictive qualifications and any percentage factors that give bidding advantages to in-State or local firms* * *" as "* * * barriers to open and free competition which are not in the public interest." (53 FR 8039).

Only open and free competition can ensure that program operators obtain the best products and services at the lowest possible prices, thereby maximizing the impact of scarce Federal resources. For example, the mission of USDA's Child Nutrition Programs is to improve children's health and well-being by providing them with nutritious, low-cost or free meals. These programs depend heavily on program operators' procurements. As noted above, increased competition enhances the program operators' ability to buy quality products at low prices, and thus enables them to offer better, lower cost meals to children. In these programs especially, maximum open and free competition is directly linked to the operators' ability to achieve program goals. It is therefore vital to the success of the programs.

The USDA received very few comments on this subject. Those comments were divided with two in favor, two opposed and one questioning the absence of specific data. The primary argument in opposition was that prohibiting geographic preference would have a negative effect on partnerships between schools and the food industry. The USDA does not agree that the effect on such partnerships is of such a magnitude that the anti-competitive practice should be allowed. The USDA has considered the benefits of partnering between procuring entities and members of the food industry located within the territory of the procuring entity. We have weighed this benefit against the detriment to competition caused by providing such preferences. We find the benefit of partnering based on geographic location does not outweigh the damage such practices cause to competition. In making this finding, USDA has taken into account the ever increasing ability of procuring entities and offerors to consult and gather information and expertise across long distances via telephone, electronic mail, facsimile, video, telephone conferencing and the Internet. In light of this trend towards the increasing availability of information and ease of communications, we disagree that the use of geographic preferences is needed as a way to foster partnering relationships.

This final rule prohibits geographic preference in procurements under USDA entitlement programs. In the proposed rule, this requirement was one of the items covered in § 3016.36(b) through (i) (see § 3016.36(c)(2)). Because, as discussed above, this final rule allows States to elect to use their own rules rather than § 3016.36(b) through (i), the prohibition on geographic preferences is included in § 3016.60(c) of subpart E as a mandatory procurement requirement.

Prohibiting the Award of a Contract to a Contractor That Previously Had Performed Certain Services Related to That Procurement for the Program Operator

Under § 3019.43, non-profit organizations are currently precluded from awarding contracts under USDA nonentitlement programs to firms "that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals" for such procurements. The purpose of this regulation is to "ensure objective contractor performance and eliminate unfair competitive advantage." Extending the applicability of part 3019 to USDA entitlement programs operated by non-profit organizations will result in equal application of this requirement to both entitlement and nonentitlement programs.

USDA also proposed applying this requirement to State and local governmental program operators through a provision in part 3016, subpart E. USDA's intent in proposing this exception to the general rule was the same as that underlying the existing requirement for non-profit organizations: to minimize the anti-competitive effect of less-than-arm's length transactions under USDA entitlement programs.

Three State agencies and one commenter representing a State agency agreed, explicitly stating that contractors involved in drafting specifications, requirements, statements of work, invitations for bids, or requests for proposals should be excluded from bidding. However, twenty-nine commenters disagreed with or had concerns regarding this proposed exception.

The commenters' principal concerns were that: (1) food service personnel might lack the necessary knowledge to write bid specifications that would be correct, complete, precise, and understandable; (2) the only way to learn about products or services is to discuss specifications with potential bidders; (3) the prohibition would have a negative impact on the food manufacturers' willingness to develop products to meet school food service

needs; (4) schools would either have to spend more money to get an acceptable product or schools would get inferior products and defeat the purpose of the program; and (5) this prohibition, when considered in conjunction with the proposal to have States follow the procurement requirements in § 3016.36(b) through (i), would unduly emphasize lowest cost to the detriment of other needs and benefits.

Following lengthy study of the comments on this issue, especially those opposing the prohibition in new § 3016.60(b), USDA concludes that there has been a misunderstanding of both the intent and the anticipated effect of this revision.

