



This document is scheduled to be published in the Federal Register on 07/26/2016 and available online at <http://federalregister.gov/a/2016-16643>, and on FDsys.gov

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AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Parts 722, 729, 731, and 752

RIN 0412-AA78

Various Administrative Changes and Clauses to the USAID
Acquisition Regulation

AGENCY: U.S. Agency for International Development.

ACTION: Final rule.

SUMMARY: The U.S. Agency for International Development (USAID) is issuing a final rule amending the Agency for International Development Acquisition Regulation (AIDAR) to maintain consistency with Federal and Agency regulations and incorporate current and new USAID clauses into the regulation.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

A. Background.

USAID published a proposed rule in the Federal Register at 80 FR 69930 on November 12, 2015 soliciting public comments on the inclusion of several agency-specific clauses into the Agency for International Development Acquisition Regulation (AIDAR). The highlights of the changes are as follows:

- Sections 722.810 and 752.222-71 are added to encourage all USAID contractors performing and recruiting entirely outside the United States to develop and enforce employment nondiscrimination policies with regard to race, color, religion, sex (including pregnancy and gender identity), sexual orientation, marital status, parental status, political affiliation, national origin, disability, age, genetic information, veteran status or any other conduct that does not adversely affect the performance of the employee.

- New part 729, subpart 729.4, sections 729.204-70 and 752.229-70 require contractors to report the amounts of foreign taxes assessed by a foreign government on commodities financed with U.S. Foreign Assistance funds. The reporting is used to require the countries to reimburse the

taxes or duties imposed on U.S. foreign assistance funds and for certain reporting to Congress.

- Sections 731.205-43 and 752.231-72 are added to mitigate the risk of inappropriate spending, as mandated by Executive Order 13589 "Promoting Efficient Spending" dated November 9, 2011. Contractors are required to obtain USAID written approval prior to committing costs related to USAID-funded conferences that meet the criteria provided in section 731.205-43.

- New section 752.7036 directs contractors to register with the Implementing Partner Notices (IPN) Portal, where USAID uploads contract modifications that affect multiple awards and provides notices to contractors.

- Section 752.7037 is added to promote child safeguarding when implementing USAID programs. The clause complements the USAID Counter Trafficking in Persons (C-TIP) Code of Conduct by expanding the range of actions prohibited by USAID to include abuse, exploitation, or neglect of children.

B. Discussion and Analysis.

One comment was received in response to the proposed rule, which USAID reviewed in the development of the final rule. No other comments were received.

A discussion of the comment received and the resulting changes are provided as follows:

Comment: One respondent recommended that USAID clarify the impact of the transfer of the requirements for prior written approval of conference costs from Agency internal policies into the AIDAR section 731.205-43. The respondent correctly pointed out that the intent of including these requirements in section 731.205-43 was to make the costs associated with a conferences meeting the criteria in the subpart unallowable, if the contractor did not obtain the required prior written approval. To minimize potential disagreement between the contractors and the Government, and to mitigate the risk of litigations, the respondent recommended including a statement in the section 731.205-43 to clarify this point. Doing so would also ensure that such costs are expressly unallowable and thus subject to the penalties provided in FAR 42.709.

Response: We concur with the respondent's recommendation. Based on this public comment, USAID is revising section 731.205-43 to include a new paragraph stating that costs associated with a conference, meeting the criteria in the subpart, are unallowable, when the required prior written approval for such costs is not obtained.

In addition, the final rule includes the following minor editorial changes from the proposed rule, based on further Agency review and comments from OMB and other agencies:

- A new paragraph was added to section 731.205-43 to specify that contracting Officers or the contracting officer's representatives will provide conference cost approvals following Agency internal procedures in Automated Directive System (ADS) Chapter 580.

- The clause at 752.231-72 is revised to make clear that contractors must obtain the required approvals for conferences from the contracting officer or contracting officer's representative.

- The definition of the universal bilateral modification at 752.3036 has been slightly edited to conform to the plain language requirements.

- The clause at 752.222-71 is revised for clarity.

C. Regulatory Planning and Review.

This rule has been determined to be "nonsignificant" under the Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993 and, therefore, is not subject to review. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act.

