



AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412-AA86

Leave and Holidays for U.S. Personal Services Contractors, including Family and Medical Leave

AGENCY: U.S. Agency for International Development.

ACTION: Final rule.

SUMMARY: The rule amends the AIDAR's provisions that pertain to the General Provision contract clause 5 (hereafter "clause"), entitled "Leave and Holidays (APR 1997).

EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

A. Background.

The U.S. Agency for International Development (USAID) published a proposed rule on June 21, 2019 (84 FR 29140), with a supplemental notice on August 16, 2019 (84 FR 41954), to amend Section 12 of Appendix D of the AIDAR by revising General Provision contract clause 5 and its related provisions. The public comment period closed on August 20, 2019, and USAID received 142 comments. The revisions to Appendix D of the AIDAR made by this final rule are as follows.

USAID is revising Section 4 of Appendix D of the AIDAR to make the prescription for Annual and Sick Leave in Paragraph (c)(2)(ix) consistent with the General Provision contract clause 5 in Section 12 of Appendix D, entitled “Leave and Holidays.” The revisions to General Provision contract clause 5 in Section 12 are as follows:

1) Annual Leave.

- The title of the clause changes from “Vacation Leave” to “Annual Leave,” to be consistent with Paragraph (c)(2)(ix) of Section 4 of this Appendix, as well as USAID’s time-keeping system, and the Family and Medical Leave Act of 1993, as amended (FMLA), which allows for the use of “Annual” leave.
- The rule clarifies the provision regarding the minimum 90-day period of continuous performance required for a USAID U.S. Personal Services Contractor (USPSC) to accrue Annual Leave.
- The terms “tour,” “tour of duty,” and “employee” change to “period of performance” and “contractor,” to be consistent with USAID’s current contractual terminology.
- The rule clarifies the accrual of Annual Leave to indicate USAID will prorate it for less-than-full-time work.
- Annual-leave accrual rates broaden to include former service as a USAID USPSC under any statutory authority, and former service as a U.S. Government civilian and/or honorable service as an active-duty member of the U.S. Uniformed Services, by using the definition from Section 2101 of Title 5 of the U.S. Code (U.S.C.). The clause also specifies the documents a USAID Contracting Officer (CO) may review as evidence of a USPSC’s prior service. This change is intended to expand the Agency’s market base for USPSCs and attract

former U.S. Government employees with relevant skills to participate in the competitive process for hiring them.

- USAID caps the maximum amount of annual leave a USPSC may carry over from one calendar year to the next during the period of a contract at 240 hours, consistent with the same restriction the Agency imposes on its U.S. direct-hire (USDH) employees. This change will also eliminate the need for making manual entries in the Agency's time-keeping system to reinstate forfeited leave automatically cancelled in the time-keeping system at the end of each calendar year.
  - The rule clarifies the conditions that allow a USPSC to avoid forfeiting Annual Leave; endorsement by a Mission Director is no longer required for a CO to approve these conditions, and a Determinations and Findings (D&F) is now required before the authorization of a lump-sum payment.
  - USPSCs who are performing at USAID's headquarters in Washington, D.C., require approval by the cognizant Assistant Administrator (AA) for advanced Annual Leave. Also, the maximum amount of advanced leave an AA may approve is limited to what a USPSC could earn in a 12-month period, or over the life of his or her contract, whichever is less.
- 2) Sick Leave.
- The rule amends the paragraph to clarify that the USPSC may take Sick Leave based on the same standards that apply to USAID's USDH employees.
  - The rule clarifies the paragraph to indicate that USAID will prorate the accrual of Sick Leave for less-than-full-time work.
  - The rule clarifies the paragraph regarding the carryover of Sick Leave to specify that it only applies to a subsequent "follow-on" contract for the same services.

### 3) Home Leave.

Home leave is a benefit a USPSC can earn after performing services for USAID abroad, usually after two years. It provides time off that the USPSC must use in the U.S., subject to his or her commitment to continued service. Home leave is meant to ensure that persons who are living and working abroad undergo reorientation and re-exposure in the U.S., and USAID provides it to USPSCs as a benefit comparable to that the Agency offers to its USDH employees. Detailed changes to the text regarding home leave are as follows:

- USAID only provides Home Leave currently to USPSCs who agree to return to the same Mission abroad after completing the Home Leave. In July 1998, USAID issued a policy deviation from Appendix D of the AIDAR to authorize a maximum of 20 workdays of Home Leave based on a USPSC's commitment to relocate to a different USAID Mission as a USPSC immediately following the Home Leave for a specific period of time, subject to prior approval by the Mission Director (*i.e.*, the Mission from which the USPSC is departing.)
- The revised clause includes the required verification documents a USPSC must provide to support Home Leave based on a commitment to continue work under a new contract with a different USAID Mission.
- The rule makes a clarification to the travel requirements to specify that the days counted toward Home Leave do not include the travel time for Home Leave, with a cross-reference to the related contract clause titled, "Travel and Transportation Expenses."

