

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

U.S. Agency for International Development

48 CFR Parts 712, 727, 742, 752, and Chapter 7, Appendix I

[AIDAR Notice 98-2]

RIN 0412-AA30

Miscellaneous Amendments to Acquisition Regulations

AGENCY: U.S. Agency for International
Development (USAID).

ACTION: Proposed rule.

SUMMARY: The U.S. Agency for International Development seeks public comment on a proposed rule that would revise the USAID Acquisition Regulation (AIDAR), 48 CFR Chapter 7. These revisions are being proposed to address current AIDAR deficiencies, some of which result from changes in the Federal Acquisition Regulation (FAR, 48 CFR Ch. 1).

DATES: Comments must be received no later than January 4, 1998.

ADDRESSES: Comments on the proposed rule should be addressed to: Ms. Diane Howard, Procurement Analyst, Policy Division, Office of Procurement (M/OP/P), Room 7.08-082U, 1300 Pennsylvania Ave. (RRB), U.S. Agency for International Development, Washington, DC 20523-7801. Electronic mail comments are encouraged and may be submitted via Internet to dhoward@usaid.gov. Please include the full body of electronic mail comments in the text and not as an attachment, as well as the name, title, organization, postal address, and E-mail address in the text of the message.

FOR FURTHER INFORMATION CONTACT: M/OP/P, Ms. Diane M. Howard, (202) 712-0206.

SUPPLEMENTARY INFORMATION: USAID is seeking comments on the proposed rule as described below:

A. The FAR was significantly revised as a result of the Federal Acquisition Streamlining Act of 1994 (FASA) and the Federal Acquisition Reform Act of 1996, now known as the Clinger-Cohen Act of 1996, particularly in how it covers the procurement of commercial items. An existing AIDAR clause, 752.7008 "Use of Government Facilities or Personnel (APR 1984)", requires that the unauthorized use of U.S. Government facilities (such as office space or equipment), or U.S. Government clerical or technical personnel in the performance of the services specified in the contract shall

result in an offset in the amount payable under the contract by an amount equal to the value of the U.S. Government facilities or personnel. Although USAID does not procure many commercial items, we envision a possible situation in which this policy may be in conflict with customary commercial practice, if there is a commercial practice of providing the purchaser's facilities or personnel to the vendor for use in the normal performance of the contract. A new section 712.101 "Policy" is proposed to address this potential concern; while we believe that the situation would rarely arise, the proposed language is intended to clarify how it is to be handled, should it arise. We are especially interested in receiving comments from vendors, particularly of commercial services, who would be in a better position to inform us whether our concerns have any basis.

B. For years before the Federal Acquisition Regulation covered Rights in Data and Copyrights (48 CFR Subpart 27.4), AIDAR Appendix I contained USAID's policy on academic publication or release to parties other than those specifically authorized, of unclassified materials gathered or developed under contracts with academic institutions. The policy stated in Appendix I is not fully consistent with comparable coverage in FAR Subpart 27.4 and the clause at FAR 52.227-14, and USAID has determined that the Appendix, which is more restrictive than the FAR coverage, should be removed, as we propose to do in this Rule. However, some of the concerns addressed in the Appendix still exist, so a new Part 727 is proposed to address these concerns by authorizing the contracting officer to reserve the right to review data prior to publication. Since this proposed rule will not require the contracting officer's approval for the manuscript's publication, we do not believe that it is contrary to FAR 27.4 or the Rights in Data—General clause at FAR 52.227-14. Rather, it will serve to establish the Agency's policy regarding publication of material that may have national security implications serious enough to adversely affect the conduct of U.S. assistance programs and that may have potential repercussions on the successful execution of development and other cooperative programs in which the United States and foreign countries are involved.

In addition, the proposed Part 727 includes language to make the clause at FAR 52.227-14 applicable to USAID's contracts performed overseas and awarded to U.S. organizations, to provide an alternate paragraph to add to this clause to reserve USAID's right to

restrict release of data when release may negatively impact the Government's development or diplomatic relationship with the cooperating country, and to provide guidance on Rights in Data coverage for overseas contracts with non-US entities.

