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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 25, 44, and 52

[FAR Case 2018-002; Docket No. FAR Case-2018-0051, Sequence No. 1]

RIN 9000-AN62

Federal Acquisition Regulation: Protecting Life in Global Health Assistance

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement the Protecting Life in Global Health Assistance policy in connection with the Presidential Memorandum regarding "The Mexico City Policy," dated January 23, 2017.

DATES: Interested parties should submit written comments at the address shown below on or before **[Insert date 60 days after date of publication in the *FEDERAL REGISTER*]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018-002 to Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2018-002". Select the link "Comment Now" that corresponds with "FAR Case 2018-002". Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2018-002" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR case 2018-002" in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Farpolicy@gsa.gov or call 202-969-4075. Please cite "FAR Case 2018-002".

SUPPLEMENTARY INFORMATION:

I. Background and Authority

A. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement the Presidential Memorandum regarding "The Mexico City Policy", issued on January 23, 2017. This Presidential Memorandum reinstated the 2001 Presidential Memorandum on the "Mexico City Policy," and directed the Secretary of State, in coordination with the Secretary of Health and Human Services, to implement a plan to extend the requirements of the Mexico City Policy to "global health assistance furnished by all departments or agencies" to the extent allowable by law.

The Mexico City Policy was first issued by President Reagan in 1984 and required foreign nongovernmental organizations (NGOs) to agree, as a condition of receiving U.S. Agency for International Development (USAID) family planning assistance, not to perform or actively promote abortion as a method of family planning with any source of funds. Under the Mexico City Policy, U.S. NGOs did not themselves have to agree that they would not perform or actively promote abortion as a method of family planning, but they were required to flow down the policy's requirements to foreign NGOs receiving family planning assistance under their awards. The Mexico City Policy was rescinded by President Clinton in 1993, reinstated by

President Bush in 2001, and rescinded by President Obama in 2009. When in effect previously, the Mexico City Policy's requirements only applied to USAID family planning assistance and, from 2003-2009, to certain State Department activities; and it only applied to Federal assistance and not contracts.

To extend the Mexico City Policy as directed under the January 23, 2017, Presidential Memorandum, the Secretary of State approved on May 9, 2017, a plan to implement the manner in which U.S. Government Departments and Agencies will apply the provisions of the Mexico City Policy to foreign NGOs that receive U.S. funding for global health assistance. The plan, called "Protecting Life in Global Health Assistance" (PLGHA), expanded the application of the Mexico City Policy in three respects, to the extent allowable by law. First, it extended the policy to all affected Federal agencies. Second, it extended the policy to all global health assistance. Third, it required the extension of the policy to contracts in addition to Federal assistance. Each of these points is addressed further below. The PLGHA policy applies to foreign NGOs (including contractors); U.S. entities are not subject to the specific policy requirement not to perform or actively promote abortion as a method of family planning with any source of

funds, but they must agree to flow down the policy requirements to foreign NGOs in accordance with the terms and conditions of their contracts.

1. Affected Federal Agencies

The PLGHA policy applies to all Federal agencies receiving global health assistance funding, including USAID, the State Department, the Department of Health and Human Services (HHS), and the DoD. To the extent other Federal agencies receive global health assistance funding through interagency transfer, they may also be required to apply the PLGHA terms in contracts with such funding, in accordance with FAR subparts 17.5 or 17.7.

2. Affected Global Health Assistance

The PLGHA policy applies to "global health assistance". This includes funding for international health programs, such as for Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome; maternal and child health; nutrition; infectious diseases, including malaria and tuberculosis; global health security; and voluntary family planning and reproductive health. More information about the scope of "global health assistance" is set forth below under "II. Discussion and Analysis—Applicability of the PLGHA Policy."

3. Affected Awards

The State Department's PLGHA implementation plan called for affected Federal agencies to take steps to apply the policy to Federal assistance (grants and cooperative agreements) and contracts. The PLGHA policy does not apply to global health assistance to foreign national or local governments, public international organizations and other multilateral entities in which sovereign nations participate.

For Federal assistance, affected Federal agencies developed a PLGHA standard provision, which they have included, starting in May 2017, in all new Federal assistance awards that use global health assistance funding and existing awards when amended to add new funding for global health assistance.

For contracts, this rule proposes to include a new clause entitled "Protecting Life in Global Health Assistance" in applicable contracts and subcontracts funded partially or wholly with global health assistance funding. The PLGHA implementation plan directs Federal agencies to take appropriate steps to apply the policy to new contracts; the plan would also apply to existing contracts, to the extent practicable, when modified to add funding.

4. Purpose

The PLGHA policy is consistent with the Presidential directive in the Presidential Memorandum—that no U.S. taxpayer money should support foreign organizations that perform or actively promote abortion as a method of family planning in other nations. Affected Federal agencies provide significant global health assistance funding through contracts each year. It is critical that such funding is also subject to the PLGHA terms and conditions to effect the President's directive.

All foreign contractors will be eligible to receive global health assistance funding if they agree to abide by the terms of the PLGHA policy in their contract or subcontract. PLGHA does not reduce the amount of global health assistance funding the United States Government makes available. The United States remains strongly committed to supporting health programs around the world.

