



AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412-AA93

Agency for International Development Acquisition Regulation (AIDAR): Revisions to the Incentive Awards Program for Personal Services Contractors

AGENCY: U.S. Agency for International Development.

ACTION: Proposed rule.

SUMMARY: The U.S. Agency for International Development (USAID) proposes to amend its regulation regarding incentive awards for personal services contracts with individuals. In 2004 and 2015, the USAID Administrator approved policies to authorize funding for incentive and recognition awards for personal services contracts with individuals under the Agency's authorities for such contracts. This proposed rule will allow USAID to

recognize the work of an individual personal services contractor (PSC) for extraordinary performance of services under their contract by providing them with monetary or non-monetary incentive awards.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit comments, identified by title of the Proposed Action and Regulation Identifier Number (RIN), by any of the following methods:

1. Through the Federal eRulemaking Portal at <http://www.regulations.gov> by following the instructions for submitting comments.

2. By Mail addressed to Marcelle J. Wijesinghe, USAID, Bureau for Management, Office of Acquisition & Assistance, Policy Division, Room 867-J, SA-44, 1300 Pennsylvania Ave. NW, Washington, DC 20523-2052.

FOR FURTHER INFORMATION CONTACT: Richard Spencer,
Telephone: 202-567-4781 or E-mail: rspencer@usaid.gov

SUPPLEMENTARY INFORMATION:

A. Instructions:

All comments must be in writing and submitted through one of the methods specified in the "Addresses" section above. All submissions must include the title of the action and RIN for this rulemaking. Please include your name, title, organization, postal address, telephone number, and e-mail address in the text of the message.

Please note that USAID recommends sending all comments to the Federal eRulemaking Portal because security screening precautions have slowed the delivery and dependability of surface mail to USAID in Washington, DC.

All comments will be made available at <http://www.regulations.gov> for public review without change, including any personal information provided. We recommend that you do not submit information that you consider Confidential Business Information (CBI) or any information that is otherwise protected from disclosure by statute.

USAID will only address substantive comments on the rule. USAID may not consider comments that are insubstantial or outside the scope of the proposed rule.

B. Request for Comments.

USAID requests comments on its proposed rule to revise the Agency's Acquisition Regulations (AIDAR), appendices D and J to allow an individual personal services contractor

to be eligible for monetary and non-monetary awards for extraordinary performance as described below.

Background

USAID awards PSCs with individuals based on multiple authorities: 1) Section 636(a) (3) of the Foreign Assistance Act of 1961, as amended (FAA, 22 U.S.C. 2396), for personal services abroad; 2) annual appropriations for Foreign Operations for a maximum number of PSCs in the U.S. (e.g. Sec. 7057(g), Division K, Pub. L. 114-113 for fiscal year 2016); or 3) program-specific provisions of the FAA, the Food for Peace Act, or an appropriations act that authorize use of a broad range of implementation authorities toward those program purposes "notwithstanding any other provision of law" (e.g., FAA Section 491, 22 U.S.C. 2292, which authorizes international assistance "to alleviate human suffering caused by natural and manmade disasters...").

Over the last 27 years, USAID has awarded personal services contracts to individuals as necessary for the Agency to carry out its mission in the U.S. and overseas.

As of September 2015, of USAID's total workforce, approximately 8 percent were U.S. PSCs, and 47 percent were cooperating country, or third country, national (CCN or TCN) PSCs). The Agency's overseas local staff are CCNPSCs, with the exception of a very few remaining Foreign Service

National (FSN) direct-hire employees. Because the Agency depends on PSCs as part of its workforce for its operations, USAID seeks to recognize and motivate excellence in contract performance.

Because PSCs are not authorized to participate in programs administered by the Office of Personnel Management (OPM), in May 2004, then Administrator Andrew Natsios used the Agency's discretionary authority to establish a separate awards program for PSCs, distinct from the Agency's awards program authorized by OPM for the Agency's direct-hire employees (see 5 U.S.C. 4501 et seq. regarding incentive awards programs for "superior accomplishment" by employees within the definition of 5 U.S.C. 2105; and 5 CFR part 451). The Administrator approved a deviation from the AIDAR appendix D to expand the PSC non-monetary awards program to include limited monetary awards such as "On The Spot" or Special Act cash; and Time-Off awards. The revised PSC monetary awards program was implemented under USAID Acquisition and Assistance Policy Directive (AAPD 04-15) issued on October 15, 2004, which authorized USPSCs, and certain TCNPSCs on an exceptional basis, to be eligible for these three types of monetary incentive awards under USAID Mission, Bureau or Independent Office (M/B/IO) programs.

