

## Environmental Protection Agency

## § 35.939

(4) The grantee may reinstate up to 10 percent withholding if the grantee determines, at its discretion, that the contractor is not making satisfactory progress or there is other specific cause for such withholding.

(5) The grantee may accept securities negotiable without recourse, condition or restrictions, a release of retainage bond, or an irrevocable letter of credit provided by the contractor instead of all or part of the cash retainage.

(b) The foregoing retention policy shall be implemented with respect to all step 3 projects for which plans and specifications are approved after March 1, 1976. Appropriate provision to assure compliance with this policy must be included in the bid documents for such projects initially or by addendum before the bid submission date, and as a special condition in the grant agreement or in a grant amendment. For all previous active projects, the grantee may implement the foregoing policy through contract amendment upon written request to the grantee by the contractor upon consideration that the grantee deems adequate.

(c) Under § 30.620-3 of this subchapter, a grantee who delays disbursement of grant funds will be required to credit to the United States all interest earned on those funds.

### § 35.938-8 Required construction contract provisions.

Each construction contract must include the "Supplemental General Conditions" set forth in appendix C-2 to this subpart.

### § 35.938-9 Subcontracts under construction contracts.

(a) The award or execution of subcontracts by a prime contractor under a construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by prime contractors in awarding or executing subcontracts are not required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.938 except those specifically stated in this section. In addition, the bid protest procedures of § 35.939 are not available to parties executing subcontracts

with prime contractors except as specifically provided in that section.

(b) The award or execution of subcontracts by a prime contractor under a formally advertised, competitively bid, fixed price construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by such prime contractors in awarding or executing such subcontracts must comply with the following:

(1) Section 35.936-2 (Grantee procurement systems; State or local law);

(2) Section 35.936-7 (Small and minority business);

(3) Section 35.936-13 (Specifications);

(4) Section 35.936-15 (Limitations on subagreement award);

(5) Section 35.936-17 (Fraud and other unlawful or corrupt practices);

(6) Section 35.938-5(d) (Negotiation of contract amendments); and

(7) Applicable subagreement clauses (see appendix C-2, clauses 8, 10, 14, 15, 16; note clause 11).

(c) The award of subcontracts under construction contracts not described above in paragraph (b) of this section and the procurement and negotiation procedures of prime contractors on contracts not meeting that description must comply with paragraphs (b)(1) through (4) of this section as well as the principles of § 35.938-5.

### § 35.939 Protests.

(a) *General.* A protest based upon an alleged violation of the procurement requirements of §§ 35.936 through 35.938-9 of this subpart may be filed against a grantee's procurement action by a party with an adversely affected direct financial interest. Any such protest must be received by the grantee within the time period in paragraph (b)(1) of this section. The grantee is responsible for resolution of the protest before the taking of the protested action, in accordance with paragraph (d) of this section, except as otherwise provided by paragraph (j) or (k) or § 35.938-4(h)(5). The Regional Administrator will review grantee protest determinations in accordance with paragraph (e) of this section, if a timely request for such review is filed under paragraph (b)(2) of this section. In the case of protests which he determines are untimely,