



AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Parts 701, 722 and Appendix J

RIN 0412-AA80

Agency for International Development Acquisition Regulation (AIDAR): Agency Warrant Program for Individual Cooperating Country National Personal Services Contractors (CCNPSCs).

AGENCY: U.S. Agency for International Development.

ACTION: Proposed rule.

SUMMARY: The U.S. Agency for International Development (USAID) proposes to amend the Agency for International Development Acquisition Regulation (AIDAR) to incorporate a warrant program for cooperating country national personal service contractors (CCN PSCs) into the regulation. The purpose of the CCN PSC warrant program is not only to address a shortage of U.S. direct-hire contracting officers by delegating limited contracting officer authorities to a select number of Cooperating Country National personal services contractors, but also to bolster the Agency to succeed in terms of building long-term, host country technical capacity to materially assist the Missions with procurement responsibility. In addition, USAID is proposing to clarify that third country nationals (TCNs) and cooperating country nationals (CCNs) employment

requirements, contained in section 722.170, do not apply to consultants.

DATES: Comments must be received no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: Address all comments concerning this notice to Lyudmila Bond, Bureau for Management, Office of Acquisition and Assistance, Policy Division (M/OAA/P), Room 867, SA-44, Washington, DC 20523-2052. Submit comments, identified by title of the action and Regulatory Information Number (RIN) by any of the following methods:

1. Through the Federal eRulemaking Portal at <http://www.regulations.gov> by following the instructions for submitting comments.

2. By Mail addressed to: USAID, Bureau for Management, Office of Acquisition & Assistance, Policy Division, Room 867J, SA-44, 1300 Pennsylvania Ave. NW., Washington, DC 20523-2052.

FOR FURTHER INFORMATION CONTACT: Lyudmila Bond,  
Telephone: 202-567-4753 or E-mail: [lbond@usaid.gov](mailto:lbond@usaid.gov)

SUPPLEMENTARY INFORMATION:

A. Instructions:

All comments must be in writing and submitted through one of the methods specified in the Addresses section above. All submissions must include the title of the action and RIN for this rulemaking. Please include your name, title, organization, postal address, telephone number, and e-mail address in the text of the message.

Please note that USAID recommends sending all comments to the Federal eRulemaking Portal because security screening precautions have slowed the delivery and dependability of surface mail to USAID/Washington.

After receipt of a comment and until finalization of the action, all comments will be made available at <http://www.regulations.gov> for public review without change, including any personal information provided. We recommend you do not submit information that you consider Confidential Business Information (CBI) or any information that is otherwise protected from disclosure by statute. USAID will only address substantive comments on the rule. Comments that are insubstantial or outside the scope of the rule may not be considered.

#### B. Background.

USAID is seeking comments on the proposed rule as described below:

1) 722.170 Employment of third country nationals (TCN's) and cooperating country nationals (CCN's).

In response to numerous inquiries, USAID is proposing a revision of this section of the AIDAR to clarify that employment requirements for TCN and CCN employees of a contractor do not apply to consultants. It is the responsibility of a contractor to determine whether an individual being hired is an employee or a consultant.

2) Cooperating country national (CCN) warrant program.

Background:

In 2011, the U.S. Agency for International Development (USAID) approved a two-year Worldwide CCN Administrative Contracting and Agreement Officer (ACO/AAO) Pilot Warrant Program. The purpose of this program was to address the shortage of USAID contracting officers and build long-term, host country technical capacity to materially assist the Missions with procurement responsibility.

USAID is located in offices in over 80 countries with programs in over 100 nations. USAID operates in a fluid environment responding to a myriad of crises such as war, natural disasters, epidemics, as well as its long term mission of ending extreme poverty, promoting resilient, democratic societies while advancing our security and

prosperity. The warranted contracting force to manage this effort consists of 150 US direct hire foreign service contracting officers overseas, 105 direct hire civil service contract officers, 83 warranted foreign service executive officers, 3 warranted US personal service contractors managing mission's acquisition portfolio, and 4 warranted US personal service contractors serving as executive officers. In addition to, and perhaps partially because of having such a relatively small warranted work force to manage a portfolio that is large and varied with a global footprint, the foreign service contracting staff has one of the highest attrition rates in USAID's work force.