In March 2015, USAID's Special Awards Committee (SAC) conducted a review of the Agency's Awards program for its direct-hire employees. Following that review, on December 22, 2015, Acting Agency Administrator Alfonso Lenhardt approved a deviation to further expand the Agency's PSC Awards program to include additional types of monetary and non-monetary awards similar to those provided to USAID's direct-hire employees.

In order to implement the awards programs for PSCs as approved by the Agency in 2004 and 2015, this revision to AIDAR appendices D and J is being proposed, and will replace the deviations approved in 2004 and 2015.

Discussion

This proposed rule will amend the AIDAR to establish a separate monetary and non-monetary awards program to recognize and reward individual personal services contractors for their contributions to the accomplishment of USAID's mission, goals, and objectives.

Based on Statute--Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended; and by regulation--appendices D and J of the AIDAR, PSCs are not allowed to participate in any award program administered by OPM. Recognition of individual accomplishments by USPSCs was limited to non-monetary awards and certificates of

appreciation. However, based on deviations and policy directives signed by the Head of Agency in 2004 and 2015, USAID established an interim separate awards program to make PSCs eligible to receive awards similar to the Agency's direct-hire employee incentive awards program.

The Agency's incentive awards program for direct-hire employees is implemented in USAID's Automated Directives System (ADS) chapter 491. The new PSC awards program proposed in this AIDAR revision will be incorporated into appendices D and J and will be implemented as described in USAID's PSC policy in ADS chapter 309. Where appropriate, this incentive awards program will closely parallel the program for U.S. direct-hire employees. Any award payments will be made from the same source of funding used for the individual's contract, and in all cases separately from the pool of funds maintained for USAID direct-hire employee awards. Recognizing that USPSCs receive an annual pay comparability adjustment similar to direct-hires, as well as an annual within-grade salary increase for work evaluated at the "satisfactory performance" level, the policy requires that these awards be for performance or a special act that goes above and beyond the minimum satisfactory performance required under the contract. USAID proposes to recognize and encourage exceptional performance

by PSCs when they perform special acts or create innovations that contribute to efficiency, economy, or other improvements in government operations, in the same way USAID recognizes superior performance by its direct-hire employees. The proportion of PSCs receiving cash awards at a M/B/IO or at the Agency level, and the total amount of the awards, will be consistent with, and will not exceed, the existing Agency policy for awards to U.S. direct-hire employees, as set by the Agency's Senior Management.

The Agency's internal policies in ADS 309 will describe the criteria for each award, any cash or other limitations associated with each award, how the PSC's supervisors or others may nominate individuals, and how such nominations will be reviewed and recommended for approval. Nominations for the annual Agency level awards will generally follow the same procedures and use the same documentation as currently required for USAID's U.S. direct-hire employees.

Regulatory Basis

Since the Agency depends so much on PSCs and their contributions to the Agency, and as the statute, Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, and the regulation, appendix D of the Agency for

International Development Acquisition Regulations (AIDAR), do not permit PSCs to participate in OPM-administered programs, the Administrator has decided to use the Agency's discretionary authority to establish a separate monetary awards program for its USPSCs. This incentive awards program is distinct and separate from the Agency's direct-hire employee incentive awards program found in ADS 491. Additionally, this AIDAR revision will establish an incentive awards program that is different from FAR Subpart 16.4 Incentive Contracts, as the Agency's PSC contracts are with individuals and profit or fee are not provided under these contracts. The details of this award program are available in a Mandatory Reference to ADS 309, 309mab - "Incentive Awards Program for Personal Services Contracts with Individuals", accessible on the Agency website.

C. Impact assessment.

1) Regulatory Planning and Review. Under E.O. 12866, OIRA has designated the proposed rule "significant" and therefore subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). OIRA has determined that this Rule is not an "economically significant regulatory action" under Section

3(f)(1) of E.O. 12866. This proposed rule is not a major rule under 5 U.S.C. 804.

