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AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Part 752

RIN 0412-AA81

Requirement for Nondiscrimination against End-Users of Supplies or Services ("Beneficiaries") under USAID-Funded Contracts

AGENCY: U.S. Agency for International Development.

ACTION: Final rule.

SUMMARY: The Foreign Assistance Act of 1961, as amended (FAA), authorizes the U.S. Agency for International Development (USAID) to provide foreign assistance in the form of development and humanitarian assistance that reflect American ideals. To help emphasize USAID's intent and expectation of non-discrimination of beneficiaries in USAID-funded activities, USAID is issuing a final rule to amend its Agency for International Development Acquisition Regulation (AIDAR) to include a new clause entitled "Nondiscrimination against End-Users of Supplies or Services." This clause expressly states that USAID-funded contractors must not discriminate among end-users of supplies or services (referred to in this rule as beneficiaries and potential

beneficiaries) in any way that is contrary to the scope of the activity as defined in the statements of work (SOWs).

DATES: *Effective:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

USAID published a proposed rule in the Federal Register at 81 FR 56572 on August 22, 2016 to amend its Agency for International Development Acquisition Regulation (AIDAR) to include a new clause entitled "Nondiscrimination against End-Users of Supplies or Services."

USAID seeks to improve the lives of people around the world by being inclusive in its development and humanitarian assistance efforts. In so doing, USAID recognizes that every person is instrumental in the transformation of their own societies, with the end result that each and every person is recognized and equally valued without regard to artificial and discriminatory distinctions. The inclusion, protection, and empowerment of all persons is critical because drawing on the

full contributions of the entire population leads to more effective, comprehensive, and sustainable development results.

Nondiscrimination is the basic foundation of USAID's inclusive development approach; as such, all USAID programs seek to ensure access for all potential beneficiaries within the scope of the contract without discrimination. Contractors must adhere to this by implementing the activities as outlined in the contract SOWs. Nondiscrimination is a critical foundation for protecting and promoting the human rights of all persons. In addition, nondiscrimination ensures equitable access to USAID programs. Effective nondiscrimination practices support USAID's principles of inclusion and equal access and help to ensure that USAID programs empower and effectively reach women and girls; marginalized ethnic and religious populations; indigenous peoples; internally displaced persons; persons with disabilities; youth and the elderly; lesbian, gay, bisexual, transgender, and intersex individuals; and other socially marginalized individuals and peoples unique to the country or regional context.

In recent years, the Government has made multiple pronouncements of policy in many areas reflecting its emphasis on equity, fairness, and human dignity—effective nondiscrimination is a means toward achieving all of these. For example, in 2011, the White House issued E.O. 13563, “Improving

Regulation and Regulatory Review,” to update all agencies on factors to consider when issuing rules; in addition to quantitative factors, it advised that the qualitative values of equity, fairness, and human dignity are important considerations. Additionally, a 2011 Presidential Memorandum, “International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons,” directs all agencies engaged abroad to advance nondiscrimination. This rule addressing discrimination in the provision of supplies or services is consistent with the values that animate the above.

II. Discussion

This rulemaking revises (48 CFR) AIDAR to add a new clause at 752.7038 entitled “Nondiscrimination against End-Users of Supplies or Services.” The clause, applicable to all solicitations, contracts, and subcontracts at any tier, prohibits contractors and subcontractors from discriminating against beneficiaries or potential beneficiaries (*i.e.*, those individuals intended to receive the benefits of the award, whether goods or services) on the basis of any characteristics not expressly stated in the award.

The purpose of this rulemaking is to ensure adherence to the intent and authorities in the FAA, and other statutes related to humanitarian assistance and international development. The intent of the FAA is to help people, without

regard to irrelevant and discriminatory distinctions among them. This intent is reflected in many places in the statute. The first words of the Act set out that it seeks to promote United States interests "by assisting peoples of the world." Congress explained its intent thusly in FAA section 101: "[T]he Congress reaffirms the traditional humanitarian ideals of the American people and renews its commitment to assist people in developing countries to eliminate hunger, poverty, illness, and ignorance."

A survey of FAA provisions relevant to USAID awards reflects that they focus on development and humanitarian assistance needs and effectiveness toward meeting them. For example, FAA section 103, on agriculture, rural development, and nutrition, suggests assistance should focus on alleviating poverty. FAA section 104, on health-related assistance, suggests limited targeting of activities to the specialized health needs of children, infants, and mothers. FAA section 491, on international disaster assistance, contemplates "prompt United States assistance to alleviate human suffering" and emphasizes that the implementing agency "shall insure that the assistance provided by the United States shall, to the greatest extent possible, reach those most in need of relief and rehabilitation as a result of natural and manmade disaster."

In some contexts, such as assistance for child survival, the foreign assistance authorities contemplate a focus on women

and children, but that is a matter of programmatic need and effectiveness. USAID has identified no context where excluding individuals from assistance based on any of the types of discrimination proscribed by this clause, outside the scope of the award, would have a positive effect on implementing USAID's foreign assistance authorities.

The main effect of this clause is to ensure that USAID's policy and practice of non-discrimination in planning projects and activities is followed through to completion by the contractors that implement them. Its impact on contractors and offerors is to remind them to follow the terms and conditions of the contract, including the implementation of the SOW as designed, and to refrain from the types of discrimination described in the clause. In itself, the clause serves as a reminder to contractors and offerors of USAID's long-standing, pre-existing expectations based on USAID's programmatic and planning priorities and authorities.

III. Summary of Comments and Explanation of Revisions

The proposed rule was published for public comment pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 1707). In total, six public comments were received. All six comments were supportive in nature.