USAID made a strategic decision to create a cadre of highly qualified Cooperating Country Nationals, who have demonstrated high potential for assuming responsibilities to serve as administrative contracting officers within designated Missions. The purpose was to alleviate some of the workload of our contracting officer staff. During the two phases of the program, USAID added 6 warranted CCN administrative contracting officers. Currently, by the end of fiscal year 2016, we anticipate that there will be approximately 12 warranted CCN contracting officers. While a seemingly small number, that would represent an 8 percent

increase of our overseas US direct hire warranted contracting officer staff.

When designing the CCN Pilot Warrant Program, USAID consulted with the Senior Procurement Executive at the State Department and the unions. The State Department's SPE advised that State conducted a similar pilot several years ago, to great success. They now have a permanent program that extends limited authority to their locally-employed staff in selected countries. The vice president of the American Foreign Service Association concurred with the Pilot, and was pleased by several of its protections.

Based on that two-year pilot program, revisions were made to the program structure to better suit the Agency's needs before the permanent program was launched in September 2014. USAID eliminated the portion of the program that allowed for third country nationals to receive warrants. A comprehensive review of the CCN Pilot Warrant Program underscored a need to broaden participation through among other things, revision of qualifications and inclusion of full obligation warrant authority up to \$150,000 per transaction and an annual cumulative amount of \$1 million at the CCN Grade 13 Level to assist the Missions'

procurement function. A better understanding of CCN grades and the grading process allowed for better clarity of expectations for Missions and warrant applicants. To help mitigate CCN inexperience from leading to mistakes or malfeasance, the revised CCN Warrant Program includes several levels of obligation authority and non-monetary administrative responsibility correlating to CCN grade/experience within the acquisition backstop. Increasing degrees of responsibility and/or obligation authority, as applicable, are granted.

The permanent CCN Warrant Program currently establishes three levels of contracting officer responsibilities that can be designated to a CCN personal services contractor depending on the needs of each mission, complexity and dollar value of the acquisitions, and the individual's experience, training, education, business acumen, judgment, reputation and grade level.

At the first level, a CCN PSC may be delegated authority for select contract administration functions listed in (48 CFR) FAR 42.302(a), including, for example, conducting post-award orientation conferences, approving contractors' requests for payments under the progress payments or performance-based payments clauses.

At the second level, in addition to performing the administrative functions discussed above, a CCN PSC contracting officer may be delegated authority to obligate incremental funding of any amount within the scope and total estimated cost of a contract (to include task orders and purchase orders).

At the third and highest participating grade level, in addition to the incremental funding obligation authority and post-award administration duties described in levels one and two above, a CCN PSC contracting officer may be delegated authority to execute new awards for a total award amount not to exceed one hundred fifty thousand dollars (\$150,000). This authority is further subject to a new award cumulative obligation limit of one million dollars (\$1 million) per Fiscal Year. No deviation from these limitations is authorized.

Regulatory authorities and limitations.

(48 CFR) FAR part 1 establishes the authority for Agency heads to select and appoint contracting officers and it does not specify that contracting officers must be U.S. citizen direct-hire employees of the Federal government.

(48 CFR) FAR part 7.5 includes contracting officer duties in the list of inherently governmental functions or functions that must be treated as such, but does not

exclude personal services contractors hired under a statutory authority from performing such functions.

(48 CFR) AIDAR 701.603-70 currently limits delegations of contracting officer authorities to U.S. citizen direct-hire employees of the U.S. Government as a matter of Agency policy. However, section 4(b)(3) of (48 CFR) AIDAR Appendix D and the corresponding section of Appendix J contain an exception for PSCs to be delegated contracting officer authority with approval from the Assistant Administrator for the Bureau of Management.