C. Over the past several years as part of the Agency's reengineering efforts under the NPR, we have been trying to standardize reporting requirements under our technical assistance contracts. Several versions of a "Reports" clause have been implemented in our contracts since 1994, in lieu of the 1989 version of the clause that currently is found at (48 CFR) AIDAR 752.7026. However, these standardized "Reports" clauses have been found to be inadequate as contractor performance monitoring tools. Many times, contractors have not been reporting substantive information that is useful to the cognizant technical officer (CTO)'s monitoring of the contractor's performance, or the CTO has not been making effective use of the information being provided, or the reports were submitted too late for the information they contained to be of any benefit in improving or correcting the contractor's performance.

We are proposing to add a new section 742.1170 to the AIDAR, as well as a new clause as 752.242-70. Although we considered just making use of (48 CFR) FAR Subpart 42.11, after conducting an informal internal review, we concluded that developing a parallel but stand-alone AIDAR section would be more effective since we would then be able to use terminology and concepts more familiar to USAID program experts, who would then be more likely to fully use it. The intent of the proposed section is to allow the CTO to be specific about what information should be reported and when, so we expect that the reporting will be more efficient and timely, and therefore more effective. Along with the rest of the Government, USAID has a renewed focus on obtaining results in our programs, and we believe that the proposed clause, AIDAR 752.242-70 entitled "Periodic Progress Reports", will provide USAID with a mechanism to tailor the reporting requirements to obtain the best information to ensure that we achieve the results we need from our contractors. In addition, the optional withholding provision in paragraph (b) of the clause provides the Agency with an enforcement tool that will reduce the contractors to comply. Supplementary guidance on how to tailor the reporting requirements and circumstances that may warrant exercising the withholding will be

issued to contracting officers and CTOs in a Contract Information Bulletin.

D. USAID has always extensively used indefinite delivery contracts which combine features from different contract types; rather than use the fixed-price or cost-reimbursement payment clauses in the FAR for these hybrid contracts, the AIDAR allowed for the use of FAR 52.232-7 with an amended preamble, per AIDAR 752.232-7, in those indefinite quantity contracts which use a fixed daily rate pricing structure for services and reimbursement of other direct costs at cost. However, the preamble to the FAR clause in AIDAR 752.232-7 leads to an ambiguity regarding how much the Agency is to withhold. Our first step to remove this ambiguity is to clarify our terminology by specifying that "contract" in this context includes "task order" or "delivery order".

We also propose to modify paragraph (a)(2) of FAR 52.232-7, which states that the amount to be withheld is "5 percent of the amounts due under this paragraph (a), but the total amount withheld shall not exceed \$50,000". The ambiguity arises because 5 percent is being withheld under each task order, many of which are issued from different Agency contracting activities and paid from different paying offices around the world. The result has been withholdings under the basic contract which exceed \$50,000, even though this is inconsistent with the FAR's capping the withholdings at \$50,000 per contract. USAID's use of these types of contracts has increased in recent years, and the size and duration of task orders under these contracts has grown to the point where there are frequent orders over \$1,000,000 and for a year or longer. Under these circumstances, for some contractors, withholding \$50,000 for each of possibly three or four task orders is a significant financial burden. However, limiting to \$50,000 per basic contract the amount withheld for some contracts having as much as \$10 million in task orders outstanding at any one time would not sufficiently protect the Agency, as intended by the FAR clause. Because of the difficulties that would arise in trying to coordinate cumulative withholdings per contract when payments are being made from so many different paying offices, we are proposing to modify the AIDAR implementation of the FAR clause by reducing the withholding percentage to one percent per task order, up to a maximum of \$50,000 per task order, and have no limit specified for the basic contract. While we believe this is a reasonable compromise between not unduly burdening contractors with

excessive withholdings and still protecting the Agency's interests by making the cap per task order, we are very interested in the public's opinion and comments. A modification of this nature will require a deviation to the FAR clause, which we intend to seek prior to formulating the final rule, after considering comments received in response to this proposed rule.