### 4) Home Leave for Qualifying Missions.

USAID adds this category of leave based on a 2006 amendment to the Foreign Service Act of 1980 (Public Law [P.L.] 96-465), as amended, which authorized this additional Home Leave for USPSCs following their completion of a 12-month period of performance at Qualifying

Missions, currently those in the Republics of Iraq and South Sudan and the Islamic Republics of Afghanistan and Pakistan. USAID provides Home Leave for USPSCs at the Qualifying Missions comparable to what it offers USDH employees, so as to attract USPSCs for these hard-to-fill positions.

#### 5) Holidays.

The rule revises the title and text of this paragraph to add “Administrative Leave” to apply all Agency closures to USPSCs on the same basis as to USDHs.

#### 6) Military Leave.

- The paragraph adds “U.S.” to “Armed Forces” to clarify that the clause only applies to the U.S. military services.
- The rule has clarified the contract-filing requirement to inform each USPSC that USAID will maintain such approval on file.

#### 7) Leave Without Pay (LWOP).

- The paragraph includes the abbreviation “LWOP” to conform to USAID’s time-keeping system.
- The paragraph includes a reference to the use of LWOP for Family and Medical Leave to conform to entitlements for this leave under the Family and Medical Leave Act (FMLA, P.L. 103-3).

#### 8) Compensatory Time.

The rule removes the term “leave” to characterize this benefit more accurately in line with USAID’s internal policies. Also, the paragraph contains a new sentence to clarify that both the earning and use of compensatory time off by USPSCs follow the same policies as apply to USAID’s USDH employees.

## 9) Family and Medical Leave.

This clause adds a new section to cover Family and Medical Leave for all USAID's USPSCs. As a matter of policy, USAID is extending the eligibility of Family and Medical Leave to USPSCs who are performing in the U.S. as well as outside the U.S. Congress passed the FMLA to allow employees to balance work and family life by protecting their employment and benefits status when taking reasonable leave for medical reasons, including the birth, adoption or care of a child; or care for a spouse, parent, or oneself in the event of a serious health condition.

Following inquiries from USPSCs, USAID examined the applicability of the FMLA to USPSCs who are working in the U.S. and abroad. USAID found that Title II of the FMLA limits eligibility to USDH employees, and does not apply to contracts with individuals. However, USAID has determined that USPSCs who are working in the U.S. are entitled to Family and Medical Leave under Title I of the FMLA, as administered by the U.S. Department of Labor (DOL) through Part 825 of Title 29 of the Code of Federal Regulations (CFR). The DOL applies the broad definition of "employee" from the Fair Labor Standards Act of 1938 (Section 201 of Title 29 of the U.S. Code [U.S.C.]).

USAID determined that FMLA does not apply to USPSCs who are working outside the U.S. However, in November 2015, as a matter of Agency policy, the then-Acting Administrator authorized Family and Medical Leave for USPSCs who are working abroad to allow for a consistent leave policy for all of USAID's USPSCs, irrespective of their place of performance. Based on this approval, in December 2015, USAID processed a two-year class deviation (under Title 48 of the CFR) from clause 5 of Section 12 of Appendix D of the AIDAR, "Leave and Holidays," to authorize Family and Medical Leave for all of the Agency's USPSCs. USAID implemented the deviation on an interim basis pending the finalization of this rule.

USAID has determined that Cooperating-Country National Personal Services Contractors (CCNPSCs) or Third-Country National PSCs (TCNPSCs) are not entitled to the Family and Medical Leave provided under this rule, even if a Mission Director approves other specific benefits based on an exception under Appendix J of the AIDAR (Title 48 of the CFR) . Key provisions of the rule regarding Family and Medical Leave are as follows:

- The clause includes eligibility criteria in accordance with Part 825.110 of Title 29 of the CFR, with detailed requirements regarding establishing eligibility in USAID’s internal policy.
- The rule specifies the reasons for which a USPSC may take Family and Medical Leave in accordance with Part 825.112 of Title 29 of the CFR.
- The rule makes the provisions for the substitution of LWOP with paid leave, as allowed under Part 825.207 of Title 29 of the CFR, consistent with what USAID provides to USDH.
- The rule clarifies that COs may not authorize Family and Medical Leave for a USPSC beyond the completion date of the contract.
- The rule provides procedures a USPSC must follow to establish eligibility for Family and Medical Leave.
- The clause refers to a publication of the Wage and Hour Division of the U.S. Department of Labor for more information about Family and Medical Leave and procedures to report violations of the underlying law.

10) Leave Records. The rule changes the use of “shall” to “must.”

B. Discussion and Analysis.

USAID received 142 public comments regarding the proposed rule, which the Agency considered in the development of the final rule.