In September 2014, USAID issued a two-year class deviation from 48 CFR) AIDAR 701.603-70 to establish the permanent CCN PSC warrant program to allow a limited number of selected and qualified CCN PSCs to be delegated contracting officer authorities. In conjunction with the approval of the class deviation described above, the Assistant Administrator for the Bureau for Management approved a class exception to the limitations in (48 CFR) AIDAR Appendix J 4(b)(3). By this rule USAID is proposing to revise (48 CFR) AIDAR to permanently authorize delegation of contracting officer authorities to a limited number of selected and qualified CCN PSCs.

Discussion.

Prior to establishing the permanent CCN warrant program, the Agency reviewed the risks associated with issuing CO warrants to Non-U.S. citizens who are not direct-hire employees of USAID. In particular, such factors as proper accountability, adequate security considerations, conflicts of interest, and appropriate legal jurisdiction over the employee were considered. Adequate management controls and warrant limitations established under the CCN PSC warrant program, as discussed below, were established to mitigate such risks.

To address the risks associated with adequate accountability and conflict of interest, the warrant program requires candidates for the CCN PSC warrant program to show commitment to the profession by meeting stringent acquisition competencies, education and training requirements. In addition to meeting these requirements, potential candidates must have extensive experience in Direct U.S. Federal Government Contracting and clearly demonstrate professional and ethical behavior. When reviewing applications for a CCN PSC warrant, the agency contacts past performance references (typically, the candidate's last three Supervisory Contracting Officers) and any other sources deemed appropriate for signs of potential risks or cautions that may be detrimental to the

responsibilities inherent in this Program. The candidate's supervisor must also attest to the candidate's education, training, experience, business acumen, judgment, character, reputation and ethical behavior.

Additionally, the Program requires the CCN contracting officer's supervisor to closely and frequently monitor the CCN PSC's work and review performance and progress every six months. This review is followed by periodic reviews conducted by the Bureau for Management, Office of Acquisition and Assistance, Evaluation Division, which is responsible for the program implementation.

CCN PSC contracting officers will support the functions of the overseas Mission's Office of Acquisition & Assistance (A&A), which typically include acquisition and assistance awards implementing the Agency's foreign assistance programs and activities. CCN PSC contracting officers are currently not delegated authority to award any personal services contracts. The program also limits delegated authority for select contract administration functions listed in (48 CFR) FAR 42.302(a), specifically, the contracting officer functions in which disputes or possible legal challenges may arise due to decisions of the contracting officer, functions related to novation and contractor name changes, which may be a result of changes

in a contractor's business structure as governed under applicable U.S. state law and other functions based on U.S. state laws, functions related to small business contracting matters and those requiring extensive knowledge of specific U.S. laws and government-wide policies not specifically related to contracting. Accordingly, the functions specified in items 5-7, 9-12, 18, 21-26, 29, 32, 50, 52-55, 62-63, 66 and 68-71 of (48 CFR) FAR 42.302(a) will not be redelegated to CCN PSC contracting officers.

To address conflict of interest concerns, the program relies on the standard clause entitled "Compliance with Laws and Regulations Applicable Abroad", included in all personal services contracts with CCNs, that mandates compliance with the Standards of Conduct for Executive Branch Employees. These standards, available at <https://www2.oge.gov/web/oge.nsf/All%20Documents/5D633072D0B2DB5085257E96006A90E7?opendocument>, contain two provisions addressing financial interests that conflict with an individual's official duties. The first provision, entitled "Disqualifying financial interests," prohibits an employee from participating in an official government capacity in a matter in which he has a financial interest or in which his spouse, minor child, employer, or any one of several other specified persons has a financial interest. The second

provision, entitled "Prohibited financial interests," contains authority by which agencies may prohibit employee from acquiring or retaining certain financial interests. To address the security concerns, the Program uses the current process, in which the USAID Office of Security and Department of State, Office of Security conduct background checks on potential personal service contractors. Recognizing the fact that some countries may not have adequate legal systems or may be unwilling to provide assistance in prosecuting their citizens for U.S. procurement infractions, the CCN PSC Warrant Program established the following management controls designed to minimize the risk that such legal actions might be necessary:

- Stringent eligibility criteria,
- Reasonable single purchase and cumulative annual limits for new awards.
- CCN participation in this program is limited to one candidate per contracting officer warrant level per overseas mission. This limitation may be expanded only if it is deemed by the Senior Procurement Executive to be in the best interest of the Agency.

- Ongoing risk assessments are performed throughout the Program implementation to assure compliance with the program requirements.

USAID is seeking public comments on the proposed changes to the AIDAR to implement the agency CCN PSC Warrant Program.

C. Impact assessment.

1) Regulatory Planning and Review.

Under E.O. 12866, USAID must determine whether a regulatory action is "significant" and therefore subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). USAID has determined that this Rule is not an "economically significant regulatory action" under Section 3(f)(1) of E.O. 12866.

This proposed rule is not a major rule under 5 U.S.C. 804.

2) 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.

3) 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 Chapter 7 parts 701, 722, 752  
and Appendix J:

Government procurement.

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

1. The authority citation for 48 CFR Chapter 7 parts 701,  
722, 752 and Appendix J 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.

PART 701 -- FEDERAL ACQUISITION REGULATION SYSTEM

Subpart 701.6 -- CAREER DEVELOPMENT, CONTRACTING AUTHORITY,  
AND RESPONSIBILITIES

2. Amend 701.603-70 by adding two sentences to the end to  
read as follows:

701.603-70 Designation of contracting officers.

\* \* \* However, upon approval of an exception by the  
Assistant Administrator for the Bureau for Management  
(AA/M), in accordance with the limitations in AIDAR  
Appendix D, the Senior Procurement Executive may designate  
a USPSC as a Contracting Officer or delegate the USPSC  
authority to sign obligating and subobligating documents.  
The Senior Procurement Executive may also delegate limited  
contracting officer authority to Cooperating Country

National personal service contractors (CCN PSCs) who meet the requirements in the Agency's warrant program for CCN PSCs, as specified in Appendix J.

PART 722—APPLICATION OF LABOR LAWS TO GOVERNMENT  
ACQUISITION

Subpart 722.1—BASIC LABOR POLICIES

3. Amend 722.170 by adding two sentences at the end of paragraph(a) to read as follows:

722.170 Employment of third country nationals (TCN's) and cooperating country nationals (CCN's).

(a) \* \* \* This policy does not apply to consultants, as defined in AIDAR Clause 752.202-1(e), who are engaged to advise the contractor on a temporary or intermittent basis and do not receive standard benefits available to the contractor's employees. It is the contractor's responsibility to identify if the individual being hired is an employee or a consultant.

\* \* \* \* \*

4. Revise paragraphs (b) (3)b. and (b) (4) to read as follows:

Appendix J to Chapter 7—Direct USAID Contracts With a Cooperating Country National and With a Third Country National for Personal Services Abroad

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\* \* \* \* \*

(b) Limitations on Personal Services Contracts.

(3)\* \* \*

b. They may not be designated as Contracting Officers or delegated authority to sign obligating or subobligating documents, unless specifically delegated limited contracting officer authority by the Senior Procurement Executive. In order to be delegated limited contracting officer authority, Cooperating Country National PSCs (CCN PSCs) must meet the requirements in the Agency's warrant program for CCN PSCs.

\* \* \* \* \*

(4) Exceptions. Exceptions to the limitations in (b) (3) (a), (c), (d) and (e) must be approved by the Assistant Administrator for Management (AA/M).

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Roy Plucknett

Chief Acquisition Officer.

Date: July 27, 2016

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