



2 CFR Part 602

48 CFR Parts 625 and 652

[Public Notice: 12630]

RIN 1400-AF65

RIN 1400-AF66

Department of State Acquisition Regulation: Nondiscrimination in Foreign Assistance; Withdrawal of Two NPRMs

AGENCY: Department of State.

ACTION: Withdrawal of notices of proposed rulemaking and termination of rulemaking proceedings.

SUMMARY: The Department of State (the Department) hereby withdraws two notices of proposed rulemaking (NPRMs) that proposed specific contract and grant terms that would have prohibited the discriminatory use of Department foreign assistance funds on specified grounds.

DATES: The two notices of proposed rulemaking published in the *Federal Register* on January 19, 2024 (89 FR 3583 and 89 FR 3625, respectively) are withdrawn as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kenneth Kero-Mentz, Senior Advisor in the Bureau of Democracy, Human Rights, & Labor, Department of State, keromentzk@state.gov, 202-647-3087.

SUPPLEMENTARY INFORMATION:

Background

On January 19, 2024, the Department published two NPRMs in the *Federal Register* that sought to amend the Department of State Acquisition Regulation (DOSAR) and the Department's grant rules.

The DOSAR rule (RIN 1400-AF65), “Department of State Acquisition Regulation: Nondiscrimination in Foreign Assistance,” proposed to amend the DOSAR (48 CFR Chapter 6) to include a new contract clause entitled “Nondiscrimination in Foreign Assistance.” The amended clause would have stated that contractors and subcontractors receiving Department-funded foreign assistance funds must not discriminate on specified bases against end-users of supplies or services or in certain employment decisions involving persons employed in the performance of the covered contract and funded in whole or in part with foreign assistance funds, with limited exceptions as specified in the relevant statement of work or as otherwise required by U.S. law.

The grants rule (RIN 1400-AF66), “Nondiscrimination in Foreign Assistance,” proposed to revise 2 CFR Part 600 to add an award term at § 602, entitled “Nondiscrimination in Foreign Assistance.” As set out in the NPRM, the proposed award term, applicable to all solicitations, Federal awards, and subawards funded with Department of State foreign assistance funds, would prohibit recipients and subrecipients from discriminating against beneficiaries or potential beneficiaries (i.e., those individuals intended to receive the benefits of the award or persons employed in the performance of the award) on the basis of specified characteristics.

The Department accepted public comments on both NPRMs through March 19, 2024. There were 26 public comments submitted in response to the DOSAR proposed rule, and 50 public comments submitted in response to the grants proposed rule. Although the two rules are distinct in their scope, the issues raised for both rules were substantively similar.

Withdrawal of the Notices of Proposed Rulemaking and Termination of the Rulemaking Proceedings

The Department believes that two of the issues raised by the public would benefit from further study that will extend beyond the time remaining in the administration. Accordingly, the Department is withdrawing these NPRMs and terminating these rulemaking proceedings at this time.

In particular, the Department notes the concern expressed in some public comments that faith-based implementing organizations would be prohibited from employing individuals of a particular religion. In considering alternative text to provide more clarity on this issue in the final rules, it became clear that additional time would be necessary to fully consider the suggestions provided by commenters and relevant regulatory provisions applicable to other Federal agency partnerships with faith-based organizations. *See, e.g.*, 29 CFR 2.37 (Department of Labor); 7 CFR 16.3(h) (Department of Agriculture); 38 CFR 50.2(h) (Department of Veterans Affairs); 45 CFR 87.3(h) (Department of Health and Human Services).

The Department also determined that additional time would be needed to fully consider comments from both supporters and opponents of the proposed rules on the need for more specific criteria on the rules' proposed waiver provision. Several of these commenters sought to ensure that the provision authorizing waivers "in the best interest of the government" on a range of issues would be applied on a clear and consistent basis. Some commenters referred to the proposed "totality of the circumstances" factor, stating their view that this language would not be enough to guarantee that the concerns of religious organizations will be protected. Other commenters recommended that additional language be included to ensure that waivers would be provided sparingly and only in rare and exceptional cases. The Department appreciates these comments and, as noted above, requires additional time to consider this issue.

The Department is withdrawing these proposed rules and terminating these rulemaking proceedings for the above, independently sufficient reasons concerning the need for further study that will extend beyond the time remaining in the administration. The Department is not withdrawing these proposed rules based on a changed view of the Secretary's authority in this area. These rulemaking proceedings were authorized by the Secretary's longstanding and existing authority, as delegated from the President, to set the terms and conditions for use of Foreign Assistance Act funding, as explained in the two NPRMs.

The Department of State does not intend for final rules to be issued on the basis of these NPRMs.

Zachary Parker,

Director,

Office of Organizational Policy,

U.S. Department of State.

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