The rule will not have an impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. Therefore, an Initial Regulatory Flexibility Analysis has not been performed.

E. Paperwork Reduction Act.

The proposed rule does not establish a new collection of information that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 722, 729, 731, and 752
Government procurement.

For the reasons discussed in the preamble, USAID amends 48 CFR chapter 7 as set forth below:

CHAPTER 7— AGENCY FOR INTERNATIONAL DEVELOPMENT

SUBCHAPTER D -- SOCIOECONOMIC PROGRAMS

PART 722 -- APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITION

1. The authority citation for 48 CFR part 722 continues to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435.

Subpart 722.8 -- Equal Employment Opportunity

2. Revise section 722.810 to read as follows:

722.810 Solicitation provisions and contract clauses.

(a) The contracting officer must insert the clause at 752.222-70, USAID Disability Policy in section I of all solicitations and resulting contracts.

(b) The contracting officer must insert the clause at 752.222-71, Nondiscrimination in section I of all solicitations and resulting contracts.

SUBCHAPTER E -- GENERAL CONTRACTING REQUIREMENTS

3. Add part 729 to subchapter E to read as follows:

PART 729 -- TAXES

Subpart 729.4 -- Contract Clauses

729.402-70 - Foreign contracts.

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, 44 FR 56673, 3 CFR 1979 Comp., p. 435.

Subpart 729.4 -- Contract Clauses

729.402-70 - Foreign contracts.

(a) Section 579 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of FY 2003 requires certain steps to prevent countries from imposing taxes [defined as Value Added Tax (VAT) or customs

duties] on U.S. foreign assistance, or if imposed, requires the countries to reimburse the assessed taxes or duties. The Act also requires certain reporting to Congress. The Department of State has published guidance for implementing this section of the Act. See <http://2001-2009.state.gov/s/d/rm/c10443.htm> for further information.

(b) Contracting Officers (COs) must insert the clause at 752.229-71, Reporting of Foreign Taxes in section I of solicitations and resulting contracts that obligate or subobligate FY 2003 or later funds except for the following:

- (1) Contracts funded with Operating Expense, Public Law 83-480 funds, or trust funds; or
- (2) Contracts where there will be no commodity transactions in a foreign country over the amount of \$500.

PART 731 -- CONTRACT COST PRINCIPLES AND PROCEDURES

4. The authority citation for 48 CFR part 731 continues to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435.

Subpart 731.2 -- Contracts With Commercial Organizations

5. Add section 731.205-43 to read as follows:

731.205-43 Trade, business, technical and professional activity costs - USAID conference approval requirements.

(a) The contractor must obtain prior written approval from the contracting officer, or the contracting officer's representative (COR), if delegated in the Contracting Officer's Representative Designation Letter, for costs related to conferences funded in whole or in part with USAID funds when:

(1) Twenty (20) or more USAID employees are expected to attend.

(2) The net conference expense funded by USAID will exceed \$100,000 (excluding salary of employees), regardless of the number of USAID participants.

(b) The contracting officer or the contracting officer's representative will follow the internal Agency procedures for review and approval of conference costs, as specified in Automated Directive System (ADS) chapter 580, prior to providing such approval to the contractor.

(c) Costs associated with a conference that meets the criteria above, incurred without USAID prior written approval, are unallowable.

(d) Contracting officers must insert the clause at 752.231-72 in all USAID-funded solicitations and contracts anticipated to include a requirement for a USAID-funded

conference. See (48 CFR) AIDAR 752.231-72 for the definition of a conference and specific requirements and procedures.

SUBCHAPTER H -- CLAUSES AND FORMS

PART 752 -- SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. The authority citation for 48 CFR part 752 continues to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435.

7. Add section 752.222-71 to read as follows:

752.222-71 Nondiscrimination.

As prescribed in (48 CFR) AIDAR 722.810(b), insert the following clause in section I of all solicitations and resulting contracts.