#### 1) Summary of Significant Changes from the Proposed Rule

There are no significant changes, and the Agency only made the following editorial clarifications to clause 5 under this final rule as a result of the public comments:

- In Paragraph (a)(3) on annual leave, the Agency corrected the sentence, “The contractor's unused annual leave balance at the end of the last pay period of each calendar year will be forfeited, ...” to indicate that a USPSC only forfeits annually those hours in excess of 240, as follows: “The contractor’s unused annual leave balance in excess of the 240 hour maximum at the end of the last pay period of each leave year will be forfeited,...”.
- In Paragraph (c)(2)(iii), the Agency revised the sentence, “The contractor agrees to return immediately after completing home leave to the same Mission to serve out the remaining time necessary to meet two (2) years of continued performance under this contract, plus an additional—...”, to clarify that the time required for the return service obligation starts after the USPSC has taken Home Leave, as follows, “The contractor agrees to immediately return to the same Mission to complete the time remaining to meet the twenty-four (24) month period of service required for home leave, which begins after the contractor returns from home leave, plus an additional—...”

#### 2) Analysis of Public Comments

Below are the Agency’s responses to comments on the changes proposed to clause 5 of Section 12 of Appendix D of the AIDAR. The Agency did not address comments unrelated to, or outside the scope of, the revisions of the proposed rule from the existing rule:

a. **Comment:** Many of the comments generally supported the rule. Numerous also included the statement, “USAID seeks consistency in its leave policies for direct-hires and USPSCs,” or similar statements to the effect that USAID’s goal is to align all USPSC benefits with its USDH staff.

**Response:** The Agency is not seeking with this rule to replicate USDH benefits for USPSCs completely. For those benefits USAID does provide to USPSCs as a matter of policy, USAID may adopt a standard generally consistent with USDH employees.

b. **Comment:** Regarding the revisions to Paragraph (a) (3) on Annual Leave, numerous comments objected to the introduction of the maximum 240 hours of leave a USPSC can retain by the end of each leave year, often by citing the cap of 360 hours currently applicable to US DH Foreign Service Officers.

**Response:** Because the rule was previously silent about a yearly cap on the accrual of Annual Leave, the proposed rule revised Paragraph (a)(3) to address this issue. The 240-hour annual cap, regardless of a contractor’s place of performance, is consistent with the U.S. Department of State’s policies for its PSCs. Also, the previous uncapped amount had a negative financial impact on the Agency, because it undermined the imperative in Paragraph (a) (4), “The contractor must use all accrued annual leave during the period of performance.” Setting the cap will encourage USPSCs to take Annual leave as required. Additionally, as stated in the preamble to the rule, the cap will avoid the administrative burden on the Agency of individual entries to the time-keeping system, which automatically cancels Annual Leave that exceeds 240 hours at the end of each leave year. USAID therefore adopted this standard to resemble the default cap on the accumulation of Annual Leave applicable to its USDH employees in the Civil Service.

c. **Comment:** Regarding the revisions to Paragraph (a) (3) on Annual Leave and the annual cap on accrual, one comment stated, “The document is silent on the issue of carrying over annual leave that currently exceeds the new cap. This needs to be addressed. For those of us who currently exceed the proposed new cap we should be grandfathered in so as we do not lose this leave or be forced to take excessive leave before the end of the calendar year.”

**Response:** The 240-hour yearly cap on Annual Leave will take effect for all new solicitations and contract awards made after the effective date of this final rule. The yearly cap on Annual Leave will not apply to contracts awarded prior to the rule’s effective date that contained the prior version of the clause with no cap.

d. **Comment:** One comment regarding Paragraph (a) (3) on Annual Leave stated, “The draft states that the contract can carry over a maximum of 240 hours from one leave year to the next, but the states that the ‘contractor's unused annual leave balance at the end of the last pay period of each calendar year will be forfeited, unless [restored].’ Do you mean ALL of the unused leave balance, or that PORTION of the unused leave balance that exceeds the authorized carry over amount? Do you mean the last pay period of each CALENDAR year, or the last pay period of the LEAVE year? The proposed rule, in the same provision, states that restoration of annual leave may be approved only by the USAID Administrator, cognizant AA or Head of an Independent Office reporting directly to the USAID Administrator, and cannot be delegated further. What is the rationale for having this approval remain at such a high level of the organization? Why not allow the Mission Director (or even the CO) to approve such restorations? The proposed rule, in the same provision, provides that restored annual leave must be used within two years. Why provide a longer period than is allowed for USDH?”

**Response:** As the Agency did not intend to indicate that USPSCs would forfeit all accrued, unused Annual Leave at the end of each leave year, we have revised this final rule to clarify that USPSCs will forfeit only leave in excess of 240 hours by the end of each leave year. Regarding the approval level the Agency chose for the restoration of annual leave, “for exceptional circumstances beyond the control of the contractor,” as stated in the rule, approval authority is with the head of the Agency or someone designated to act in that capacity consistent with the standard applicable to USDH employees under similar circumstances. Lastly the two-year maximum time limit for use of such restored leave is consistent with that USAID provides to USDH employees.

e. **Comment:** Related to Paragraphs (a) (3) on Annual Leave and (b) on Sick Leave, numerous comments spoke to the provisions in the rule for the carryover of such leave to a new contract. Many related comments requested a donation program for Annual and Sick Leave comparable to what is available to USDH employees.