5. More Information

More information about the 2017 Presidential Memorandum and the PLGHA policy is available in the following:

- Presidential Memorandum on the Mexico City Policy (82 FR 8495, January 23, 2017).

- U.S. Agency for International Development's (USAID) website at <https://www.usaid.gov/global-health/legislative-policy-requirements>.

B. Authority

The President has broad discretion to set the terms and conditions on which the United States provides foreign assistance. The United States provides global health assistance through various Federal agencies, under the authorities granted to those Federal agencies, including the Foreign Assistance Act (FAA) (22 U.S.C. 2151 et seq.). The State Department and USAID, as well as other Federal agencies that receive foreign assistance funds from the State Department and USAID, rely on the authorities under the FAA. Under the FAA, the President is authorized to furnish foreign assistance for voluntary population planning, health programs, and to promote economic or political stability "on such terms and conditions as [the President] may determine." See, e.g., section 104(b) of the FAA (22 U.S.C. 2151b(b)) (assistance for family planning and population growth); section 104(c)(1) of the FAA (22 U.S.C. 2151b(c)(1)) (health assistance); section 531 of the FAA (22 U.S.C. 2346) (assistance to promote economic or political stability). The President, through the issuance of the January 23, 2017, Presidential

Memorandum, has exercised his broad discretion to set the terms and conditions of U.S. foreign assistance relating to global health programs, including by applying the PLGHA policy to contracts.

II. Discussion and Analysis

A. Applicability of the PLGHA Policy

The PLGHA policy applies to all global health assistance funding, to the extent allowable by law. Under this policy, "global health assistance funding" is Federal funding used for international health activities that is authorized under the FAA, and funded from the Global Health Programs; Economic Support Fund; or Assistance for Europe, Eurasia, and Central Asia appropriations, including successor appropriations, under the annual Department of State, Foreign Operations, and Related Programs Appropriations Act.

Global health assistance funding excludes the following:

- (1) Humanitarian assistance;
- (2) USAID's American Schools and Hospitals Abroad Program activities;
- (3) USAID's Food for Peace activities;
- (4) USAID's Water Supply and Sanitation activities reported under Program Area HL.8 or successor program under

the State Department's Foreign Assistance Standardized Program Structure; and

(5) USAID's Vulnerable Children activities reported under Program Area ES 4.1 or successor program under the State Department's Foreign Assistance Standardized Program Structure.

The policy applies to U.S. Government contracts funded with global health assistance funding that provide supplies or services for international health activities performed partially or wholly outside the United States (the 50 states, the District of Columbia, and outlying areas). This includes technical assistance and training of foreign individuals or entities as well as services listed in FAR 37.203(b)(1)-(6).

The policy will not apply to—

- (1) Contracts at or below the micro-purchase threshold, as defined in FAR 2.101;
 - (2) Contracts for personal services with individuals;
- or
- (3) Contracts for the acquisition of commercial items, including pharmaceuticals, medical supplies, logistics support, data management, freight forwarding, and warehousing.

B. Requirements Applicable to U.S. Contractors

As noted above, while U.S. contractors are not themselves subject to the PLGHA policy, they are required to flow down the PLGHA requirements to any foreign contractor with whom they subcontract, where applicable. Specifically, the proposed rule would require that, in signing a contract or subcontract funded with global health assistance funds, U.S. contractors and U.S. subcontractors at any tier agree that they shall not subcontract for global health assistance under the contract with a foreign contractor unless such foreign contractor agrees, as part of the subcontract, that it shall not, during the term of the award: (1) perform or actively promote abortion as a method of family planning outside the United States (the 50 states, the District of Columbia, and outlying areas); or (2) provide financial support to any other foreign NGO that conducts such activities.

C. Requirements Applicable to Foreign Contractors

Foreign contractors that perform a contract with global health assistance funds will be subject to the PLGHA requirements. Specifically, such foreign contractors shall agree not to perform or actively promote abortion as a method of family planning or to provide financial support to any other foreign NGO that conducts such activities. In addition, a foreign contractor shall agree that it will not

subcontract for global health assistance under its award with another foreign contractor unless such subcontractor agrees that it shall not, during the term of the award, (1) perform or actively promote abortion as a method of family planning outside the United States (the 50 states, the District of Columbia, and outlying areas) or (2) provide financial support to any other foreign NGO that conducts such activities. The term "foreign NGO," as used in the rule, excludes public international organizations.

The contractor or subcontractor is not required to impose these requirements on foreign NGOs that are not receiving a subcontract and are only the beneficiaries of the training or technical assistance provided by the contractor or subcontractor.

D. Additional Requirements

The proposed rule further provides that, where the contract requires Government consent to subcontract, the contractor shall describe the due diligence it performed on the subcontractor related to the PLGHA requirements.

The proposed rule permits the furnishing of global health assistance funding under a contract to a foreign government or foreign-government-owned (parastatal) organization even if the organization includes abortion in its health program, provided that no global health

assistance funds under the contract are used in support of the abortion activity of the foreign government or foreign-government-owned (parastatal) organization, and that such funds are placed in a segregated account to ensure they are not used for such activity.

