

Agency for International Development

§ 228.01

PART 228—RULES FOR PROCUREMENT OF COMMODITIES AND SERVICES FINANCED BY USAID

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Subpart A—Definitions and Scope of This Part

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SOURCE: 77 FR 1401, Jan. 10, 2012, unless otherwise noted.

§ 228.01 Definitions.

As used in this part, the following terms shall have the following meanings:

Advanced developing countries mean those countries that are categorized by the World Bank as upper middle income countries according to their gross national income per capita, except for those countries in which USAID provides assistance. USAID will maintain a list of advanced developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID's Automated Directives System, ADS 310. This list will include determinations made under § 228.17 of this part.

Available for purchase means for commodities, that the commodity is offered for sale in a country in the authorized principal geographic code at the time of purchase from the supplier, irrespective of the place of manufacture or production, unless it is a prohibited source country. If applicable, the commodity must also be able to be serviced, and, if warrantied, have a valid warranty. For services, available for purchase means the service is offered from a vendor which has complied with nationality and foreign government-owned organization requirements of this regulation, and is otherwise organized in a country in the authorized principal geographic code designated in an implementing instrument. This definition does not apply to procurements under the geographic Code 935, see § 228.03 of this part, because that geographic code is for any country or area except for prohibited source countries.

Commission means any payment or allowance by a supplier to any person for the contribution which that person has made to secure the sale or contract for the supplier or which that person makes to securing on a continuing basis similar sales or contracts for the supplier.

Commodities or goods means any material, article, supply, good, or equipment.

Commodity-related services means delivery services and/or incidental services.

Cooperating country or *recipient country* means the country receiving the USAID assistance subject to this part 228, and includes all the countries receiving assistance under a regional program or project.

Delivery means the transfer to, or for the account of, an importer of the right to possession of a commodity, or, with respect to a commodity-related service, the rendering to, or for the account of, an importer of any such service.

Delivery service means any service customarily performed in a commercial export or import transaction which is necessary to affect a physical transfer of commodities to the cooperating/recipient country. Examples of such services are the following: export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. “Delivery service” may also include work and materials necessary to meet USAID marking requirements.

Developing countries means those countries that are categorized by the World Bank as low or lower middle income economies according to their gross national income per capita, and also includes all countries to which USAID provides assistance. USAID will maintain a list of developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID’s Automated Directives System, ADS 310.

Free Port or *Bonded Warehouse* is a special customs area with favorable customs regulations (or no customs duties and controls for transshipment).

Implementing instrument means a binding relationship established between USAID and an outside party or parties to carry out USAID programs, by authorizing the use of USAID funds and/or nonfinancial resources for the procurement of services or commodities and/or commodity related services. Implementing instruments include specific conditions that apply to

each such procurement. Examples of such instruments include contracts, grants, cooperating agreements, and interagency agreements.

Incidental services means services such as installation, erection, maintenance, or upgrading of USAID-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment, or similar services provided for the authorized disposition of such commodities.

Long term lease means, for purposes of subpart B, a single lease of more than 180 calendar days; or repetitive or intermittent leases under a single award within a one-year period, which cumulatively total more than 180 calendar days. A single lease may consist of lease of one or more of the same type of commodity within the same lease term.

Motor vehicles means self-propelled vehicles with passenger carriage capacity, such as highway trucks, passenger cars and buses, motorcycles, scooters, motorized bicycles, ATVs, and utility vehicles. Excluded from this definition are ambulances, snowmobiles, industrial vehicles for materials handling and earthmoving, such as lift trucks, tractors, graders, scrapers, off-the-highway trucks (such as off-road dump trucks), boats, and other vehicles that are not designed for travel at normal road speeds (40 kilometers per hour and above).

Mission means the USAID Mission, office or representative in a cooperating/recipient country.

Nationality refers to the place of legal organization, ownership, citizenship, or lawful permanent residence (or equivalent immigration status to live and work on a continuing basis) of suppliers of commodities and services.