NONDISCRIMINATION (JUNE 2012)

FAR part 22 and the clauses prescribed in that part prohibit contractors performing in or recruiting from the U.S. from engaging in certain discriminatory practices. USAID is committed to achieving and maintaining a diverse and representative workforce and a workplace free of discrimination. Based on law, Executive Order, and Agency policy, USAID prohibits discrimination in its own workplace

on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, disability, age, veteran's status, sexual orientation, genetic information, marital status, parental status, political affiliation, and any other conduct that does not adversely affect the performance of the employee. USAID does not tolerate any type of discrimination (in any form, including harassment) of any employee or applicant for employment on any of the above-described bases.

Contractors are required to comply with the nondiscrimination requirements of the FAR. In addition, the Agency strongly encourages all its contractors (at all tiers) to develop and enforce nondiscrimination policies consistent with USAID's approach to workplace nondiscrimination as described in this clause, subject to applicable law.

(End of clause)

8. Add section 752.229-71 to read as follows:

752.229-71 Reporting of foreign taxes.

As prescribed in (48 CFR) AIDAR 729.402-70, insert the following clause in section I of applicable solicitations and resulting contracts. The contracting officer must insert address and point of contact at the Embassy,

Mission, or M/CFO/CMP as appropriate under paragraph (d) of this clause.

REPORTING OF FOREIGN TAXES (JULY 2007)

(a) The contractor must annually submit a report by April 16 of the next year.

(b) Contents of report. The report must contain:

(1) Contractor name.

(2) Contact name with phone, fax number and email address.

(3) Contract number(s).

(4) Amount of foreign taxes assessed by a foreign government [each foreign government must be listed separately] on commodity purchase transactions valued at \$500 or more financed with U.S. foreign assistance funds under this agreement during the prior U.S. fiscal year.

(5) Only foreign taxes assessed by the foreign government in the country receiving U.S. assistance are to be reported. Foreign taxes by a third party foreign government are not to be reported. For example, if a contractor performing in Lesotho using foreign assistance funds should purchase commodities in South Africa, any taxes imposed by South Africa would not be included in the report for Lesotho (or South Africa).

(6) Any reimbursements received by the contractor during the period in paragraph (b) (4) of this clause regardless of

when the foreign tax was assessed and any reimbursements on the taxes reported in paragraph (b) (4) of this clause received through March 31.

(7) Report is required even if the contractor did not pay any taxes during the reporting period.

(8) Cumulative reports may be provided if the contractor is implementing more than one program in a foreign country.

(c) Definitions. As used in this clause--

(1) Agreement includes USAID direct and country contracts, grants, cooperative agreements and interagency agreements.

(2) Commodity means any material, article, supply, goods, or equipment.

(3) Foreign government includes any foreign governmental entity.

(4) Foreign taxes means value-added taxes and customs duties assessed by a foreign government on a commodity. It does not include foreign sales taxes.

(d) Where. Submit the reports to: [contracting officer must insert address and point of contact at the Embassy, Mission, or CFO/CMP as appropriate].

(e) Subagreements. The contractor must include this reporting requirement in all applicable subcontracts and other subagreements.

(f) For further information see <http://2001-2009.state.gov/s/d/rm/c10443.htm>.

(End of clause)

9. Add section 752.231-72 to read as follows:

752.231-72 Conference planning and required approvals.

As prescribed in (48 CFR) AIDAR 731.205-43, insert the following clause in section I of all solicitations and resulting contracts anticipated to include a requirement for a USAID-funded conference, as defined in the clause.

CONFERENCE PLANNING AND REQUIRED APPROVALS (AUG 2013)

(a) Definitions. Conference means a seminar, meeting, retreat, symposium, workshop, training activity or other such event that requires temporary duty travel of USAID employees. For the purpose of this policy, an employee is defined as a U.S. direct hire; personal services contractor, including U.S. PSCs, Foreign Service National (FSN)/Cooperating Country National (CCN) and Third Country National (TCN); or a Federal employee detailed to USAID from another government agency.

(b) The contractor must obtain approval from the contracting officer or the contracting officer's representative (COR), if delegated in the Contracting Officer's Representative Designation Letter, as prescribed

in 731.205-43, prior to committing costs related to conferences funded in whole or in part with USAID funds when:

(1) Twenty (20) or more USAID employees are expected to attend.