Further, the proposed rule states that in the event of a conflict between the rule and an affirmative duty of a health care provider required under local law to provide abortion counseling or referrals, such compliance will not be considered a violation of the rule.

Finally, the proposed rule requires that the contractor insert certain terms of the clause in all subcontracts at any tier, except for subcontracts at or below the micro-purchase threshold; subcontracts for the acquisition of commercial items; and subcontracts for personal services with individuals.

E. Violations

The proposed rule sets forth specific requirements for responding to violations of contract terms. Specifically, the Government shall terminate the performance of work under the contract in accordance with the termination clause of the contract, if the foreign contractor violates its undertakings, unless the Government determines that other corrective action or remedy is warranted. If the

contractor has reason to believe that the subcontractor has violated any requirement of the contract, the contractor shall consult with the contracting officer and provide full cooperation prior to terminating the subcontract or determining that other corrective action is warranted.

Furthermore, the proposed rule provides the circumstances under which violations by the subcontractor of any requirement in the contract will be imputed to the contractor -- if the contractor knowingly subcontracts with a foreign subcontractor that does not abide by the requirements of the policy; where the contractor fails to make reasonable due diligence efforts prior to awarding a subcontract, and the subcontractor did not abide by its contractual terms required in the clause; or where the contractor knows, or has reason to know, of a violation by its subcontractor but fails to terminate the subcontract or take other corrective action.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items.

A. Applicability to Contracts at or below the SAT

The PLGHA policy does not apply to contracts below the micro-purchase threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf Items

DoD, GSA, and NASA do not intend to apply the PLGHA policy to contracts for the acquisition of commercial items.

IV. Expected Cost Impact on the Public

The following is a summary of the impact on contractors awarded contracts that include the new FAR clause:

(1) All foreign contractors, whether prime or sub-recipients, of global health assistance funding must agree that (1) they will not perform or actively promote abortion as a method of family planning, or (2) provide financial support to any other foreign nongovernmental organization that conduct such activities. Notably, the new clause will be included in new awards and, to the extent practicable, in existing awards when modified to add funding. For the existing awards that will include the new clause, if a foreign prime contractor or subcontractor refuses to comply with this prohibition, the government and/or prime contractors would need to either not award a contract to that entity if they had otherwise been the selected offeror, or terminate an existing contract. The government

or prime contractor would then have to find and contract or subcontract with an alternative entity that would agree to this prohibition. We expect that domestic entities would incur costs for ensuring the compliance of their foreign contractors with this rule.

(2) The primary costs to contractors (both U.S. and foreign) and foreign subcontractors associated with the rule may include increased compliance costs such as training, development of compliance tools, ongoing monitoring activities, etc.

(3) Foreign contractors and foreign subcontractors will be required to allow the Government, at any reasonable time announced or unannounced, to—

- (i) Inspect the documents and materials maintained or prepared by the contractor in the usual course of its operations that describe the health activities implemented by the contractor or subcontractor, including reports, brochures and service statistics;
- (ii) Observe the health activities conducted by the contractor or subcontractor;
- (iii) Consult with health care personnel of the contractor or subcontractor; and

(iv) Obtain a copy of audited financial statements or reports of the contractor or subcontractor; as applicable.

(4) All contractors will be required to request Government approval prior to treating the health activities of two or more organizations that are affiliates as separate, when determining whether a foreign firm is eligible for a subcontract funded with global health assistance funding. This would entail contract employees preparing and submitting a written justification to the government explaining why the entities should be considered separate.

(5) When preparing requests for a contracting officer's consent to subcontract, contractor must include a written description of the due diligence it has performed on the subcontractor relating to the requirements of the new clause. Activities could include inspecting financial and programmatic documents; interviewing witnesses and employees; and inspecting facilities; as well as drafting the description.

(6) All contractors will be required to review the health activities of subcontractors that are suspected of violating the terms of the FAR clause 52.225-X and to provide the results of any of those reviews to the

Government. This would require contractor employees to inspect financial and programmatic documents; interview witnesses and employees; and inspect facilities.

(7) All contractors will be required to place in a segregated account any global health assistance funds transferred to a foreign government or parastatal that includes abortion in its health program. This would require the contractor overseeing that the foreign government or parastatal contractor or subcontractor is maintaining a separate bank account. The foreign government or parastatal contractor or subcontractor would have to open and maintain a separate bank account for these award funds.