This rule codifies the Agency's deviations to date from the current rule in the CFR. The costs calculated in this section are based on upper end estimates to illustrate the potential impact of these revisions from the baseline costs of the current rule. Under this proposed rule, incentive awards at the M/B/IO level paid to USPSCs, and TCNPSCs with exceptions to be paid on the GS-scale (i.e., "excepted TCNPSCs") for fiscal years 2014 - 2015 averaged \$86,158 per year based on historical data provided by the Bureau for Management, Office of the Chief Financial Officer (M/CFO). The administrative and processing costs for these awards averaged \$47,865. Therefore, the total estimated cost for M/B/IO awards is estimated at **\$134,023** per fiscal year.

For the newly proposed "Agency-level" incentive awards issued from USAID headquarters, the total estimated amount that could be paid to all selected PSCs (USN, TCN and CCN) is \$160,000 per fiscal year, assuming nominations are approved for every award. This figure is based on an estimated payout for all of 31 possible cash award amounts listed in ADS 309mab.

As the Agency level headquarters awards program is new and there is no historical data for such awards paid to PSCs, USAID used historical data for awards to U.S. direct hires, as provided by USAID's Office of Human Capital and Talent Management (HCTM) for estimating the administrative and processing costs. On that basis administrative and processing costs are estimated at \$118,525 per fiscal year comprised of labor for nominations, selection panels and award processing, plus ceremony event costs for a volume PSC awards equivalent to those given to direct hires. Also, as PSCs are eligible for fewer categories of Agency-level awards than are U.S. direct hires, the costs were pro-rated accordingly. Therefore, the total estimated cost for Agency-level awards from headquarters is **\$278,525** per fiscal year.

Based on the above, the M/B/IO awards and Agency level award issues at headquarters are estimated together estimated to cost **\$412,547** per fiscal year.

Note that for incentive awards at the Agency Mission level for cooperating country national (CCN) and third country national (TCN) PSCs, AIDAR appendix J authorizes such awards in accordance with the local compensation plan at each USAID Mission overseas through the "Joint Special Embassy" awards program. While this proposed rule revises

the title of the Mission incentive awards program using current terminology, this rule does not otherwise affect the authority for this long-established awards program for CCN and TCN PSCs. Therefore there are no increased cost implications for this revision that updates the title of the program under AIDAR appendix J.

Overall, USAID's proposed awards program will impact approximately 5,200 individual PSCs based on USAID's staffing numbers for fiscal year 2015 (i.e., 775 USPSCs and over 4,470 cooperating country and third country national PSCs). The costs to implement this revision are justified as the Agency depends on PSCs as part of its workforce. Given that USAID PSCs are an important and flexible supplement for the Agency's dynamic operations, this revision provides the Agency the ability to recognize and motivate excellence in contractor performance. Additionally, since these incentives were previously approved at the highest levels of Agency management, the costs to implement these revisions were deemed necessary as a business decision about how to best promote performance excellence by USAID PSCs.

As a regulatory matter, the cost of the rule making process to incorporate these revisions into the regulation is also justified. The AIDAR appendices include all the

compensation and benefits available under personal services contracts. Therefore, the Agency needs these revisions in order to keep the regulation consistent, complete and transparent to industry, other government agencies and the general public.

2) Regulatory Flexibility Act. The rule will not have an impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. Therefore, an Initial Regulatory Flexibility Analysis has not been performed.

3) Paperwork Reduction Act. The proposed rule does not establish a new collection of information that requires 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 Chapter 7, Appendices D and J
Government procurement.

For the reasons discussed in the preamble, USAID proposes to amend 48 CFR chapter 7 as follows:

CHAPTER 7— AGENCY FOR INTERNATIONAL DEVELOPMENT

1. Appendix D is amended by revising Section 4 paragraph (f) and adding a parenthetical authority citation at the end of the Appendix to read as follows:

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

Abroad

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4. Policy

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(f) *Incentive awards.* U.S. Personal Services Contractors are not eligible to participate in, or be funded under, the OPM-administered incentive awards program for USAID direct-hire employees in accordance with section 636(a) of the Foreign Assistance Act of 1961, as amended. U.S. Personal Services Contractors are eligible to receive certain monetary and non-monetary incentive awards as authorized under this section. All nominations for incentive awards must be approved by a U.S. direct hire employee, who is either the contractor's supervisor or is at the next higher level within the M/B/IO. The list of incentive awards and detailed eligibility, nomination and approval processes are specified in internal Agency policies in ADS chapter 309, available on the USAID website. These awards will be funded from the authorizations used to fund the specific contract.