**Response:** The carryover provisions for Annual and Sick Leave to new contracts from the existing regulatory text remained materially unchanged in the proposed rule. Both in the existing and proposed rule, USPSCs may carry over sick leave to a “follow on” contract, but not carry over Annual or Sick Leave to a new contract for different services at a different place of performance.

Regarding leave “donations,” the Office of Personnel Management (OPM) administers the Voluntary Leave Transfer Program (VLTP), and statute prohibits PSCs from participating in OPM’s programs, in accordance with Section 636(a)(3) of the Foreign Assistance Act, as reiterated in Appendix D of the AIDAR. Furthermore, the Agency has determined that a similar program for contractors is not allowable, as there is no legal basis for leave donation among

contractors in light of the constraints of the statutes, regulations, and general contract principles applicable to USAID when hiring and administering PSCs.

f. **Comment:** Regarding Paragraph (b) on Sick Leave, numerous comments indicated disagreement with the following text indicated by quotes as having been included in the rule: "sick leave can be carried over from one contract to another when the follow-on is for the same services as the original contract (*i.e.*, the same scope of work in the same location)."

**Response:** Although the cited text is inaccurate, as it is not a verbatim quotation from the proposed rule, the Agency understands the point of the comments was to disagree with the regulatory text that states, "The contractor is not authorized to carry over sick leave to a new contract for a different position or at a different location." The proposed rule does not substantively change the existing regulatory text regarding the carryover of Sick Leave. The Agency only made an editorial clarification for the proposed rule, as stated in the preamble, "A clarification is made to the carryover of sick leave to specify that it only applies to a subsequent 'follow-on' contract for the same services."

g. **Comment:** Regarding Paragraph (c) on Home Leave, one comment stated, "What is the justification for providing Home Leave to contractors who voluntarily take work overseas, and whose contracts fund their return to the U.S. after only five years at most? Compared to Foreign Service Officers who agree to a career of service abroad at the direction of the Agency for decades, what is the Agency's justification for incurring a cost that should be reserved to career officials? The same level of productivity and rest from service abroad could be achieved for contractors with regular [travel for rest and recuperation] instead of a costly 30 days of added vacation. Providing Home Leave as proposed in this rule, which is in ways more generous than

what a Foreign Service Officer gets, undermines the incentives our Government needed to grow a dedicated Foreign Service workforce so important to best representing U.S. interests overseas.”

**Response:** The existing rule already provided eligibility for Home Leave for USPSCs, with a return service agreement of two years, or only one year subject to a Mission Director’s approval when a USPSC cannot meet the two-year return service requirement after the fourth year of a five-year contract. This rule does not affect the provision of Home Leave generally to USPSCs, nor does it involve travel between rest and recuperation. Regarding whether provisions for USPSCs to receive Home Leave are more generous than what USAID provides to USDH employees, the Agency is not required to replicate USDH benefits completely, as explained above.

h. **Comment:** Regarding Paragraph (c) (2) on Home Leave, one comment stated, “The draft states that ‘the contractor agrees to return immediately after completing home leave to the same Mission to serve out the remaining time necessary to meet two (2) years of continued performance under this contract, plus . . .’ How do you define ‘remaining time’? If the contractor takes advance home leave after 18 months, then returns to post after one month of home leave, how much longer must he serve under the contract after his return? Six months (24 months minus 18) or five months (24 months minus 18 months minus one month of home leave)? Phrased a different way, does the home leave period count as PART of the 24 month-contract, or as an ADDITION to the 24-month contract? This same section provides for up to five days in work status for consultation at USAID/Washington. Why is this different than for USDH employees (who normally get three days)?”

**Response:** The Agency has revised Paragraph (c)(2)(iii) on advanced Home Leave to clarify that the time spent on Home Leave, irrespective of when taken, is additional to the required 24-

months of performance necessary for a USPSC to be eligible for home leave. Regarding Paragraph (4) that addresses “five (5) days in work status for consultation at USAID/Washington,” the text in the proposed rule remains unchanged from the existing regulatory text, and is therefore not germane to the revisions of the rule.

i. **Comment:** Regarding Paragraph (f) on military leave, one comment stated, “This draft provision authorizes military leave of not more than 15 calendar days in any calendar year for military leave. USDH are authorized 15 WORK days in any FISCAL year. What is the reason for the inconsistency?”

**Response:** The Agency has not changed the provision for military leave materially from the existing regulatory text, and is therefore not part of the substantive revisions proposed for the rule. As stated in the preamble, USAID has made only the following clarifying editorial changes, “The paragraph adds “U.S.” to “Armed Forces” to clarify that the clause only applies to the U.S. military services. The rule has clarified the contract-filing requirement to inform each USPSC that USAID will maintain such approval on file.”

j. **Comment:** Regarding Paragraph (g) on compensatory time off, one comment stated, “This draft provision states that USAID may grant compensatory time off ‘under the same guidelines which apply to USAID direct-hire employees for its use.’ Which kind of USAID direct-hire do you mean? The guidelines are different for Civil Service and Foreign Service direct-hire employees. And they are different for commissioned Foreign Service and non-commissioned Foreign Service direct-hire employees. Commissioned Foreign Service employees are not authorized compensatory time at all (other than travel compensatory time, which falls under a different set of rules anyway), so this is an important distinction to make.”