The changes in this proposed rule are not considered significant under FAR 1.301 or FAR 1.501. The proposed rule does not establish a new collection of information as contemplated by the Paperwork Reduction Act nor will it 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.* Although the proposed changes affecting withholdings under indefinite quantity contracts may result in cumulative withholdings over \$50,000 per basic contract, the limit specified in the FAR, we do not anticipate that this will have a negative impact on small businesses, since, overall, the withholdings will be less than they are now. We conducted a survey of existing task orders with small businesses and found that none of the orders currently being implemented would reach the \$50,000 cap per task order using a one percent withholding. In addition, using the reduced withholding, a task order would have to have \$5,000,000 worth of burdened labor costs before this threshold is reached, which is an unusually large order for the small businesses with whom USAID typically contracts. Finally, since \$5,000,000 is the maximum in annual receipts for qualifying as a small business in the typical SIC codes under which USAID's services contracts usually fall, a firm may no longer be considered a small business if it were to receive orders of this size. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. Comments or questions may be addressed as specified in the **FOR FURTHER INFORMATION CONTACT** section of the Preamble.

List of Subjects in 48 CFR Parts 712, 727, 742, and 752

Government procurement.

Therefore, it is proposed that 48 CFR Chapter 7 be amended as set forth below:

1. The authority citations in Parts 742 and 752 continue to read as follows:

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

2. A new Part 712 is added to subchapter B to read as follows:

PART 712—ACQUISITION OF COMMERCIAL ITEMS

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; 3 CFR 1979 Comp., p. 435.

712.101 Policy.

USAID policy regarding the acquisition of commercial items prohibits the use of Government facilities or personnel in the performance of such contracts, unless customary commercial practice for the item or service being acquired involves the use of the purchaser's facilities or personnel. In the latter case, USAID shall comply with customary commercial practice but shall ensure that the contract terms, including price, reflect this practice, unless a waiver is obtained in accordance with FAR 12.302. If a waiver is approved, then the contracting officer shall include the clause at 752.7008 in the contract.

3. A new part 727 is added to subchapter E to read as follows:

PART 727—PATENTS, DATA, AND COPYRIGHTS

Subpart 727.4—Rights in Data and Copyrights

Sec.

727.401 Definitions.

727.409 Solicitation provisions and contract clauses.

727.470 USAID policy on academic publications.

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; 3 CFR 1979 Comp., p. 435.

Subpart 727.4—Rights in Data and Copyrights

727.401 Definitions.

Contract manuscript means a report or other data [as defined in FAR 27.401] which is prepared and delivered to the Agency under the terms of the contract.

Non-contract manuscript means an article, book or other data compilation based upon experience and information gained under a USAID contract but not prepared or delivered under the contract.

727.409 Solicitation provisions and contract clauses.

(a) Notwithstanding the exception in FAR 27.409(a)(1)(iii), and as provided for in paragraph (n) of the same section, USAID procedures are to include the clause at FAR 52.227.14 in contracts with U.S. entities, regardless of place of performance, and in contracts with non-

U.S. entities for performance in the U.S., to the same extent that the clause would be included in contracts with U.S. entities for performance in the U.S. In contracts performed overseas, where the release or publication of data first produced in the performance of the contract may be sensitive to U.S. Government relations with the cooperating country, the contracting officer shall also use the clause at 752.227-14.

(b) For contracts with non-U.S. entities involving performance overseas, contracting officers shall include the substance of the clause at FAR 52.227-14 but adapted as necessary to comply with applicable laws in the country of performance. Legal advice shall be obtained to the extent necessary in adapting the clause. A deviation is not required.

727.470 USAID policy on academic publications.

(a) USAID policy favors and encourages the publication of scholarly research as well as the maximum availability, distribution, and use of knowledge developed in its programs and will not require an academic institution to obtain permission to publish the written work produced under a contract. USAID does, however, ask for the opportunity to review the manuscript, for comment only, prior to publication.

(1) In the case of a contract manuscript as defined in section 727.401 of this subpart, USAID reserves the right to disclaim endorsement of the opinions expressed.

(2) In the case of a non-contract manuscript as defined in section 727.401 of this subpart, USAID reserves the right to dissociate itself from sponsorship or publication.

(b)(1) To implement the policy stated in paragraph (a) of this section, the contracting officer may reserve the right to review all manuscripts prior to release for publication in those exceptional cases where conditions exist making its reasonably foreseeable, in light of the contract's scope of work and the manner and place of performance, that the written work to be prepared and delivered under the contract may have adverse repercussions on the relations and programs of the United States. Where this right is reserved, it must be so specified in the contract in accordance with paragraph (c) of this section.