DoD, GSA, and NASA have performed a regulatory cost analysis on this proposed rule. The following is a summary of the estimated cost calculated in from FY2016-FY2018 at a 3 and 7 percent discount rate and in perpetuity:

SUMMARY	Public	Government	Total
Present Value (3%) (millions)	\$30.0	\$39.3	\$69.3
Annualized Costs (3%) (millions)	\$.9	\$1.2	\$2.1

Present Value (7%) (millions)	\$21.6	\$28.0	\$49.6
Annualized Costs (7%) (millions)	\$1.5	\$2.0	\$3.5

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 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 equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This proposed rule is considered an E.O. 13771 regulatory action. We estimate that this rule generates \$2.1 million in annualized costs, discounted at 7 percent relative to year 2016, over a perpetual time horizon. More

details on the costs associated with this rule can be found in the expected cost impact section of the rule.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

This action is necessary to implement the Presidential Memorandum Regarding the Mexico City Policy, issued on January 23, 2017. This Presidential Memorandum reinstated the 2001 Presidential Memorandum on the "Mexico City Policy," and directed the Secretary of State, in coordination with the Secretary of Health and Human Services, to implement a plan to extend the requirements of the Mexico City Policy to "global health assistance furnished by all departments or agencies" to the extent allowable by law.

To extend the Mexico City Policy as directed under the January 23, 2017, Presidential Memorandum, the Secretary of State approved, on May 9, 2017, a plan to implement the manner in which U.S. Government Departments and Agencies will apply the provisions of the Mexico City Policy to foreign NGOs that receive U.S. funding for global health assistance. The plan, called "Protecting Life in Global Health Assistance" (PLGHA), expanded the application of the Mexico City Policy in three respects, to the extent allowable by law. First, it extended the policy to all affected Federal agencies. Second, it extended the policy to all global health assistance. Third, it required the extension of the policy to contracts in addition to Federal assistance.

The objective of this proposed rule is to ensure contractors are aware of the requirement to comply with the PLGHA policy, pursuant to the PLGHA plan approved by the Secretary of State further to the January 23, 2017, Presidential memorandum.

The President has broad discretion to set the terms and conditions on which the United States provides foreign assistance. The United States provides global health

assistance through various Federal agencies, under the authorities granted to those Federal agencies, including the Foreign Assistance Act (FAA) (22 U.S.C. 2151 et seq.). The Department of State and USAID, as well as other Federal agencies that receive foreign assistance funds from the Department of State and USAID, rely on the authorities under the FAA. Under the FAA, the President is authorized to furnish foreign assistance for voluntary population planning, health programs, and to promote economic or political stability "on such terms and conditions as [the President] may determine." See, e.g., section 104(b) of the FAA (22 U.S.C. 2151b(b)) (assistance for family planning and population growth); section 104(c)(1) of the FAA (22 U.S.C. 2151b(c)(1)) (health assistance); section 531 of the FAA (22 U.S.C. 2346) (assistance to promote economic or political stability). The President, through the issuance of the January 23, 2017, Presidential Memorandum, has exercised his broad discretion to set the terms and conditions of U.S. foreign assistance relating to global health programs, including by applying the PLGHA policy to contracts.

The PLGHA policy applies to foreign nongovernmental organizations (including contractors). Although U.S. entities are not themselves subject to the policy (not to perform or actively promote abortion as a method of family planning with any source of funds), they must agree to flow down the policy requirements to foreign nongovernmental organizations under their contracts.

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Analysis Act, 5 U.S.C. 601, et seq. U.S. contractors are not themselves subject to the policy (not to perform or actively promote abortion as a method of family planning with any source of funds), but they must agree to flow down the PLGHA requirements to subcontractors and ensure that foreign subcontractors comply with the policy. This rule applies to foreign prime contractors.

Based on data available from FY2016-FY2018, we estimate that approximately 253 contractors would be affected by this rule. Of that we estimate that 45 small businesses would be affected; equating to 18 percent of the total contractors affected.

This rule does impose new reporting, recordkeeping and other compliance requirements. The rule includes requirements for access to documents, records, and processes to conduct inspections for compliance purposes. U.S. contractors will be responsible for the oversight of their foreign subcontractors. The foreign contractors will be subject to this requirement. Instances of these requirements are—

a. 52.225-XX(c)(2)(i) Inspection of documents and materials (foreign primes)-

"(c) *Foreign prime contractors.* This paragraph (c) applies only to foreign prime contractors, and does not affect any contractual rights between U.S. prime contractors and the U.S. Government:

(2) The Contractor shall allow authorized representatives of the Government to, at any reasonable time, announced or unannounced, consistent with the terms of this contract-

(i) Inspect the documents and materials maintained or prepared by the Contractor in the usual course of its operations that describe the health activities implemented by the Contractor, including reports, brochures, and service statistics";

b. 52.225-XX(j)(1)(ii)(A) Inspection of documents and materials (foreign subcontractors)-

"(j) *Obligations regarding foreign subcontracts.*

(1) The Contractor shall ensure that foreign subcontractors at any tier that receive global health assistance funding agree to the following additional terms:

(ii) The Contractor and authorized representatives of the Government may, at any reasonable time, announced or unannounced, consistent with the terms of this contract, perform any of the following:

(A) Inspect the documents and materials maintained or prepared by the subcontractor in the usual course of its operations that describe the health activities of the subcontractor, including reports, brochures, and service statistics."