**Response:** Compensatory time off applies equally to eligible USDH employees. The only employees who are not eligible are commissioned Foreign Service Officers, members of the Senior Foreign Service, and members of the Senior Executive Service.

C. Impact assessment.

1) Regulatory Planning and Review. Under Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) has designated this final rule as being “significant” and therefore subject to review by the Office of Management and Budget (OMB). OMB/OIRA has determined that this final rule is not an “economically significant regulatory action” under Section 3(f)(1) of E.O. 12866. This final rule is not a major rule under title Section 804 of Title 5 of the U.S.C.

The costs and benefit of the revisions described above are as follows, by each type of leave affected:

- Annual Leave—Under the existing rule, USPSCs can only accrue Annual Leave per Pay Period at increasingly higher hourly rates based on prior PSC service under the authority of “Section 636(a)(3) of the FAA [Foreign Affairs Act of 1961, as amended].” The default accrual rate for a USPSC is four hours per Pay Period; however a contractor may accrue at a rate of six hours per pay period as a prior PSC under the FAA for more than three years, or eight hours per period for prior PSC services under the FAA for more than 15 years. The final rule broadens this to allow USPSCs to include prior service as a USAID PSC under other statutory authorities, as well as prior civilian or uniformed service. USAID estimated the cost of progressively adding four hours for three years and two hours for two years for 26 Pay Periods each year of a five-year contract to reach the maximum eight-hour accrual rate per Pay Period. USAID’s historical data indicate only approximately 50 percent of a given

USPSC population will have prior experience to make them eligible for the maximum accrual rate. Based on an average annual salary for a General Schedule (GS) employees at the levels of GS-13, GS-14, and GS-15, step 10, of \$146,000 (base with locality pay for Washington, D.C.) equal to \$70 per hour, USAID estimates 270 U.S.-based USPSCs (*i.e.*, 50 percent of 540 total) would cost approximately \$1.575 million per year in higher accrual rates. The equivalent calculation for 275 USPSCs who are serving abroad (*i.e.*, 50 percent of 550 total) with an average salary of \$117,000 (base with no locality) equal to \$56/hour comes to \$1.283 million per year. Therefore the total estimated cost of additional compensation in Annual Leave based on the expanded prior service eligibility is \$2.859 million per year. The benefit of this provision is to provide this leave for USPSCs on a similar basis as USAID provides to USDH to attract a wider pool of offerors with greater opportunities for higher accrual rates.

- Home Leave—The final rule codifies USAID’s current policy in place by deviation from the existing AIDAR to add eligibility for Home Leave for USPSCs who relocate to a different Mission under a new USPSC contract immediately following Home Leave every two years. Assuming about half of USAID’s 550, or 275, USPSCs abroad fulfil their continued service commitments at a different Mission, the maximum additional cost at an average GS-13, GS-14, and GS-15, step 10, annual salary of \$117,000 (base with no locality) equal to \$450/day for 20 days is \$2.476 million every two years, or \$1.238 million for each year.
- Home Leave for Qualifying Missions—The final rule increases Home Leave by providing 10 days of leave for USPSCs after every 12 months abroad when performing at certain “Qualifying” Missions, currently in Iraq, Afghanistan, Pakistan, and South Sudan. Together these Missions have approximately 70 USPSCs abroad, so using the average GS-13, GS-14,

GS-15, step 10, annual salary of \$117,000 per year (base with no locality) equal to \$450/day for 10 days, the total additional annual cost of this leave is approximately \$315,000 each year. The cost of this additional leave is justified to increase USAID's ability to hire USPSCs for hard-to-fill positions at dangerous and high-attrition Missions.

- **Holidays and Administrative Leave**—The final rule adds emergency dismissals and closures to acknowledge when USAID/Washington headquarters or Missions abroad are closed for inclement weather, civil unrest, or other logistical complications. This will not have a cost impact, because previously USPSCs were not able to work when USAID facilities were closed, and so received the same Administrative Leave as USDH as a practical matter. Additionally, telework-ready USPSCs will continue to perform as USDH do.
- **Family and Medical Leave**—The addition of Family and Medical Leave will only have a marginal cost impact, if any, because this entitlement does not provide additional leave. USPSCs must use Leave without Pay, Annual, or Sick Leave while under the status of Family and Medical Leave. The benefit that Family and Medical Leave provides is that it entitles an individual to use leave once he or she is determined eligible and not subject to the ordinary leave-approval process. Statute requires the provision of this benefit to USPSCs who are performing in the U.S.; therefore, the only expansion beyond what the law requires is the Agency's discretion to apply it equally to USPSCs based abroad. USAID made this decision to provide this entitlement equally to all USPSCs and not disadvantage those who are performing abroad.

As a regulatory matter, the cost of the rule-making process to incorporate these revisions into the regulation is also justified. The AIDAR's Appendices include all the compensation and benefits available under PSCs. Therefore, the Agency needs these revisions to keep the

regulation consistent, complete, and transparent to industry, other U.S. Government agencies, and the general public.