The commenters' concerns listed above focus on a program operator's ability to obtain the information necessary to formulate specifications that will elicit responsive bids or offers of the desired product or service. Specifications comprise a statement of a program operator's need for a product or service. The USDA agrees that a program operator is in the best position to know its own needs. Under both the old rules and this final rule, that operator may consult with as many expert sources as necessary to obtain the information needed for an effective procurement. In proposing the prohibition against using contractors who previously drafted the bid specifications, USDA had no intention of prohibiting consultations between program operators and industry.

Permissible practices include accessing publicly available information and contacting manufacturers and distributors directly. Examples of publicly available information include, but are not limited to: Product brochures; product specification handouts; information available on the Internet and in trade journals; recommendations from other program operators; and information obtained by visiting other program operations and attending industry and professional trade fairs. The types of information that a program operator can obtain through direct industry contacts include, but are not limited to: recommendations of one product over another; features that enable one to differentiate between available products; prices for specific products or product features; model numbers and other data that enable one to identify products that may meet one's needs; specification sheets; and, informational hand-outs. A program operator can do all these things in the course of conducting a proper procurement.

Legislation enacted subsequent to the publication of the proposed rule further affirmed program operators' authority to obtain information needed for their procurements under USDA entitlement programs. Section 104(e) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Goodling Act) (Pub. L. 105–336, 112 Stat. 3143) amended the National School Lunch Act to provide that "[i]n acquiring a good or service for programs under [such] Act or the Child Nutrition Act of 1966 (other than section 17 of that Act (42 U.S.C. 1771 *et seq.*)) a State, State agency, school, or school food authority may enter into a contract with a person who has provided *specification information* to the State, State agency, school, or school food authority *for use* in developing contract specifications for acquiring such good or service."(Emphasis added.) (Pub. L. 105–336, § 104(e), 112 Stat. 3143). The emphasized language makes clear Congress' intent to permit all States, State agencies, schools, or school food authorities operating programs under either the National School Lunch Act or the Child Nutrition Act of 1966 (except for the WIC program) to collect information from prospective contractors, yet still enter into contracts with such contractors.

A program operator may not engage a contractor to actually write the bid or proposal terms, product specifications, procurement procedures, contract terms, etc., and then consider this same contractor for the resulting contract award. Congress made it clear, by prefacing the phrase "in developing contract specifications" with the words "for use" that it must be the State, State agency, school, or school food authority that does the actual development, drafting or any other form of bid specification preparation. The Conference Report accompanying the Goodling Act makes clear that this provision "* * * is not intended to allow a potential contractor or other interested party to participate in the procurement process through drafting the procurement specifications, procedures or documents" (H.R. Conf. Rep. No. 786,105th Cong., 2d Sess.38 (1998).) Prospective contractors who develop, draft or in any other way prepare bid specifications, may not enter into a contract based on those specifications.

One commenter articulated the key distinction: A vendor that furnished information to a program operator for the program operator's use in formulating specifications for a procurement action may still be considered for the procurement award. But, a vendor engaged in actually drafting the specifications or other procurement documents may not be considered for the award. Both Federal law and regulations thus hold program operators responsible for their own specifications and procurement documents. Program operators must conduct their procurements under the USDA entitlement programs in a manner that avoids any appearances of, or actual, conflicts of interest.

With regard to the related concern that lowest cost was being over emphasized to the detriment of quality, USDA is aware that industry specification advice is not the only information program operators use in formulating specifications. For example, the USDA supports those schools and institutions operating the Child Nutrition Programs in their efforts to identify children's preferences for different types of food products through student surveys, tastes tests, etc. Such quality factors will continue to be allowed as part of the specifications under these revised rules. We would note that this kind of information cannot be obtained through consultations with industry, yet obtaining it is an essential prerequisite both to discussing a school district's needs for products and services with industry representatives and to soliciting bids or offers from industry.

With regard to balancing cost and quality, the method a program operator chooses for a procurement (small purchase, formal advertising with sealed bids, formal advertising for negotiable proposals, etc.) must be appropriate for the desired product or service. For example, for subgrantees subject to § 3016.36(b) through (i), the formal advertising, sealed bid method described at § 3016.36(d)(2) is appropriate when a program operator's public solicitation describes the desired product or service with sufficient precision that responsive bids will differ only in price. If this is not possible, a program operator should consider using the competitive negotiation method described at § 3016.36(d)(3).