Five commenters recommended minor edits to the second sentence of subsection (a) of the rule to clarify that all of

the listed categories are included among the factors, which if not expressly stated in the award, are precluded from being used as a basis for discrimination by the contractor. The second sentence of this final rule has accordingly been clarified in response to these comments to eliminate any potential ambiguity.

Four commenters suggested that the rule be modified to apply to USAID grantees and be included in USAID grant and cooperative agreement awards. One commenter also urged that the rule be clarified to apply to subcontracts and subgrants. These comments did not warrant any changes to the final rule. The AIDAR only applies to contracts. USAID will address assistance awards (i.e., grants and cooperative agreements) and subawards separately from this rulemaking. Additionally, the new clause already specifies in subsection (b) that it must be inserted in all subcontracts at any tier.

One commenter recommended the inclusion of language in the third sentence of the new clause to specify that targeted activities by the contractor toward the assistance needs of certain populations specified in the contract must serve a "legitimate programmatic purpose." This change was not included in the final rule, as the programmatic purpose of USAID contracts is already considered as part of the contract SOWs. On its own initiative, USAID made a minor editorial revision to better clarify the regulation, replacing the article "a" with

“the” in the third sentence of the clause to clearly refer to the contractor receiving a USAID funded contract.

Finally, USAID also received a comment outside the scope of this rule from one commenter urging the Agency to examine its reporting and verification procedures to ensure compliance with the rule, and urging the government-wide harmonization of nondiscrimination policies for beneficiaries of foreign assistance.

IV. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess the costs and benefits of the intended regulation. E.O. 13563 allows that in making this assessment, an agency “may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” The estimated costs of this rulemaking do not exceed the threshold of economic significance (*i.e.*, an annual effect on the economy of \$100 million or more). However, the rule has been designated a “significant regulatory action” under section 3(f) of Executive Order 12866 and therefore it has been reviewed by the Office of Management and Budget.

This rule provides a benefit by promoting non-discrimination, which itself promotes programmatic efficiency,

with very little additional administrative burden for the affected entities, USAID contractors. It does not ask them to carry out activities beyond those in their contract SOWs and terms and conditions; it does not ask them to alter the manner in which they conduct the work as set out in their contracts. In fact, it reminds them to stay within those instructions. The only potential cost the Agency could identify for contractors and subcontractors is for minimal training, to the extent that contractors do not already proscribe discrimination as part of the normal conduct of their business.

USAID awards approximately 1,300 contracts/task orders annually. As a practical matter for these current contracts, even absent this clause, if for example a contract specified the provision of food parcels in a certain community, the contractor could not, on its own, decide that only certain members of that community should receive the food parcels or that certain members should be excluded.

Including this clause in all new contracts and subcontracts going forward provides an explicit reminder of USAID's expectation that its contractors not discriminate against any protected group or individual, and is particularly important in countries where stigma and discrimination toward certain groups is tolerated or officially endorsed by the government. The benefits of the rule would be to expressly reinforce notions of

equity, fairness, and human dignity under Federal Government contracts.

Contractors responding to a solicitation (e.g. request for proposals (RFP) or invitation for bid (IFB)) would further be on notice not to include any discriminatory criteria in their response to a solicitation, absent specific programmatic justification in the SOW to do so.

V. Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601-612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. It requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities.

In fiscal year 2015, 330 small businesses received USAID funds. In fiscal years 2011, 2012, 2013, and 2014 the 391, 384, 349, and 363 small businesses received USAID funds, respectively. The requirement this rule would impose on small businesses is no different than the requirement for other entities: Contracts or subcontracts awarded to them will include a provision reminding them not to discriminate. Beyond adding a brief reminder or discussion of this now explicit requirement to existing trainings on business ethics and conduct they provide

to their staff, as already required by FAR 3.10, we do not estimate that this will impose a significant additional cost. As with all contractors, the employees of small businesses will be expected to be mindful of the principles of equity, fairness, and human dignity when performing the work under their contracts; as they have always been. The additional effort by small businesses (a matter of a few minutes of discussion) is so de minimis that we do not estimate that this will impose more than a negligible cost.

There are no reporting or recordkeeping requirements associated with this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules. There is currently no other Federal rule addressing discrimination of recipients of supplies or services pursuant to a Federal Government contract. There were no significant alternatives identified that would meet the objective of the rule.

In light of the above analysis, the USAID Chief Acquisition Officer certifies that this rule would not have a significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act

This rule does not include a reporting or information collection requirement. Therefore, USAID has determined that this rule does not impose any new or revised reporting or

disclosure requirements that would be considered collections of information requiring Office of Management and Budget approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Part 752

Government procurement

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

PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 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.

PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Add section 752.7038 to read as follows:

§ 752.7038 Nondiscrimination against End-Users of Supplies or Services.

The following clause must be inserted in section I of all solicitations and resulting contracts.

Nondiscrimination Against End-Users of Supplies or Services (OCT 2016)

(a) USAID policy requires that the contractor not discriminate against any end-user of the contract supplies or services (*i.e.*, the beneficiaries of the supplies or services) in implementation of this award, such as, but not limited to, by withholding, adversely impacting, or denying equitable access to the supplies or services (benefits) provided through this contract on the basis of any factor not expressly stated in the award. This includes, for example, race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, disability, age, genetic information, marital status, parental status, political affiliation, or veteran's status. Nothing in this clause is intended to limit the ability of the contractor to target activities toward the assistance needs of certain populations as defined in the contract.

(b) The Contractor must insert this clause, including this paragraph, in all subcontracts under this contract.

(End of clause)

Dated: October 18, 2016.

Roy Plucknett,

Chief Acquisition Officer.

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