



AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412-AA94

U. S. Agency for International Development Acquisition Regulation (AIDAR): Designation of Personal Services Contractors (PSCs) as Contracting Officers and Agreement Officers

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 streamline the procedures for issuing contracting officer and agreement officer warrants to U.S. Personal Services Contractors (US PSCs) and Cooperating Country National Personal Services Contractors (CCN PSCs).

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

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SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Agency for International Development (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 working towards its long term mission of reducing poverty, strengthening democratic governance, and helping people emerge from humanitarian crises and progress beyond assistance.

The Agency's warranted work force is critical to managing these efforts. A shortage of warranted contracting/agreement officers requires that the Agency be able to designate highly qualified US Personal Services Contractors (US PSCs) and Cooperating Country National Personal Services Contractors (CCN PSCs) as contracting/agreement officers in an expeditious manner. The delegation of limited contracting/agreement officer authorities to a select number of CCN PSCs will also bolster the Agency to succeed in terms of building long-term, host country technical capacity to materially assist the Missions with procurement responsibility.

Currently, a US PSC can be designated as a contracting officer only when a deviation from AIDAR 701.603-70 is approved; and when the Assistant Administrator for the Bureau for Management (AA/M) approves an exception in accordance with AIDAR Appendix D 4(b)(3)e.

Additionally, the Agency currently allows for the delegation of certain limited contracting officer authorities to highly qualified CCN PSCs. The CCN warrant program ran as a pilot from 2011-2014. The program became permanent in September 2014, when USAID issued a two-year class deviation from 48 CFR AIDAR 701.603-70. In conjunction with the approval of the class deviation, the Assistant Administrator for the Bureau for Management (AA/M) approved a class exception to the limitations in AIDAR Appendix J 4(b)(3). Subsequent two-year class deviations were issued for the permanent CCN warrant program in September 2016 and September 2018.

USAID published a proposed rule in the Federal Register at 84 FR 27745 on June 14, 2019, to amend the AIDAR to allow for the designation of US PSCs and CCN PSCs as contracting officers and agreement officers. The proposed rule's supplementary information contains additional background on the designation of US PSCs and CCN PSCs as contracting and agreement officers, including more details on the permanent CCN warrant program and an

analysis of the risks associated with designating non-U.S. citizens as contracting and agreement officers.

This final rule amends the AIDAR to streamline the procedures for issuing contracting officer and agreement officer warrants to US PSCs and CCN PSCs. Thirteen respondents submitted comments related to the proposed rule.

II. **Discussion and Analysis**

USAID reviewed and considered the public comments before the issuance of this final rule. No changes were made to the proposed rule as a result of the comments. A discussion of the comments is provided below.

A. General Support for the Rule

Comment: Eleven of the thirteen respondents expressed explicit support for the proposed rule. For example, several respondents stated that the rule helps PSCs and highlights their contributions to the Agency. Several other respondents noted that the current process for securing warrants for PSCs, which requires an exception from AA/M, was difficult and cumbersome and that the improvements in the proposed rule will result in a more efficient process, allowing the Agency to issue warrants to PSCs in a timely manner. Others noted that this rule will help address a shortage of contracting officers and is a positive change for an overburdened workforce.

Response: USAID agrees with these comments. PSCs are an important part of the Agency's workforce.

B. Designating CCN PSCs as Contracting Officers

Comment: One respondent was concerned that the delegation of warrant CCN PSCs would be in conflict with regulations relating to inherently governmental functions.

Response: USAID CCN PSCs are able to perform inherently governmental functions under federal law and USAID policy. (48 CFR) FAR subpart 7.5 exempts PSCs from the restrictions on contracts for inherently governmental functions. (48 CFR) FAR does not specify that contracting officers must be U.S. citizen direct-hire employees of the Federal government.

Comment: One respondent stated that providing CCN warrants was an inherent conflict, given that USAID is distributing US taxpayer funds in a foreign environment and the possibility for corruption when approving subcontracts.

Response: USAID has had a permanent CCN warrant program in place for five years, and over that time period, the program has been extensively reviewed on multiple occasions. This final rule streamlines warrant issuance procedures. The Agency does not view the issuance of administrative warrants with limited authorities to CCN PSCs as a conflict. Concerning the possibility for corruption, warranted CCN PSCs do not provide subcontract approvals in isolation, as the Agency's procurement systems have a built-in segregation of duties, even for administrative contracting duties. When approving subcontracts, the Contracting Officer's Representative (COR) initiates the process and provides technical clearance. The warranted CCN PSC then reviews and executes the COR's request. This system applies to all staff, including US direct hires, US PSCs, and CCN PSCs, and is an important risk mitigation measure against fraud, waste, and abuse in USAID's procurement system.

Comment: Two respondents expressed concerns relating to the training, certification, and oversight of CCN PSCs.

Response: The Agency has built stringent qualifications and oversight measures into the warrant program to mitigate risk. The current training, certification and experience requirements for CCN PSCs to receive a limited, administrative warrant exceed those required for US citizens to receive a warrant to ensure that CCN PSCs understand the complexities associated with U.S. regulations and policies. CCN PSCs are required to have a Federal Acquisition Certification – Contracting (FAC-C) Level II certification along with seven years of Agency experience, and at least five years of that experience must be in the area of acquisition and assistance. As noted in the preamble to the proposed rule, the CCN warrant 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. The review includes an assessment of all actions where the warrant was used. 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.

Comment: One respondent expressed a desire for more information about the CCN warrant program, including information relating to the design, scope, duration, and results of the program, including information related to the State Department's program.