Once a method is chosen for a particular procurement, however, the program operator must consistently observe the principles of that method. Negotiating under a sealed bid procurement, for example, is inappropriate; the lowest responsive bid must be accepted and unresponsive bids, regardless of price, must be rejected.

In this regard, a program operator seeking to work with a contractor in developing a custom-made product that will meet program needs must exercise caution to avoid inappropriately blending the sealed bid and competitive

proposal procedures. The program operator may engage the contractor to develop the product and supply the finished product to the program, thus providing all qualified vendors the opportunity to compete for an award to both develop and supply the product. It would not be acceptable, however, for the same program operator to negotiate with the same contractor to develop the product and then, in a separate procurement action, publicly solicit bids to supply the product; the product would only be available from the firm that developed it.

We cannot overemphasize, however, that neither the sealed bid method nor the competitive proposal method requires a program operator to award a contract to a vendor that lacks the capability to successfully perform under the terms and conditions of the proposed procurement. Nor is a program operator required to award a contract to a bidder whose bid does not meet bid specifications simply because that bidder submitted the lowest price; any unresponsive bid must be rejected.

Other than the geographic preference and conflict of interest prohibitions in § 3016.60, the procurement regulations applicable to USDA entitlement program grantees and subgrantees remain essentially unchanged from prior practice. Grantees and subgrantees are encouraged to incorporate quality and taste related factors into the specifications and evaluation requirements as appropriate under each procurement mechanism and in accordance with applicable State and local procurement regulations.

The regulations continue to allow program operators to use small purchase, sealed bid, and competitive proposals procurement methods. All three methods allow program operators to incorporate quality as a procurement consideration. Under the sealed bid method, which requires that awards be made on the basis of lowest price, quality considerations, when sufficiently definite, can be built into the specifications, or a two-step bidding process may be used. Quality considerations under the sealed bid method are not an award factor, but a responsiveness issue assessing compliance with the specifications, which is why the specifications must be sufficiently definite. Awards cannot be made to a bidder offering a nonconforming product.

Under the competitive proposals method, quality considerations not only can be built into the product specifications for responsiveness, but also can be used as evaluation factors in making the award determination. The competitive proposals method allows for the use of less definite factors. The following hypothetical case illustrates this point.

A school district solicits sealed bids for fresh or frozen pizza products, inviting bids from all potential suppliers. Among other specifications, the solicitation requires that the pizza products be tasty. To assess conformance with the taste specification, the school district requires that bidders provide pizza product samples with their bids. The school district will assess taste acceptability through blind taste tests by students, rating samples as either acceptable or unacceptable. Bids providing unacceptable samples will be considered nonresponsive for failure to conform with the specification requirements. The solicitation instructs that award will be made to the lowest price supplier whose pizza product conforms to all specification requirements, including taste acceptability.

Five suppliers of fresh and frozen pizza submit prices and bid samples. The bids are as follows:

Supplier	Product type	Price per serving	Taste
A	Frozen	$0.27	Unacceptable.
B	Fresh	0.57	Acceptable.
C	Fresh	0.40	Acceptable.
D	Frozen	0.54	Acceptable.
E	Fresh	0.56	Acceptable.

The school district correctly awards the contract to Supplier C. Of the four suppliers whose products ranked acceptable for taste (those of Suppliers B, C, D, and E), Supplier C submitted the lowest bid. The school district correctly rejects the Supplier A's bid even at the lowest price because the product did not conform to the specification requiring an acceptable taste.