2) Regulatory Flexibility Act. The Director of the Office of Acquisition and Assistance in USAID's Bureau for Management, acting as the Head of the Agency for purposes of the Federal Acquisition Regulation, certifies that this rule will not affect a substantial number of small entities within the meaning of the Regulatory Flexibility Act, Section 601 of Title 5 of the U.S.C. 601, *et seq.* Therefore, USAID has not performed an Initial Regulatory Flexibility Analysis.

3) Paperwork Reduction Act. The rule does not establish or modify a collection of information that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (Chapter 35 of Title 44 of the U.S.C.).

List of Subjects in Appendix D of Chapter 7 of Title 48 of the CFR

Government procurement.

For the reasons discussed in the preamble, USAID amends Chapter 7 of Title 48 of the CFR under the authority of Section 621 of Public Law 87-195, 75 Stat. 445, (Section 2381 of Title 22 of the U.S.C.), as amended; E.O. 12163, Sept. 29, 1979, 44 Federal Register 56673; and Title 3 of the CFR, 1979 Comp., p. 435, as follows:

#### CHAPTER 7— AGENCY FOR INTERNATIONAL DEVELOPMENT

1. Amend Appendix D to Chapter 7 by:
  - a. In section 4, revising the second sentence of paragraph (c)(2)(ix);
  - b. In section 12:
    - i. Revising the section heading;
    - ii. Revising clause 5;

iii. In clauses 6 and 16, removing the word “vacation” each time it appears and adding in its place the word “annual”.

c. By adding a parenthetical authority citation at the end of the appendix.

The revisions and addition 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

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ix) \* \* \* However, PSCs with previous service are eligible to earn annual leave in accordance with the “Leave and Holidays” General Provision contract clause in section 12 of this appendix.

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12. General Provisions for a Contract With a U.S. Citizen or a U.S. Resident Alien for  
Personal Services Abroad

\* \* \* \* \*

5. Leave and Holidays

[Insert the following clause in all USPSC contracts.]

Leave and Holidays (DATE)

(a) *Annual Leave.* (1) The contractor may accrue annual leave at the rate specified in paragraph (a)(2) of this clause as follows:

(i) If the contract period of performance is ninety (90) calendar days or more, and the contractor's performance is continuous for the contract period of performance, the contractor is entitled to accrue annual leave as of the start date of the contract.

(ii) If the contract period of performance is ninety (90) calendar days or more, and the contractor's performance is not continuous during the contract period of performance, the contractor is entitled to accrue annual leave only for each instance of continuous performance of ninety (90) calendar days or more.

(iii) If the contract period of performance is less than ninety (90) calendar days, the contractor is not entitled to accrue annual leave.

(2) The rate at which the contractor will accrue annual leave is based on the contractor's time in service according to the table of this paragraph (a)(2). The accrual rates are based on a full-time, 40-hour workweek, which will be prorated if the contract provides for a shorter workweek:

Time in Service	Annual Leave (AL) Accrual Rate
0 to 3 years	4 hours of leave for each 2-week period
over 3, and up to 15 years	6 hours of AL for each 2-week period (including 10 hours AL for the final pay period of a calendar year)
over 15 years	8 hours of AL for each 2-week period

(i) USAID will calculate the time in service based on all the previous service performed by the contractor as--:

(A) An individual personal services contractor with USAID for any duration covered by Sec. 636(a)(3) of the FAA or other statutory authority applicable to USAID; and/or

(B) A former U.S. Government (USG) direct-hire civilian employee; and/or

(C) An honorable active duty member of the uniformed services based on the definition in 5 U.S.C. 2101(3).

(ii) In addition to the information certified by the contractor in their Offeror Information form, the contracting officer may require the contractor to furnish copies of previously executed contracts, and/or other evidence of previous service (e.g. SF 50, DD Form 214 or 215) to conduct the due diligence necessary to verify creditable previous service.

(3) Annual Leave is provided under this contract primarily for the purposes of providing the contractor necessary rest and recreation during the period of performance. The contractor, in consultation with the Supervisor, must develop an annual leave schedule early in the period of performance, taking into consideration the requirements of the position, the contractor's preference, and other factors. The maximum amount of annual leave that the contractor can carry over from one leave year to the next is limited to 240 hours. The contractor's unused annual leave balance in excess of the 240 hour maximum at the end of the last pay period of each leave year will be forfeited, unless the requirements of the position precluded the contractor from taking such leave. The contractor may be authorized to restore annual leave for exceptional circumstances beyond the control of the contractor. The restoration of annual leave may be approved only by the USAID Administrator, cognizant Assistant Administrator or Head of an Independent Office reporting directly to the USAID Administrator, and cannot be delegated further. Annual leave restored must be scheduled and used no later than either the end of the leave year two years after either--

(i) The date fixed by the approving official as the termination date of the exigency of the public business or other reason beyond the contractor's control, which resulted in the forfeiture;  
or

(ii) The end of the contract, whichever is earlier.