c. 52.225-XX(e) Consent to subcontract (all primes and subcontractors)-

"(e) *Consent to subcontract.* If the contract includes the clause at FAR 52.244-2, Subcontracts, and requires the Contractor to obtain consent prior to entering into a subcontract, then the Contractor shall provide to the Contracting Officer, in the consent request, a description of the due diligence performed by the Contractor on the subcontractor relating to the requirements in this clause.

d. 52.225-XX(g)(2) Review of health program for violations (all primes and subcontractors)-

"(g) *Government independent inquiries.*

(2) In the event that the Contractor or the Government has reason to believe that a foreign subcontractor may have violated the requirements of this clause, the Contractor shall review the health program of the foreign subcontractor to determine whether such a violation has occurred. The Contractor shall provide the Contracting Officer the results of the review."

e. 52.225-XX(j) (2) and (j) (3) Review of health program for violations (foreign subcontractors)-

"(j) *Obligations regarding foreign subcontracts.*

(2) In the event that the Contractor or the Government has reason to believe that a foreign subcontractor may have violated the requirements of this clause, the Contractor shall review the health program of the subcontractor to determine whether such a violation has occurred.

(3) If the Contractor has reason to believe that the subcontractor has violated any requirement of this clause, the Contractor shall consult with the Contracting Officer and provide full cooperation prior to terminating the subcontract or determining that other corrective action is warranted."

The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD, GSA, and NASA were unable to identify any alternatives to the rule that would reduce the impact on small entities and still meet the requirements.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C.

610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2018-002), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division has submitted a request for approval of a new information collection requirement concerning FAR Case 2018-002, Protecting Life in Global Health Assistance to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average 35.8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

*Respondents: 253

*Responses per respondent: 4.3

*Total annual responses: 1,089

*Preparation hours per response: 35.8

*Total response burden hours: 38,992

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than **[Insert date 60 days after publication in the *FEDERAL REGISTER*]** to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street, NW, 2nd floor, Washington, DC 20405-0001.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street, NW, 2nd floor, Washington, DC 20405-0001. Please cite OMB Control Number 9000-00XX, Title, in all correspondence.

The rule contains information collection requirements that require 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 1, 7, 25, 44, and 52

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 7, 25, 44, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 7, 25, 44, and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. In section 1.106, amend the table by adding an entry for "52.225-XX" in numerical order to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB control No.
* * * * *	* * *
52.225-XX	9000-XXXX
* * * * *	* * *

PART 7—ACQUISITION PLANNING

3. Add section 7.10X to read as follows:

7.10X Additional requirements for global health assistance acquisitions.

When planning to procure supplies or services for global health assistance, the requiring activity is

responsible for notifying the contracting officer, in writing, when the contract will be funded partially or wholly with global health assistance funding, as defined in 25.100X-4.

PART 25—FOREIGN ACQUISITION

4. Add section 25.100X to read as follows:

25.100X Protecting Life in Global Health Assistance.

25.100X-1 Scope of section.

This section implements the “Protecting Life in Global Health Assistance” policy approved by the Secretary of State on May 9, 2017, as directed by the Presidential Memorandum regarding The Mexico City Policy, dated January 23, 2017.

25.100X-2 Authority.

(a) Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.).

(b) Presidential Memorandum on the Mexico City Policy (Memorandum of January 23, 2017, 3 CFR, 2017 Comp., p. 435.).

25.100X-3 Applicability.

This section applies to all executive agencies that implement programs or activities funded partially or wholly with global health assistance funding as defined in 25.100X-4.

25.100X-4 Definitions.

As used in this section—

Abortion as a method of family planning means abortion when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother and abortions performed for fetal abnormalities, but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term, or abortions performed following rape or incest.

Actively promote abortion as a method of family planning means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

(1) This includes, but is not limited to, the following activities:

(i) Operating a service-delivery site that provides, as part of its regular program, counseling, including advice and information, regarding the benefits and/or availability of abortion as a method of family planning;

(ii) Providing advice that abortion as a method of family planning is an available option or encouraging women to consider abortion (passively responding to a question

regarding where a safe, legal abortion may be obtained is not considered active promotion if a woman who is already pregnant specifically asks the question, she clearly states that she has already decided to have a legal abortion, and the healthcare provider reasonably believes that the ethics of the medical profession in the host country requires a response regarding where it may be obtained safely and legally);

(iii) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and

(iv) Conducting a public information campaign outside the United States (the 50 states, the District of Columbia, and outlying areas), regarding the benefits and/or availability of abortion as a method of family planning.

(2) Excluded from this definition are referrals for abortion as a result of rape or incest, or if the life of the mother would be endangered if she were to carry the fetus to term. Also excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care.

(3) Action by an individual acting in the individual's capacity to actively promote abortion as a method of family planning shall not be attributed to an organization with which the individual is associated, provided that the individual is neither on duty nor acting on the organization's premises, and the organization neither endorses nor provides financial support for the action and takes reasonable steps to ensure that he or she does not improperly represent that the individual is acting on behalf of the organization.

Foreign contractor means a contractor or subcontractor organized or existing under the laws of a country other than the United States (the 50 states, the District of Columbia, and outlying areas). This excludes public international organizations.