USDA has revised the proposed regulatory language in new section 3016.60(b) to make express the authority of, and limitations on, program operators to acquire information from prospective contractors as spelled out in the Goodling Act; and to otherwise clarify the aspects of this provision that have been misunderstood. New paragraph 3016.60(b) makes clear that a grantee or subgrantee may not contract with a party who has developed, drafted, or in any other way prepared specifications, procedures, or documents for such contract; and that, conversely, a prospective contractor may provide information to a grantee or subgrantee, which the grantee or subgrantee may then use to develop its own documents and specifications, and still enter into a contract with the grantee and subgrantee.

Clarification of Conditions for Use of the Small Purchase Procurement Method

Purchases using informal, small purchase methods can generally be made in less time and at less expense because such methods are simpler than formal procurement methods. State and local governments' ability to use the small purchase method for these programs is generally expressed as a dollar level known as the small purchase threshold. The Federal small purchase threshold under both § 3016.36 and § 3019.44 is tied to the level set at 41 U.S.C. 401(11) (currently $100,000). Two commenters expressed concern that many program operators may not realize the benefits of this feature of this rule because State and local government procurement rules often set small purchase thresholds lower than the Federal $100,000 level. The commenters' assessment of the effect of the lower State and local thresholds is correct when applied to this final rule. When a lower State or local small purchase threshold exists, only procurements below that level can be conducted using the simplified procedures. A formal method (sealed bid or competitive proposal) must be used for those procurements above the State or local level.

Financial Reporting Requirements

The USDA proposed a third specific exception to be included in subpart E of 7 CFR 3016: the exclusion of the USDA entitlement programs listed at § 3016.4(b), except the Food Distribution Program on Indian

Reservations, from the financial reporting provisions in § 3016.41. No comments were received on this proposal. The exception language proposed for subpart E, § 3016.61 has been incorporated into the final rule.

Editorial and Technical Changes

The USDA made an editorial change in part 3015 to correct the name of the USDA office responsible for Federal assistance policy. Finally, USDA made a technical change in § 3016.4 to recognize the recent reclassification of the Food Distribution Program on Indian Reservations from nonentitlement to entitlement. No comments were received on these two changes. Therefore, the changes have been incorporated into the final rule.

Regulatory Impact Analysis

Executive Order 12866

The Office of Management and Budget reviewed the Proposed Rule and determined the rule to be significant under Executive Order 12866. In accordance with the provisions of Executive Order 12866, USDA prepared a cost benefit assessment which analyzed the economic impact of this rule on States, other grantees, and subgrantees operating USDA entitlement programs. The economic impact analysis had two discrete dimensions: bringing these programs under the umbrella of parts 3016 and 3019, and establishing the deviations and exceptions stated in subpart E to part 3016.

As stated in the Proposed Rule, USDA believes that both dimensions would have a negligible economic impact.

However, USDA does not have the database needed to quantify the foregoing generalizations about the costs and savings associated with this rule. Accordingly, USDA requested commenters to provide feedback on the economic impact of this rule. One of the commenters referred to the issue of economic impact of the overall rule in relation to USDA's proposal to set aside the Federalism principle to require the State to use § 3016.36(b) through (i) in conducting procurements under USDA entitlement programs. However, no commenter provided any substantive information on this subject or referred USDA to sources where it could be found. Since USDA has revised the final rule to avoid setting aside the Federalism principle, the one comment received in this regard is now moot. Several comments contained references to the potential cost of implementing certain specific provisions within the rule. These comments are discussed in the appropriate sections above.

As noted above, under this rule, financial reporting requirements, with the exception of the Food Distribution Program on Indian Reservations, will continue to be contained in the program-specific regulations rather than in part 3016. Because the reporting requirements themselves remain unchanged, this provision of the rule will have no economic impact on grantees and subgrantees.

The Office of Management and Budget has reviewed this final rule and determined the rule to be not significant.