(4) The contractor must use all accrued annual leave during the period of performance. At the end of the contract, the contractor will forfeit any unused annual leave except where the requirements of the position precluded the contractor from taking annual leave. In this case, the contracting officer may authorize the following:

(i) The contractor to take annual leave during the concluding weeks of the contract, not to exceed the period of performance; or

(ii) Payment of a lump-sum for annual leave not taken based on a signed, written determination and findings (D&F) from the contractor's supervisor. The D&F must set out the facts and circumstances that prevented the contractor from taking annual leave, and the contracting officer must find that the contractor did not cause, or have the ability to control, such facts and circumstances. This lump-sum payment must not exceed the number of days the contractor could have accrued during a twelve (12)-month period based on the contractor's accrual rate.

(5) The contractor may be granted advanced annual leave by the contracting officer when circumstances warrant. Advanced leave must be approved by the Mission Director, cognizant Assistant Administrator, or Head of an Independent Office reporting directly to the Administrator, as appropriate. In no case may the contracting officer grant advanced annual leave in excess of the amount the contractor can accrue in a twelve (12)-month period or over the life of the contract, whichever is less. At the end of the period of performance or at termination, the contractor must reimburse USAID for any outstanding balance of advanced annual leave provided to the contractor under the contract.

(b) *Sick Leave*. The contractor may use sick leave on the same basis and for the same purposes as USAID direct-hire employees. The contractor will accrue sick leave at a rate not to exceed four (4) hours every two (2) weeks for a maximum of thirteen (13) work-days per year based on a full-time, 40-hour workweek, and the rate of accrual will be prorated if the contract provides for a shorter workweek. The contractor may carry over unused sick leave from year to year under the same contract, and to a new follow-on contract for the same work at the same place of performance. The contractor is not authorized to carry over sick leave to a new contract for a different position or at a different location. The contractor will not be compensated for unused sick leave at the completion of this contract.

(c) *Home Leave*. (1) The contractor may be granted home leave to be taken only in the U.S., its commonwealth, possessions, or territories, in one continuous period, under the following conditions:

(i) The contractor must complete twenty-four (24) continuous months of service abroad under this contract, and must not have taken more than thirty (30) workdays leave (annual, sick, or LWOP) in the U.S., its commonwealths, possessions, or territories. The required service abroad will include the actual days in orientation in the U.S. (excluding any language training), travel time by the most direct route, and actual days abroad beginning on the date of arrival in the cooperating country. Any annual and sick leave taken abroad, excluding leave without pay (LWOP), will count toward the period of service abroad. Any days of annual and sick leave taken in the U.S., its commonwealths, possessions, or territories will not be counted toward the required twenty-four (24) months of service abroad.

(ii) The contractor must agree to return immediately after completing home leave to continue performance for an additional—

(A) Two (2) years, or

(B) Not less than one (1) year, if approved in writing by the Mission Director before the contractor departs on home leave.

(iii) If the contractor agrees to meet the conditions in paragraph (c)(1)(ii) of this clause above by returning to the same USAID Mission under this contract or a new contract, the contractor may be granted thirty (30) workdays of home leave.

(iv) If the contractor agrees to meet the continued performance conditions of paragraph (c)(1)(ii) of this clause and will be relocating to a different USAID Mission under a new USAID personal services contract immediately following the completion of home leave, the contractor may be granted twenty (20) workdays of home leave. USAID will provide the contractor these twenty days of home leave under this contract, not under the new contract.

(v) If home leave eligibility is based on paragraph (c)(1)(iv) of this clause, prior to departure on home leave, the contractor must submit to the contracting officer at the current Mission, a copy of the new contract with a special award condition in the contract Schedule indicating the contractor's obligation to fulfill the commitment for continued performance in accordance with paragraph (c)(1)(ii) of this clause.

(2) Notwithstanding the requirements in paragraph (c)(1) of this clause, the contractor may be granted advanced home leave subject to all of the following conditions:

(i) Granting of advanced home leave would serve in each case to advance the attainment of the objectives of this contract; and

(ii) The contractor has served at least eighteen (18) months abroad, as defined in paragraph (c)(4) of this clause, at the same USAID Mission under this contract, and has not taken more than 30 work days leave (annual, sick or LWOP) in the U.S.; and

(iii) The contractor agrees to return immediately to the same Mission to complete the time remaining to meet the twenty-four (24) month period of service required for home leave, which begins after the contractor returns from home leave, plus an additional—

(A) Two (2) years, or

(B) Not less than one (1) year, if approved by the Mission Director, under the current contract, or under a new contract for the same or similar services at the same Mission, before the contractor departs on home leave.

(3)(i) Home leave must be taken only in the U.S., its commonwealths, possessions, or territories. Any days spent in any other location will be charged to annual leave, or if the contractor does not have accrued annual leave to cover these days, the contractor will be placed on LWOP.

(ii) Travel time by the most direct route is authorized in addition to the home leave authorized under this “Leave and Holidays” clause. Salary during travel to and from the U.S. for home leave will be limited to the time required for travel by the most direct and expeditious route. Additional home leave travel requirements are included in the “Travel and Transportation Expenses” clause of this contract.