Foreign nongovernmental organization means any nongovernmental organization or entity, whether non-profit or profit making, organized or existing under the laws of a country other than the United States (the 50 states, the District of Columbia, and outlying areas). This excludes public international organizations.

Global health assistance funding is Federal funding used for international health activities that is authorized under the Foreign Assistance Act of 1961, and funded from

the Global Health Programs; Economic Support Fund; or Assistance for Europe, Eurasia, and Central Asia appropriations, including successor appropriations, under the annual Department of State, Foreign Operations, and Related Programs Appropriations Act. Global health assistance funding excludes funding for—

(1) Humanitarian assistance;

(2) U.S. Agency for International Development's (USAID's) American Schools and Hospitals Abroad Program activities;

(3) USAID's Food for Peace activities;

(4) USAID's Water Supply and Sanitation activities reported under Program Area HL.8 or successor program under the Department of State's Foreign Assistance Standardized Program Structure; and

(5) USAID's Vulnerable Children activities reported under Program Area ES 4.1 or successor program under the Department of State's Foreign Assistance Standardized Program Structure.

Perform abortions means to operate a facility where abortions are provided as a method of family planning. Excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care.

Provide financial support means to provide funding, from any source, to a foreign nongovernmental organization through a contract, subcontract, other written agreement or donation of funds; it does not include the provision of funding through contracts, subcontracts, or other written agreements for commercial items as defined under 2.101, except for commercial items to be used primarily to perform abortions as a method of family planning.

Public international organization means an organization—

(1) Designated as a public international organization under the International Organizations Immunities Act; or

(2) Treated as a public international organization pursuant to the regulations or policies of an Executive agency.

25.100X-5 Policy.

(a) The Protecting Life in Global Health Assistance policy is that executive agencies take appropriate actions to ensure that foreign nongovernmental organizations agree that they shall not perform or actively promote abortion as a method of family planning, nor provide financial support to any other foreign nongovernmental organization that conducts such activities, during the term of a contract funded with global health assistance funding. This policy

applies to Federal assistance awards, as well as contracts containing the clause at 52.225-XX, Protecting Life in Global Health Assistance. For more information about the Protecting Life in Global Health Assistance policy, see the U.S. Agency for International Development's (USAID) website at <https://www.usaid.gov/global-health/legislative-policy-requirements>.

(b) To comply with the Protecting Life in Global Health Assistance policy, a foreign contractor or subcontractor is required to agree not to perform or actively promote abortion as a method of family planning or provide financial support to any other foreign nongovernmental organization that conducts such activities. U.S. contractors are required to flow this requirement down to all foreign subcontracts subject to this policy.

25.100X-6 Procedures.

(a) When the requiring activity notifies the contracting officer in writing that global health assistance funding is to be used for the procurement (see 7.10X), the contracting officer shall include the clause at 52.225-XX, Protecting Life in Global Health Assistance prescribed at 25.100X-7;

(b) When providing consent to subcontract with a foreign subcontractor in accordance with subpart 44.2, the

contracting officer must ensure that the contractor has provided a description of the due diligence performed by the contractor on the subcontractor relating to the requirements in clause 52.225-XX (see 44.202-2(a)(14)).

25.100X-7 Contract clauses.

(a) Insert the clause at 52.225-XX, Protecting Life in Global Health Assistance, in solicitations and contracts that—

(1) Provide supplies or services for international health activities that are funded partially or wholly with global health assistance funding, including contracts for technical assistance and training of foreign individuals or entities and services listed in 37.203(b)(1)-(6); and

(2) Are performed partially or wholly outside the United States (the 50 states, the District of Columbia, and outlying areas).

(b) The clause is not required to be used for—

(1) Contracts at or below the micro purchase threshold, as defined in FAR 2.101;

(2) Contracts for personal services with individuals; or

(3) Contracts for the acquisition of commercial items.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

5. Amend section 44.202-2 by adding paragraph (a) (14) to read as follows:

44.202-2 Considerations.

(a) * * *

(14) When the clause at 52.225-XX, Protecting Life in Global Health Assistance, is in the contract, has the contractor included a description of the due diligence performed on the subcontractor relating to the requirements of the clause.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Add section 52.225-XX to read as follows:

52.225-XX Protecting Life in Global Health Assistance.

As prescribed in 25.100X-7, insert the following clause:

PROTECTING LIFE IN GLOBAL HEALTH ASSISTANCE (DATE)

(a) *Definitions.* As used in this clause—

Abortion as a method of family planning means abortion when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother and abortions performed for fetal abnormalities, but does not include abortions performed if the life of the mother would be

endangered if the fetus were carried to term, or abortions performed following rape or incest.

Actively promote abortion as a method of family planning means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

(1) This includes, but is not limited to, the following activities:

(i) Operating a service-delivery site that provides, as part of its regular program, counseling, including advice and information, regarding the benefits and/or availability of abortion as a method of family planning;

(ii) Providing advice that abortion as a method of family planning is an available option or encouraging women to consider abortion (passively responding to a question regarding where a safe, legal abortion may be obtained is not considered active promotion if a woman who is already pregnant specifically asks the question, she clearly states that she has already decided to have a legal abortion, and the healthcare provider reasonably believes that the ethics of the medical profession in the host country requires a response regarding where it may be obtained safely and legally);

(iii) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and

(iv) Conducting a public information campaign outside the United States (the 50 states, the District of Columbia, and outlying areas), regarding the benefits and/or availability of abortion as a method of family planning.