Response: This comment is outside the scope of the streamlined warrant issuance procedures in the final rule. The Agency provided some historical information in the preamble of the proposed rule to provide context for the rule. However, the warrant program is internal to the Agency and not contained in federal regulation.

C. Recommendation of an Independent Ombudsman

Comment: One respondent recommended an independent Ombudsman to investigate complaints related to the behavior of CCN PSCs and their ability to manage US funds.

Response: USAID agrees that an independent Ombudsman is important to support the integrity of its procurement system. The Agency has had a Personal Services Contractor Ombudsman since 2016.

D. Support for a “Limited” Program

Comment: One respondent provided support of a limited program to provide a temporary alternative solution to the direct-hire of full-time USAID employees as contracting and agreement officers, with appropriate limitations on the scope of warrants issued to these individuals.

Response: USAID agrees that certain limitations on PSC warrants are appropriate. US PSCs must meet the same requirements as US direct hires to receive a warrant. The CCN PSC warrant program has more stringent training, certification, and experience requirements than those required for US citizens and only allows for the delegation of limited contract administration functions. Warranted CCN PSCs are not delegated authority to make new awards or execute any actions or awards related to personal services contracts or public international organizations (PIOs). 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) are not redelegated to CCN PSC contracting officers.

Comment: One respondent expressed concern that issuing warrants to PSCs would dilute the Agency's position in advocating for increasing funding for direct-hire contracting staff.

Response: USAID continues to advocate strongly for more operational expense funding for direct-hire staff. The US PSC and CCN PSC warrant programs could not and are not intended to be a permanent solution to the shortage of direct-hire contracting staff. These warrant programs are significantly limited in scope and are only available to overseas Missions with a demonstrated need for additional warranted individuals. The Agency does not view the issuance of these warrants to PSCs as diluting the argument for both a larger direct-hire acquisition workforce and the funding necessary to support that workforce.

E. Number of PSCs at USAID Missions

Comment: One respondent commented on the number of PSCs with warrants and inquired if the positions noted in the preamble of the proposed rule were a fixed number designated to be filled or if they were the only ones that the Agency was able to fill.

Response: This comment is outside the scope of the streamlined warrant issuance procedures in the rule. At the time of the issuance of the proposed rule, there were 21 PSCs with warrants. However, this is not a fixed number. The Agency only issues

warrants to US PSCs and CCN PSCs when there is a demonstrated need for such warrants.

III. **Regulatory Findings**

Executive Orders 12866, 13563, and 13771

This final rule has been drafted in accordance with Executive Orders (E.O.s) 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equality). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. USAID has reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in E.O.s 12866 and 13563 and finds that the benefits of issuing this rule outweigh any costs, which the Agency assesses to be minimal. The Office of Management and Budget's Office of Information and Regulatory Affairs (OMB/OIRA) has determined that this regulatory action is "significant" and therefore subject to the requirements of the E.O. and subject to review by OMB. OMB/OIRA has determined that this rule is not an "economically significant regulatory action" under Section 3(f)(1) of E.O. 12866. This final rule is not subject to the requirements of E.O. 13771 because this rule is related to agency organization, management, or personnel.

Regulatory Flexibility Act

USAID certifies that this rule will not have a significant economic impact on a substantial number of small entities. Consequently, the Agency has not prepared a regulatory flexibility analysis.

Small Business Regulatory Enforcement Fairness Act

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required.

List of Subjects in 48 CFR Part 701

Government procurement.

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

1. The authority citation for 48 CFR part 701 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. Revise 701.603-70 to read as follows:

701.603-70 Designation of contracting officers.

A contracting officer represents the U.S. Government through the exercise of his/her delegated authority to negotiate, sign, and administer contracts on behalf of the U.S. Government. The contracting officer's duties are sensitive, specialized, and responsible. To ensure proper

accountability, and to preclude possible security, conflict of interest, or jurisdiction problems, USAID contracting officers must be U.S. citizen direct-hire employees of the U.S. Government. However, Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) may also designate a U.S. Personal Services Contractor (USPSC) or a Cooperating Country National Personal Services Contractor (CCNPSC) as a contracting officer with a specific level of warrant authority. To qualify for a designation as a contracting officer, an individual must meet the requirements in FAR subpart 1.6 and the Agency's applicable warrant program.

3. In appendix D to chapter 7, in section 4 "Policy", revise paragraph (b)(3)b. and add paragraph (b)(4) and revise the authority citation at the end of the appendix to read as follows:

Appendix D to Chapter 7 — Direct USAID Contracts With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

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4. Policy

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(b) * * *

(3) * * *

b. They may not be delegated authority to sign obligating or subobligating documents except when specifically designated as a contracting officer or an agreement officer in accordance with FAR subpart 1.6 and the Agency's applicable warrant program.

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(4) *Exceptions.* The Assistant Administrator, Bureau for Management (AA/M) must approve exceptions to the limitations in (b)(3). Approval of an exception by the AA/M is not required when the Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) designates a USPSC as a contracting officer or an agreement officer.

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(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)

4. In appendix J to chapter 7, in section 4 “Policy”, revise paragraphs (b)(3)b. and (b)(4) and the authority citation at the end of the appendix 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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4. Policy

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(b) * * *

(3) * * *

b. They may not be delegated authority to sign obligating or subobligating documents except when a cooperating country national personal services contractor is specifically designated as a contracting officer or an agreement officer in accordance with FAR subpart 1.6 and the Agency’s applicable warrant program.

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(4) *Exceptions.* The Assistant Administrator, Bureau for Management (AA/M) must approve exceptions to the limitations in (b)(3). Approval of an exception by the AA/M is not required when the Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) designates a cooperating country national personal services contractor as a contracting officer or an agreement officer.

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(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)

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