Executive Order 13132

Executive Order 13132 (E.O. 13132) on "Federalism" (64 FR 43255, August 10, 1999) requires Federal agencies to have an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The final rules for 7 CFR parts 3015 and 3019 have no federalism implications. 7 CFR part 3016 is already applicable to State and local governments operating nonentitlement programs. A proposed revision to 7 CFR part 3016 was published as a Proposed Rule on February 17, 1998, to make the rule applicable to State and local governments operating entitlement programs. It should be noted that this Proposed Rule was published prior to the November 2, 1999, implementation of E.O. 13132. However, in the spirit of E.O 13132, USDA had already included substantial intergovernmental consultation in the development of the Proposed Rule. Subsequently it was determined that the Proposed Rule included a potential Federalism implication related to § 3016.36 which deals with procurement. The USDA met with State and local officials on multiple occasions to discuss proposed policy changes for entitlement programs and, in particular, to discuss the subject matter of the Proposed Rule. In addition, during the comment period USDA received comments on the Proposed Rule from eight State agencies in seven States and twenty local governments in eleven States. In light of comments received, the proposed provision for States to follow Federal rules in procurement was changed in this final rule to give States the option of following State or Federal procurement rules. We believe this change is in accordance with Federalism principles.

Civil Rights Impact Analysis

The USDA does not believe that this rule will have a significant civil rights impact and invited comments on this position. No comments were received.

Paperwork Reduction Act

The information collection requirements of this rule were previously approved for USDA under #0505–0008 for entitlement and nonentitlement programs. However, that number has been retired because the reporting and recordkeeping requirements of this rule are the same as those required by OMB Circulars A–102 and A–110 and have already been cleared by OMB. The USDA believes this rule will not impose additional information collection requirements on grantees and subgrantees.

Regulatory Flexibility Act

In accordance with the requirements of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the USDA Chief Financial Officer has reviewed this rule and certifies that it does not have a significant economic impact on a substantial number of small entities. The potential economic impact is discussed above in connection with Executive Order 12866.

List of Subjects

7 CFR part 3015

Grant programs, Intergovernmental relations.

7 CFR part 3016

Grant programs.

7 CFR part 3019

Grant programs.

Issued at Washington, DC.

Sally Thompson,

Chief Financial Officer.

Approved:

Dan Glickman,

Secretary of Agriculture.

Accordingly, USDA amends 7 CFR chapter XXX as set forth below.

PART 3015—UNIFORM FEDERAL ASSISTANCE REGULATIONS

1. The authority citation for part 3015 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 901–903; 7 CFR 2.28, unless otherwise noted.

2. In § 3015.1, revise paragraphs (a)(l), (a)(3), (a)(4) and (d) to read as follows:

§ 3015.1 Purpose and scope of this part.

(a)(l) This part specifies the set of principles for determining allowable costs under USDA grants and cooperative agreements to State and

local governments, universities, non-profit and for-profit organizations as set forth in OMB Circulars A–87, A–21, A–122, and 48 CFR 31.2, respectively. This part also contains the general provisions that apply to all grants and cooperative agreements made by USDA.

* * * * *

(3) Rules for grants and cooperative agreements to State and local governments are found in part 3016 of this chapter.

(4) Rules for grants and cooperative agreements to institutions of higher education, hospitals, and other non-profit organizations are found in part 3019 of this chapter.

* * * * *

(d) Responsibility for developing and interpreting the material for this part and in keeping it up-to-date is delegated to the Office of the Chief Financial Officer.

3. In § 3015.2, revise paragraphs (d)(3), (d)(4), (d)(5), and (d)(6) to read as follows:

§ 3015.2 Applicability.

* * * * *

(d) * * *

(3) Agencies or instrumentalities of the Federal government,

(4) Individuals,

(5) State and local governments, and

(6) Institutions of higher education, hospitals and other non-profit organizations.

* * * * *

PART 3016—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

4. The authority citation for part 3016 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 901–903; 7 CFR 2.28.

§ 3016.4 [Amended]

5. In § 3016.4 remove paragraphs (a)(4) through (6), redesignate paragraphs (a)(7) through (10) as (a)(4) through (7) and revise paragraph (b) to read as follows:

§ 3016.4 Applicability.

* * * * *

(b) *Entitlement programs.* In USDA, the entitlement programs enumerated in this paragraph are subject to subparts A through D and the modifications in subpart E of this part.