(2) The net conference expense funded by USAID will exceed \$100,000 (excluding salary of employees), regardless of the number of USAID participants.

(c) Conferences approved at the time of award will be incorporated into the award. Any subsequent requests for approval of conferences must be submitted by the contractor to the USAID contracting officer representative (COR). The contracting officer representative will obtain the required agency approvals and communicate such approvals to the contractor in writing.

(d) The request for conference approval must include:

- (1) A brief summary of the proposed event;
- (2) A justification for the conference and alternatives considered, e.g., teleconferencing and videoconferencing;
- (3) The estimated budget by line item (e.g., travel and per diem, venue, facilitators, meals, equipment, printing, access fees, ground transportation);

- (4) A list of USAID employees attending and a justification for each; and the number of other USAID-funded participants (e.g., institutional contractors);
- (5) The venues considered (including government-owned facility), cost comparison, and justification for venue selected if it is not the lowest cost option;
- (6) If meals will be provided to local employees (a local employee would not be in travel status), a determination that the meals are a necessary expense for achieving Agency objectives; and
- (7) A certification that strict fiscal responsibility has been exercised in making decisions regarding conference expenditures, the proposed costs are comprehensive and represent the greatest cost advantage to the U.S. Government, and that the proposed conference representation has been limited to the minimum number of attendees necessary to support the Agency's mission.

(End of clause)

10. Add section 752.7036 to read as follows:

752.7036 USAID Implementing Partner Notices (IPN) portal for acquisition.

Insert the following clause in section I of all solicitations and resulting contracts, except for orders under indefinite delivery contracts issued pursuant to (48

CFR) FAR subpart 16.5; orders under Federal Supply (GSA) Schedules issued pursuant to (48 CFR) FAR subpart 8.4; and contracts and purchase orders awarded under the simplified acquisitions procedures of (48 CFR) FAR part 13.

USAID IMPLEMENTING PARTNER NOTICES (IPN) PORTAL FOR ACQUISITION (JULY 2014)

(a) Definitions. As used in this clause--

"Universal" bilateral modification means a bilateral modification, as defined in FAR subpart 43.1, that updates or incorporates new FAR or AIDAR clauses, other terms and conditions, or special requirements, affecting all USAID awards or a class of awards, as specified in the Agency notification of such modification.

USAID Implementing Partner Notices (IPN) Portal for Acquisition (IPN Portal) means the single point where USAID uploads universal bilateral modifications, which can be accessed electronically by registered USAID contractors.

The IPN Portal is located at

<https://sites.google.com/site/ipnforacquisitions/>.

IPN Portal Administrator means the USAID official designated by the M/OAA Director, who has overall responsibility for managing the USAID Implementing Partner Notices Portal for Acquisition.

(b) By submission of an offer and execution of a contract, the Offeror/Contractor acknowledges the requirement to:

(1) Register with the IPN Portal if awarded a contract resulting from this solicitation; and

(2) Receive universal bilateral modifications of this contract and general notices through the IPN Portal.

(c) Procedure to register for notifications. Go to: <https://sites.google.com/site/usaidipnforacquisitions/> and click the "Register" button at the top of the page.

Contractor representatives must use their official organization email address when subscribing, not personal email addresses.

(d) Processing of IPN portal modifications. (1) The contractor may access the IPN Portal at any time to review all IPN Portal modifications; however, the system will also notify the contractor by email when the USAID IPN Portal Administrator uploads a universal bilateral modification for contractor review and signature. Proposed IPN Portal modifications distributed through the IPN Portal are applicable to all awards, unless otherwise noted in the proposed modification.

(2) Within 15 calendar days from receipt of the notification email from the IPN Portal, the contractor must do one of the following:

(i) (A) Verify applicability of the proposed modification to their award(s) per the instructions provided with each modification;

(B) Download the modification and incorporate the following information on the SF30 form: contract number, organization name, and organization mailing address as it appears in the basic award;

(C) Sign the hardcopy version; and

(D) Send the signed modification (by email or hardcopy) to the contracting officer for signature;

Note to paragraph (d) (2) (i): The contractor must not incorporate any other changes to the IPN Portal modification.