(iii) Except for reasons beyond the contractor's control as determined by the contracting officer, the contractor must return abroad immediately after home leave to fulfill the additional required continued performance of services for any home leave provided under this contract, or else the contractor must reimburse USAID for the salary and benefits costs of home leave, travel and transportation, and any other payments related to home leave.

(iv) Unused home leave is not reimbursable under this contract.

(4) The contracting officer may authorize the contractor to spend no more than five (5) days in work status for consultation at USAID/Washington while on home leave in the U.S., before returning abroad. Consultation in excess of five (5) days or at locations other than USAID/Washington must be approved in advance by the Mission Director or the contracting officer.

(d) *Home Leave for Qualifying Posts.* (1) If the contractor ordinarily qualifies for home leave and has completed a 12-month period at one of the USAID qualifying Missions, as announced by the Department of State or USAID, the contractor is entitled to ten (10) workdays of home leave in addition to the home leave the contractor is normally entitled to in accordance with paragraph (c) of this “Leave and Holidays” clause.

(2) There is no requirement that an eligible contractor take this additional home leave for qualifying Missions; it is for use at the contractor’s option. If the contractor is eligible and elects to take such home leave, the contractor must take all ten (10) workdays at one time in the U.S. under the conditions described in paragraphs (c)(3) and (c)(4) of this clause. If the contractor is returning to the U.S. and not returning abroad to the same or different USAID Mission, the contractor is not eligible for home leave for qualifying Missions, and this paragraph (d) will not apply.

(e) *Holidays and Administrative Leave.* The contractor is entitled to all holidays and administrative leave granted by USAID to U.S. direct-hire employees as announced by the Agency or Mission.

(f) *Military Leave.* Military leave of not more than fifteen (15) calendar days in any calendar year may be granted to the contractor who is a reservist of the U.S. Armed Forces, provided that the military leave has been approved, in advance, by the contracting officer or the

Mission Director. A copy of the contractor's official orders and the contracting officer or Mission Director approval will be part of the contract file.

(g) *Leave Without Pay (LWOP)*. The contractor may be granted LWOP only with the written approval of the contracting officer or Mission Director, unless a such leave is requested for family and medical leave purposes under paragraph (i) of this clause.

(h) *Compensatory Time*. USAID may grant compensatory time off only with the written approval of the contracting officer or Mission Director in rare instances when it has been determined absolutely essential and under the policies that apply to USAID U.S. direct-hire employees. The contractor may use earned compensatory time off in accordance with policies that apply to USAID direct-hire employees

(i) *Family and Medical Leave*. (1) USAID provides family and medical leave for eligible USPSCs working within the U.S., or any territories or possession of the U.S., in accordance with Title I of the Family and Medical Leave Act of 1993, as amended (FMLA), and as administered by the Department of Labor under 29 CFR 825. USAID also provides family and medical leave to eligible USPSCs working outside the U.S., or any territories or possession of the U.S., in accordance with this paragraph (i) outside the provisions of Title I of the FMLA as a matter of policy discretion.

(2) Family and medical leave only applies to USPSCs, not any other type of PSC.

(3) In accordance with 29 CFR 825.110, to be eligible for family and medical leave, the contractor must have performed services for --

(i) At least twelve (12) months with USAID; and

(ii) At least 1,250 hours with USAID during the previous 12-month period.

(4) In accordance with 29 CFR 825.200(a), and USAID's internal policies available in Automated Directive System Chapter 309 (ADS 309), an eligible contractor may take up to twelve (12) workweeks of leave under FMLA, Title I, in any 12-month period for the reasons specified in 29 CFR 825.112.

(5) In accordance with 29 CFR part 825.207, the contractor may take LWOP for family and medical leave purposes. However, the contractor may choose to substitute LWOP with accrued annual or sick leave earned under the terms of this contract. If the contractor does not choose to substitute accrued paid leave, the contracting officer, in consultation with the contractor's supervisor, may require the contractor to substitute accrued paid leave for LWOP. The CO must obtain the required certifications for approval of family medical leave in accordance with USAID policy. The contractor must notify the contractor's Supervisor of the intent to substitute paid leave for LWOP prior to the date such paid leave commences. After having invoked the entitlement to family and medical leave and taking LWOP for that purpose, the contractor cannot retroactively substitute paid leave for the LWOP already taken under family and medical leave.

(6) Family medical leave is not authorized for any period beyond the completion date of this contract.

(7) When requesting family medical leave, the contractor must submit the relevant leave request in writing, including certifications and other supporting documents required by 29 CFR 825 and USAID policy in ADS 309.

(8) The U.S. Department of Labor's (DOL's) Wage and Hour Division (WHD) Publication 1420 explains the FMLA's provisions and provides information concerning procedures for filing complaints for violations of the Act.

(j) *Leave Records*. The contractor must maintain their current leave records and make them available as requested by the Mission Director or the contracting officer.

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

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Mark A. Walther,

Chief Acquisition Officer.

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