(1) Entitlement grants under the following programs authorized by The National School Lunch Act:

(i) National School Lunch Program, General Assistance (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) National School Lunch Program, Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service Program for Children (section 13 of the Act), and

(v) Child and Adult Care Food Program (section 17 of the Act);

(2) Entitlement grants under the following programs authorized by The Child Nutrition Act of 1966:

(i) Special Milk Program for Children (section 3 of the Act),

(ii) School Breakfast Program (section 4 of the Act), and

(iii) Entitlement grants for State Administrative Expense Funds (section 7 of the Act); and

(3) Entitlement grants under the following programs authorized by the Food Stamp Act of 1977:

(i) Food Distribution Program on Indian Reservations (section 4(b) of the Act), and

(ii) State Administrative Expense Funds (section 16 of the Act).

6. Subpart E is added to read as follows:

Subpart E—Entitlement

Sec.
3016.60 Special procurement provisions.
3016.61 Financial reporting.

§ 3016.60 Special procurement provisions.

(a) Notwithstanding §§ 3016.36(a) and 3016.37(a), States conducting procurements under grants or subgrants under the USDA entitlement programs specified in § 3016.4(b) may elect to follow either the State laws, policies, and procedures as authorized by §§ 3016.36(a) and 3016.37(a), or the procurement standards for other governmental grantees and all governmental subgrantees in accordance with § 3016.36(b) through (i). Regardless of the option selected, States shall ensure that paragraphs (b) and (c) of this section are followed

(b) When conducting a procurement under the USDA entitlement programs specified in § 3016.4(b) of this part, a grantee or subgrantee may enter into a contract with a party that has provided specification information to the grantee or subgrantee for the grantee's or subgrantee's use in developing contract specifications for conducting such a procurement. In order to ensure objective contractor performance and eliminate unfair competitive advantage, however, a person that develops or drafts specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other documents for use by a grantee or subgrantee in conducting a procurement under the USDA entitlement programs specified in § 3016.4(b) shall be excluded from competing for such procurements. Such persons are ineligible for contract awards resulting from such procurements regardless of the procurement method used. However, prospective contractors may provide grantees or subgrantees with specification information related to a procurement and still compete for the procurement if the grantee or subgrantee, and not the prospective contractor, develops or drafts the specifications, requirements, statements of work, invitations for bid, and/or requests for proposals used to conduct the procurement.

(c) Procurements under USDA entitlement programs specified in § 3016.4(b) shall be conducted in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographic preferences except as provided for in § 3016.36(c)(2).

§ 3016.61 Financial reporting.

The financial reporting provisions found in § 3016.41 do not apply to any of the USDA entitlement programs listed in § 3016.4(b) except the Food Distribution Program on Indian Reservations. The financial reporting requirements for these entitlement programs are found in the following program regulations:

(a) For the National School Lunch Program, 7 CFR part 210;

(b) For the Special Milk Program for Children, 7 CFR part 215;

(c) For the School Breakfast Program, 7 CFR part 220;

(d) For the Summer Food Service Program for Children, 7 CFR part 225;

(e) For the Child and Adult Care Food Program, 7 CFR part 226;

(f) For State Administrative Expense Funds under section 7 of the Child Nutrition Act of 1966, 7 CFR part 235; and

(g) For State Administrative Expenses under section 16 of the Food Stamp Act of 1977, 7 CFR part 277.

PART 3019—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

7. The authority citation for part 3019 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 901–903; 7 CFR 2.28.

8. In § 3019.1, designate the existing text as paragraph (a) and add paragraph (b) to read as follows:

§ 3019.1 Purpose.

* * * * *

(b) This part also applies specifically to the grants, agreements and subawards to institutions of higher education, hospitals, and other non-profit organizations that are awarded to carry out the following entitlement programs:

(1) Entitlement grants under the following programs authorized by The Richard B. Russell National School Lunch Act:

(i) National School Lunch Program, General Assistance (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) National School Lunch Program, Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service Program for Children (section 13 of the Act), and

(v) Child and Adult Care Food Program (section 17 of the Act).