(ii) Notify the Contracting Officer in writing if the modification requires negotiation of the additional changes to terms and conditions of the contract; or

(iii) Notify the contracting officer that the contractor declines to sign the modification.

(3) Within 30 calendar days of receipt of a signed modification from the contractor, the contracting officer must provide the fully executed modification to the contractor or initiate discussions with the contractor. Bilateral modifications provided through the IPN Portal are

not effective until both the contractor and the contracting officer sign the modification.

(End of clause)

11. Add section 752.7037 to read as follows:

752.7037 Child safeguarding standards.

Insert the following clause in section I of all solicitations and contracts other than those for commercial items.

CHILD SAFEGUARDING STANDARDS (INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER)

(a) Implementation of activities under this award may involve children, or personnel engaged in the implementation of the award may come into contact with children, which could raise the risk of child abuse, exploitation, or neglect within this award. The contractor agrees to abide by the following child safeguarding core principles:

(1) Ensure compliance with host country and local child welfare and protection legislation or international standards, whichever gives greater protection, and with U.S. law where applicable;

- (2) Prohibit all personnel from engaging in child abuse, exploitation, or neglect;
 - (3) Consider child safeguarding in project planning and implementation to determine potential risks to children that are associated with project activities and operations;
 - (4) Apply measures to reduce the risk of child abuse, exploitation, or neglect, including, but not limited to, limiting unsupervised interactions with children; prohibiting exposure to pornography; and complying with applicable laws, regulations, or customs regarding the photographing, filming, or other image-generating activities of children;
 - (5) Promote child-safe screening procedures for personnel, particularly personnel whose work brings them in direct contact with children; and
 - (6) Have a procedure for ensuring that personnel and others recognize child abuse, exploitation, or neglect; mandating that personnel and others report allegations; investigating and managing allegations; and taking appropriate action in response to such allegations, including, but not limited to, dismissal of personnel.
- (b) The contractor must also include in the code of conduct for all personnel implementing USAID-funded

activities, the child safeguarding principles in paragraphs (a) (1) through (6) of this clause.

(c) The following definitions apply for purposes of this clause:

(1) Child. A child or children are defined as persons who have not attained 18 years of age.

(2) Child abuse, exploitation, or neglect. Constitutes any form of physical abuse; emotional ill-treatment; sexual abuse; neglect or insufficient supervision; trafficking; or commercial, transactional, labor, or other exploitation resulting in actual or potential harm to the child's health, well-being, survival, development, or dignity. It includes, but is not limited to: any act or failure to act which results in death, serious physical or emotional harm to a child, or an act or failure to act which presents an imminent risk of serious harm to a child.

(3) Emotional abuse or ill treatment. Constitutes injury to the psychological capacity or emotional stability of the child caused by acts, threats of acts, or coercive tactics. Emotional abuse may include, but is not limited to: humiliation, control, isolation, withholding of information, or any other deliberate activity that makes the child feel diminished or embarrassed.

(4) Exploitation. Constitutes the abuse of a child where some form of remuneration is involved or whereby the perpetrators benefit in some manner. Exploitation represents a form of coercion and violence that is detrimental to the child's physical or mental health, development, education, or well-being.

(5) Neglect. Constitutes failure to provide for a child's basic needs within USAID-funded activities that are responsible for the care of a child in the absence of the child's parent or guardian.

(6) Physical abuse. Constitutes acts or failures to act resulting in injury (not necessarily visible), unnecessary or unjustified pain or suffering without causing injury, harm or risk of harm to a child's health or welfare, or death. Such acts may include, but are not limited to: punching, beating, kicking, biting, shaking, throwing, stabbing, choking, or hitting (regardless of object used), or burning. These acts are considered abuse regardless of whether they were intended to hurt the child.

(7) Sexual abuse. Constitutes fondling a child's genitals, penetration, incest, rape, sodomy, indecent exposure, and exploitation through prostitution or the production of pornographic materials.

(d) The contractor must insert this clause in all subcontracts under this award.

(End of clause)

Dated: June 29, 2016.

Roy Plucknett,

Chief Acquisition Officer.

[FR Doc. 2016-16643 Filed: 7/25/2016 8:45 am; Publication Date: 7/26/2016]