(2) This does not include referrals for abortion as a result of rape or incest, or if the life of the mother would be endangered if she were to carry the fetus to term. Also excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care.

(3) Action by an individual acting in the individual's capacity to actively promote abortion as a method of family planning shall not be attributed to an organization with which the individual is associated, provided that the individual is neither on duty nor acting on the organization's premises, and the organization neither endorses nor provides financial support for the action and takes reasonable steps to ensure that he or she does not

improperly represent that the individual is acting on behalf of the organization.

Foreign contractor means a contractor or subcontractor organized or existing under the laws of a country other than the United States (the 50 states, the District of Columbia, and outlying areas). This excludes public international organizations.

Foreign nongovernmental organization means any nongovernmental organization or entity, whether nonprofit or profit making, organized or existing under the laws of a country other than the United States (the 50 states, the District of Columbia, and outlying areas). This excludes public international organizations.

Full cooperation,

(1) Means, at a minimum—

(i) Disclosure to the Government information sufficient to identify the nature and extent of a violation;

(ii) Providing timely and complete responses to Government auditors' and investigators' requests for documents and access to employees with information; and

(iii) Cooperating fully in providing reasonable access to its facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other

responsible Federal agencies to conduct audits, investigations, or other actions to ascertain compliance with this clause.

(2) Does not—

(i) Foreclose any contractor rights arising in law, this regulation, or the terms of the contract;

(ii) Require the Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine;

(iii) Require any officer, director, owner, employee, or agent of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; or

(iv) Restrict the Contractor from—

(A) Conducting an internal investigation; or

(B) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Global health assistance funding is Federal funding used for international health activities that is authorized under the Foreign Assistance Act of 1961, and funded from the Global Health Programs; Economic Support Fund; or Assistance for Europe, Eurasia, and Central Asia appropriations, including successor appropriations, under

the annual Department of State, Foreign Operations, and Related Programs Appropriations Act. Global health assistance funding excludes funding for—

(1) Humanitarian assistance;

(2) U.S. Agency for International Development's (USAID's) American Schools and Hospitals Abroad Program activities;

(3) USAID's Food for Peace activities;

(4) USAID's Water Supply and Sanitation activities reported under Program Area HL.8 or successor program under the Department of State's Foreign Assistance Standardized Program Structure; and

(5) USAID's Vulnerable Children activities reported under Program Area ES 4.1 or successor program under the Department of State's Foreign Assistance Standardized Program Structure.

Parastatal means a foreign-government-owned organization operated as a commercial company or other organization, including nonprofits, or enterprises in which foreign governments or foreign agencies have a controlling interest.

Perform abortions means to operate a facility where abortions are provided as a method of family planning. Excluded from this definition is the treatment of injuries

or illnesses caused by legal or illegal abortions, for example, post-abortion care.

Provide financial support means to provide funding, from any source, to a foreign nongovernmental organization through a contract, subcontract, other written agreement or donation of funds; it does not include the provision of funding through contracts, subcontracts, or other written agreements for commercial items as defined under 2.101, except for commercial items to be used primarily to perform abortions as a method of family planning.

Public international organization means an organization—

(1) Designated as a public international organization under the International Organizations Immunities Act; or

(2) Treated as a public international organization pursuant to the regulations or policies of an Executive agency.

(b) *Prime contractor*. The Contractor shall not subcontract for supplies or services using global health assistance funding under this contract with a foreign contractor unless the subcontractor at any tier agrees, by entering into such subcontract, that it shall not, during the term of the subcontract—

(1) Perform or actively promote abortion as a method of family planning, outside the United States (the 50 states, the District of Columbia, and outlying areas); or

(2) Provide financial support to any other foreign nongovernmental organization that conducts such activities.

(c) *Foreign prime contractors.* This paragraph (c) applies only to foreign prime contractors, and does not affect any contractual rights between U.S. prime contractors and the U.S. Government:

(1) The Contractor shall not, during the term of this contract—

(i) Perform or actively promote abortion as a method of family planning outside the United States (the 50 states, the District of Columbia, and outlying areas); or

(ii) Provide financial support to any other foreign nongovernmental organization that conducts such activities.

(2) The Contractor shall allow authorized representatives of the Government to, at any reasonable time, announced or unannounced, consistent with the terms of this contract—

(i) Inspect the documents and materials maintained or prepared by the Contractor in the usual course of its operations that describe the health

activities implemented by the Contractor, including reports, brochures, and service statistics;

(ii) Observe the health activities conducted by the Contractor;

(iii) Consult with healthcare personnel of the Contractor; and

(iv) Obtain a copy of audited financial statements or reports of the Contractor; as applicable.