(2) When deciding whether to reserve the right of review prior to release, the contracting officer shall consult with other USAID technical offices (such as the strategic objective/results package

team, LPA, GC, etc.), as appropriate, and shall carefully consider all relevant factors of the specific contract, including:

(i) The extent to which prompt and full performance of the contract will require access, facilitated by reason of the contract, to information not generally available to scholars;

(ii) The extent to which the work involves matters of political concern to foreign countries, particularly where any substantial part of the work is to be performed therein;

(iii) The extent to which, by reason of USAID's close involvement and cooperation in the performance of the contract, the work product may be so identified with USAID itself as to prevent effective disclaimer of USAID endorsement thereof;

(iv) The extent to which the objective of the contract is to provide advice to USAID or to a foreign government of immediate operational significance in the conduct of the USAID program or the implementation of governmental programs in the host country;

(v) The desires of the host country.

(c) The actual contractual language reserving to the contracting officer the right to review a manuscript prior to release for publication must be worded to reflect the agreement reached in the contract negotiations. In order to allow enough time for USAID to adequately review and then determine its position regarding the manuscript, the contractual language shall provide for at least a two week (10 business days) timeframe for the USAID review to take place prior to the manuscript being submitted to the publisher.

PART 742—CONTRACT ADMINISTRATION

742.1170 [Added]

4. A new section 742.1170 and subsections 742.1170-1 through 742.1170-4 are added to read as follows:

742.1170 Performance monitoring and progress reporting.

742.1170 General.

Performance monitoring is a function of contract administration used to determine contractor progress towards achieving the goals and objectives of the contract and to identify any factors that may delay or prevent the accomplishment of those goals and objectives. Performance monitoring requires USAID personnel, particularly the Cognizant Technical Officer, to maintain adequate knowledge of the contractor's activities and progress in order to ensure that USAID's objectives,

as stated in the contract's Statement of Work, will be achieved.

742.1170-2 Applicability.

(a) This section applies to USAID non-personal, professional/technical services contracts exceeding the simplified acquisition threshold, but may be applied to other USAID contracts (except personal services contracts awarded in accordance with Appendices D and J), if the contracting officer and requiring office determine that doing so is in the best interests of the Agency. This determination shall be documented in the contract file.

(b) The underlying principles of FAR Subpart 42.11 apply to USAID contracts and are inherent to this section. However, not all of the specific requirements and terminology in FAR 42.11 are compatible with the types of technical assistance contracts usually awarded by USAID. Therefore, this section 742.1170 shall apply in lieu of the requirements of FAR Subpart 42.11.

(c) The progress reports discussed in this section are separate from the performance evaluation reports prepared in accordance with FAR 42.15 and internal Agency procedures, although they may be used by USAID personnel or their authorized representatives when evaluating the contractor's performance. Furthermore, the policies, procedures and limitations of this section do not apply to technical reports, studies, papers, etc., the acquisition of which may be part of or even the sole purpose of the contract.

742.1170-3 Policy.

(a) The contractor is responsible for timely contract performance. Performance monitoring by USAID does not obviate this responsibility.

(b) The Strategic Objective Team (SOT), particularly the Cognizant Technical Officer and the Contracting Officer, will determine how to monitor the contractor's performance to protect the Government's interests, by considering:

(1) The contract requirements for reporting progress;

(2) The contract performance schedule;

(3) The contractor's implementation plan or workplan;

(4) The contractor's history of contract performance;

(5) The contractor's experience with the services or supplies being provided under the contract;

(6) The contractor's financial capability;

(7) Any other factors the SOT considers appropriate and necessary to adequately monitor contractor

performance (for example, the day-to-day working proximity of the SOT, CTO, or contracting officer to the contractor's place of performance).

(c) In monitoring contractor performance, the SOT (particularly the cognizant technical officer and contracting officer) shall utilize any of the contractor's existing systems or processes for monitoring progress, provided that doing so is not contrary to the terms of the contract. The SOT shall not require anything from the contractor that is outside the claims of waivers, of changes, or of other contract modifications. Further, progress reports shall not require information already available from other sources.

742.1170-4 Progress reporting requirements and contract clause.