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

2. Appendix J is amended as follows:

a. In section 4:

i. By revising paragraph (c) (1);

ii. In paragraph (c) (2) (i), by removing "TCN or CCN" and adding in its place "CCN or TCN" and removing the reference "4c(2)(ii)" and adding in its place the reference "4(c) (2) (ii)";

iii. In paragraph (c) (2) (ii) introductory text, by removing the words "FSNs which includes CCNs and TCNs" and adding in their place "CCNs and TCNs" and revising the second sentence.

iv. In paragraph (c) (2) (ii) (A), by removing the words "foreign national employee" and adding in its place the words "CCN or TCN personal services contractor";

v. In paragraph (c) (2) (ii) (B), by revising the first sentence;

vi. In paragraph (c) (2) (iii), by removing the words "compensation plan for each" and adding in its place the words "local compensation plan for each Mission";

vii. By revising paragraphs (c) (2) (v) and (vii) and (c) (3); and

viii. In Paragraph (c) (4), by removing "CCN and TCN PSCs" and adding in its place "CCN and TCN personal services contractors" and removing the words "Contracting Officer" and adding in their place the words "contracting officer".

b. Under section 12, General Provisions for a Contract with a Cooperating Country National or with a Third Country National for Personal Services, revise item 19.

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

The revisions and addition read as follows:

APPENDIX J- Direct USAID Contracts with a Cooperating Country National and with a Third Country National for Personal Services Abroad

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4. Policy

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(c) * * *

(1) *General.* For the purpose of any law administered by the U.S. Office of Personnel Management, USAID personal services contractors are not to be regarded as employees of the U.S. Government, are not included under any retirement or pension program of the U.S. Government, and are not eligible for the Incentive Awards Program covered by Uniform State/USAID regulations. Each USAID Mission is

expected to participate in an interagency Mission incentive awards program. Additionally, CCN and TCN personal services contractors are eligible to receive certain USAID monetary and non-monetary incentive awards as authorized under this section. See paragraph (3) of this section for incentive awards.

(2) * * *

(ii) * * * The plan is each post's official system of position classification and pay, consisting of the local salary schedule, which includes salary rates, statements authorizing fringe benefit payments, and other pertinent facets of compensation for CCNs and TCNs.* * *

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(B) Section 4 of appendix D of this chapter, entitled Policy, subsections (c) "Withholdings and Fringe Benefits", (d) "Resident Hire U.S. Personal Services Contractors", (e) "Determining Salary for Personal Services Contractors", (g) "Annual Salary Increase", (h) "Pay Comparability Adjustment", and (i) "Subcontracting".* * *

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(v) CCN and TCN personal services contractors are eligible for allowances and differentials as provided under the post's local compensation plan.

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(vii) CCNs and TCNs retired from the U.S. government may be awarded personal services contracts without any reduction in or offset against their U.S. Government annuity.

(3) *Incentive Awards.* (i) All CCN and TCN personal services contractors of the Foreign Affairs Community are eligible for an interagency Mission incentive awards program. The Joint Country Awards Committee administers each post's (Embassy) awards program, including establishment of procedures for submission, review and approval of proposed awards.

(ii) CCN and TCN personal services contractors are also eligible to receive certain monetary and non-monetary USAID incentive awards. The list of incentive awards, eligibility, nomination and approval processes are specified in internal Agency policies in ADS chapter 309, available on the USAID website. These awards will be funded from the authorizations used to fund the PSC contract, and not from funds allocated for the OPM-administered awards program for USAID direct-hire employees.

(iii) Meritorious Step Increases for USAID CCN and TCN personal services contractors may be authorized provided the granting of such increases is the general practice locally.

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12. General Provisions for a Contract with a Cooperating Country National or with a Third Country National for Personal Services

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19. Incentive Awards

[For use in both CCN and TCN Contracts].

Incentive Awards (Date)

(a) Cooperating Country National (CCN) and Third Country National (TCN) personal services contractors of the Foreign Affairs Community are eligible for an interagency Mission incentive awards program. The program is administered by each post's (Embassy) Joint Country Awards Committee.

(b) CCN and TCN personal services contractors are also eligible to receive certain monetary and non-monetary USAID incentive awards in accordance with the AIDAR and internal USAID policies.

(c) Meritorious Step Increases.

CCNs and TCN personal services contractors paid under the local compensation plan are eligible to receive meritorious step increases provided the granting of such increases is the general practice locally.

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

Dated: February 14, 2019.

Mark A. Walther,

Acting Chief Acquisition Officer

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