(2) Entitlement grants under the following programs authorized by The Child Nutrition Act of 1966:

(i) Special Milk Program for Children (section 3 of the Act), and

(ii) School Breakfast Program (section 4 of the Act).

(3) Entitlement grants for State Administrative Expenses under The Food Stamp Act of 1977 (section 16 of the Act).

9. In § 3019.2, remove the last sentence in paragraph (e) introductory text and paragraphs (e)(1) through (e)(5).

[FR Doc. 00–20489 Filed 8–11–00; 8:45 am]

BILLING CODE 3410–90–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

Business Loan Programs

AGENCY: Small Business Administration.

ACTION: Final rule; correcting amendment.

SUMMARY: The U.S. Small Business Administration (SBA) published a final rule governing 7(a) loan securitizations on February 10, 1999. In that rule, SBA inadvertently omitted a sentence in the section covering capital requirements for securitizing institutions ("securitizers"). This document adds that sentence.

DATES: Effective on August 14, 2000.

FOR FURTHER INFORMATION CONTACT: James W. Hammersley, Director, Secondary Market Sales, (202) 205–7505.

SUPPLEMENTARY INFORMATION: SBA published a final rule in the **Federal Register** on February 10, 1999, (64 FR 6503), governing 7(a) loan securitizations. This correction adds a sentence to § 120.425(a), on capital requirements, that was inadvertently omitted. Section 120.425(a) provides that all "securitizers must be considered to be 'well capitalized' by their regulator." It further states that "SBA, as the regulator, will consider a nondepository institution to be 'well capitalized' if it maintains a minimum unencumbered paid in capital and paid in surplus equal to at least 10 percent of its assets, excluding the guaranteed portion of 7(a) loans." This correction adds that "[t]he capital charge applies to the remaining balance outstanding on the unguaranteed portion of the securitizer's 7(a) loans in its portfolio and in any securitization pools."

This correction is consistent with notice provided in the preamble to the final rule published on February 10, 1999 (64 FR 6503). That preamble stated that commenters requested SBA to clarify that "the capital charge applies not only to the unguaranteed portion of the securitizer's 7(a) loans in the portfolio but also to the remaining balance outstanding in the securitization pools" and that SBA "incorporated" this clarification "into the final rule."

By making this correction, SBA is incorporating the clarification, as intended, into the final rule.

List of Subjects in 13 CFR Part 120

Loan programs—business, Small businesses.

Accordingly, SBA amends 13 CFR part 120 by making the following correcting amendment:

PART 120—[CORRECTED]

1. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6) and 636(a) and (h).

2. In § 120.425, amend paragraph (a) by adding a new sentence after the fourth sentence to read as follows:

§ 120.425 What are the minimum elements that SBA will require before consenting to a securitization?

* * * * *

(a) * * * The capital charge applies to the remaining balance outstanding on the unguaranteed portion of the securitizer's 7(a) loans in its portfolio and in any securitization pools. * * *

* * * * *

Aida Alvarez,

Administrator.

[FR Doc. 00–19339 Filed 8–11–00; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NM–331–AD; Amendment 39–11769; AD 2000–11–21]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319, A320, and A321 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects information in an existing airworthiness directive (AD) that applies to certain Airbus Model A319, A320, and A321 series airplanes. That AD currently requires a one-time general visual inspection to determine the part number and serial number of the spoiler servocontrol, and corrective action, if necessary. This document corrects the type of inspection required by this AD, and corrects references to certain paragraphs of the applicable service bulletins. These corrections are necessary to ensure that operators are notified of the type of inspection required and the correct paragraph references of the applicable service bulletins.

DATES: Effective July 18, 2000.

The incorporation by reference of certain publications listed in the regulations was approved previously by the Director of the Federal Register as of July 18, 2000 (65 FR 37017, June 13, 2000).

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: On June 1, 2000, the Federal Aviation Administration (FAA) issued AD 2000–11–21, amendment 39–11769, which applies to certain Airbus Model A319, A320, and A321 series airplanes. That AD requires a one-time general visual inspection to determine the part number