(a) When information on contract performance status is needed, the contract may include a requirement for the contractor to submit periodic progress reports, tailored to address specific contract requirements but limited to only that information essential to USAID's needs in monitoring the contractor's progress.

(b) Because the cognizant technical officer (CTO) is the individual most familiar with the contractor's performance, the progress reports shall be directed to the CTO, who shall review the reports and advise the contracting officer of any required action, including any action needed to address potential or actual delays in performance. Such advice shall be in writing and provided in sufficient time for the contracting officer to take necessary action, and shall provide a definite recommendation, if action is appropriate. The requirements of this paragraph do not relieve the contractor of notification requirements identified elsewhere in the contract.

(c) The contracting officer shall insert the clause at 752.242-70, Periodic Progress Reports, in solicitations and contracts when progress reporting is required, as specified in this section. When this clause is used, the contract shall specify appropriate reporting instructions in Section G of the contract.

PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

752.227-14 [Added]

5. A new section 752.227-14 is added to read as follows:

752.227-14 Rights in data—General (overseas).

As prescribed in 727.409(a), the following paragraph (d) shall be used in lieu of paragraph (d) in FAR 52.227-14 in all contracts requiring performance overseas:

Rights in Data—General (Overseas) (XXXX 1998)

(d)(1) For all data first produced or specifically used by the Contractor in the performance of this contract in the United States, its territories, or Puerto Rico, the Contractor shall have the right to use, release to others, reproduce, distribute, or publish such data, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this contract.

(2) For all data first produced or specifically used by the Contractor in the overseas performance of this contract, the Contractor shall not release, reproduce, distribute, or publish such data without the written permission of the Contracting Officer.

(3) The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

752.232-7 [Revised]

5. Section 752.232-7 is revised to read as follows:

752.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

USAID uses the payment clause contained in FAR 52.232-7, PAYMENT UNDER THE TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS, in indefinite delivery (task order) contracts for professional services, modified as follows:

Payment Under Time-and-Materials and Labor-Hour Contracts (XXXX 1998)

(a) The following preamble will be included:

Certain terms used in this clause shall be interpreted as follows:

The term "contract(s)" includes "delivery order(s)" and "task orders"; "hour(s)", or "hourly" may be calculated in terms of "day(s)" or "daily (8 hours)"; and "materials" includes "other direct costs".

(b) Paragraph (a)(2) of the FAR clause is revised to read as follows:

Unless otherwise prescribed in the Schedule, the Contracting Officer shall withhold one (1) percent of the amount due under each task order, but the total amount withheld per task order shall not exceed

\$50,000. Amounts withheld under an individual task order shall be retained until the execution and delivery of a release for each task order by the Contractor as provided in paragraph (f) below.

752.242-70 [Added]

6. A new section 752.242-70 is added to read as follows:

752.242-70 Periodic progress reports.

As prescribed in 742.1170-3(c), insert the following clause in contracts for which periodic progress reports are required from the contractor. The term "contract" shall be interpreted as "task order" or "delivery order" when this clause is used in an indefinite-delivery contract.

Periodic Progress Reports (August 1998)

(a) The contractor shall prepare and submit progress reports as specified in the Schedule of this contract. These reports are separate from the interim and final performance evaluation reports prepared by USAID in accordance with FAR 42.15 and internal Agency procedures, but they may be used by USAID personnel or their authorized representatives when evaluating the contractor's performance.

(b) During any delay in furnishing a progress report required under this contract, the contracting officer may withhold from payment an amount not to exceed US\$25,000 (or local currency equivalent) or 5 percent of the amount of this contract, whichever is less, until such time as the contracting officer determines that the delay no longer has a detrimental effect on the Government's ability to monitor the contractor's progress.

752.7008 [Amended]

7. Section 752.7008 is amended by adding ", and in commercial contracts when required in 712.101" after "contracts" in the introductory paragraph.

752.7026 [Removed]

8. Section 752.7026 is removed and reserved.

Appendix I to Chapter 7—[Removed]

9. Under the authority of 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; 3 CFR 1979 Comp., p. 435, Chapter 7 is amended by removing Appendix I and reserving it.

Dated: September 21, 1998.

Marcus L. Stevenson,

Procurement Executive.

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