(3) The Government shall terminate the performance of work under this contract in accordance with the termination clause of this contract for any violation of this clause unless the Government determines that other corrective action or remedy is warranted. In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of this clause may result in—

(i) Suspension of contract payments until the Contractor has taken appropriate remedial action; and/or

(ii) Suspension or debarment.

(d) *Subcontractor eligibility.* When the Contractor is determining whether a foreign contractor is eligible for a subcontract with global health assistance funding under this contract, the action of separate nongovernmental organizations shall not be imputed to the subcontractor,

unless, in the judgment of the Government, a separate nongovernmental organization is being used purposefully to avoid the requirements of the clause.

(1) Separate nongovernmental organizations are those that have distinct legal existence in accordance with the laws of the countries in which they are organized. Foreign organizations that are separately organized shall not be considered separate if they are affiliates (see definition at FAR 2.101).

(2) The Contractor may request the Government's approval to treat as separate the health activities of two or more organizations, which would be considered affiliates under paragraph (d) (1) of this clause.

(3) In the event the Contractor makes a request under paragraph (d) (2) of this clause, the Contractor shall provide a written justification to the Government that the health activities of the organizations are sufficiently distinct to warrant not imputing the activity of one to the other.

(e) *Consent to subcontract.* If the contract includes the clause at FAR 52.244-2, Subcontracts, and requires the Contractor to obtain consent prior to entering into a subcontract, then the Contractor shall provide to the Contracting Officer, in the consent request, a description

of the due diligence performed by the Contractor on the subcontractor relating to the requirements in this clause.

(f) *Violations.* Violations by the subcontractor of any requirement in this clause will be imputed to the Contractor only if—

(1) The Contractor knowingly provides global health assistance funding in a subcontract under this contract to a foreign contractor that performs or actively promotes abortion as a method of family planning;

(2) The Contractor failed to make reasonable due diligence efforts prior to providing global health assistance funding in a subcontract under this contract to a foreign contractor, and the subcontractor did not abide by its contractual terms required in this clause; or

(3) The Contractor knows or has reason to know, by virtue of the monitoring that the contractor is required to perform under the terms of this contract, that a subcontractor has violated any of the contract terms required by this clause, and the Contractor fails to terminate the subcontract or fails to take other appropriate corrective action.

(g) *Government independent inquiries.* (1) The Government may make independent inquiries in the community served by a foreign contractor or subcontractor under this

contract regarding whether it performs or actively promotes abortion as a method of family planning.

(2) In the event that the Contractor or the Government has reason to believe that a foreign subcontractor may have violated the requirements of this clause, the Contractor shall review the health program of the foreign subcontractor to determine whether such a violation has occurred. The Contractor shall provide the Contracting Officer the results of the review.

(h) *Foreign Governments and parastatals.* The Contractor may award a contract with global health assistance funding to a foreign government or parastatal even though the foreign government or parastatal includes abortion in its health program, provided that no global health assistance funding shall be used under this contract in support of the abortion activity of the foreign government or parastatal, and any funds transferred to the foreign government or parastatal shall be placed in a segregated account to ensure that such funds are not used to support the abortion activity of the foreign government or parastatal.

(i) *Affirmative duty exception.* In the event of a conflict between a term of this clause and an affirmative duty of a healthcare provider required under local law to

provide counseling about and referrals for abortion as a method of family planning, compliance with such law shall not trigger a violation of this clause.

(j) *Obligations regarding foreign subcontracts.* (1)

The Contractor shall ensure that foreign subcontractors at any tier that receive global health assistance funding agree to the following additional terms:

(i) The subcontractor shall not, during the term of the subcontract

(A) Perform or actively promote abortion as a method of family planning outside the United States (the 50 states, the District of Columbia, and outlying areas); or

(B) Provide financial support to any other foreign nongovernmental organization that conducts such activities.

(ii) The Contractor and authorized representatives of the Government may, at any reasonable time, announced or unannounced, consistent with the terms of this contract, perform any of the following:

(A) Inspect the documents and materials maintained or prepared by the subcontractor in the usual course of its operations that describe the health activities of the subcontractor, including reports, brochures, and service statistics.

(B) Observe health activities conducted by the subcontractor.

(C) Consult with healthcare personnel of the subcontractor.

(D) Obtain a copy of audited financial statements or reports of the subcontractor, as applicable.

(2) In the event that the Contractor or the Government has reason to believe that a foreign subcontractor may have violated the requirements of this clause, the Contractor shall review the health program of the subcontractor to determine whether such a violation has occurred.

(3) If the Contractor has reason to believe that the subcontractor has violated any requirement of this clause, the Contractor shall consult with the Contracting Officer and provide full cooperation prior to terminating the subcontract or determining that other corrective action is warranted.

(k) *Subcontracts.* The Contractor shall insert the terms of this clause, except paragraphs (b), (c) and (e), in all subcontracts awarded with global health assistance funding at any tier except for subcontracts—

(1) At or below the micro-purchase threshold, as defined at FAR 2.101;

- (2) For personal services with individuals; or
- (3) For the acquisition of commercial items.

(End of Clause)

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