Pharmaceutical means any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases in humans or animals; any substances (other than food) intended to affect the structure or any function of the body of humans or animals; and, any substance intended for use as a component in the above. The term includes drugs, vitamins, oral rehydration salts, biologicals, and some in-vitro diagnostic reagents/test kits; but

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does not include devices or their components, parts, or accessories. Contractives, including condoms, are not included in this definition.

Prohibited sources means countries to which assistance is prohibited by the annual appropriations acts of Congress or other statutes, or those subject to other executive branch restrictions, such as applicable sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control. USAID maintains a list of prohibited sources, available in USAID's Automated Directives System, ADS 310.

Recipients and contractors. *Recipient* has the same meaning as defined in 22 CFR 226.02, except that it shall include non-U.S. individuals, entities and organizations, as well as subrecipients. *Contractors* mean those entities which enter into a contract, as the term is defined in 48 CFR part 2, with the U.S. Government, and includes subcontractors.

Services means the performance of identifiable tasks, rather than the delivery of an end item of supply.

Source means the country from which a commodity is shipped to the cooperating/recipient country or the cooperating/recipient country itself if the commodity is located therein at the time of the purchase, irrespective of the place of manufacture or production, unless it is a prohibited source country. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, "source" means the country from which the commodity was shipped to the free port or bonded warehouse.

Supplier means any person or organization, governmental or otherwise, who furnishes services, commodities, and/or commodity related services, including delivery or incidental services, financed by USAID.

United States means the United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S. associated sovereignty, including commonwealths, territories and possessions.

USAID means the United States Agency for International Development or any successor agency, including

when applicable, each USAID Mission or office abroad.

USAID Principal Geographic Code means a USAID code which designates a country, a group of countries, or an otherwise defined area. The USAID principal geographic codes for purposes of procurement are described in § 228.03 of this part.

§ 228.02 Scope and application.

This part is applicable to commodities and services procured under implementing instruments using Federal program funds made available for assistance under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 *et seq.* (FAA). The authorities and conditions applicable to the procurement of commodities or services shall be those in effect on the effective date of an implementing instrument for procurement of commodities or services. They include any directives, prohibitions, restrictions or other statutory and related requirements by the United States Congress that govern the Federal program funds appropriated to fund the specific procurement, including those on types of assistance and recipients of assistance. If additional authorities and conditions are otherwise provided by statute, regulation, or related administrative authorities, those authorities and conditions shall be incorporated in the implementing instrument and shall prevail in the event of any conflict with this part 228. This part is not applicable to

(a) Procurements of commodities and services under General Services Administration (GSA) supply schedules;

(b) Procurements with donated funds received under USAID's gift authority, FAA section 635(d);

(c) Procurements funded by cost share or program income as defined in 22 CFR 226.24;

(d) USAID Title II food programs, including monetization proceeds thereunder.

(e) Procurements funded from any congressional appropriation authorized by any statute other than the FAA;

(f) Procurements with non-program funds (such as operational expense account funds) made available under the FAA for any purpose other than assistance.

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§ 228.03 Identification of the authorized principal geographic procurement codes.

(a) USAID has established principal geographic codes which are used by USAID in implementing instruments. This regulation establishes a presumptive authorized principal geographic code, Code 937, for procurement of commodities and services unless otherwise specified in the implementing instrument. Code 937 is defined as the United States, the cooperating/recipient country, and developing countries other than advanced developing countries, and excluding prohibited sources. USAID maintains a list of developing countries, advanced developing countries, and prohibited sources, which will be available in USAID's Automated Directives System, ADS 310.

(b) For purposes of procurements under the authority of the Development Fund for Africa, 22 U.S.C. 2293 *et seq.*; for any waivers authorized under Subpart D of this regulation; and if otherwise designated in an implementing instrument, the authorized principal geographic code shall be Code 935, any area or country but excluding prohibited sources.

(c) For purposes of procurements under the Support for Economic and Democratic Development of the Independent States of the Former Soviet Union, 22 U.S.C. 2295b, the authorized principal geographic codes are Code 937 and Code 110 (New Independent States).

(d) Additional principal geographic codes may be added to this section if authorized by Congress.

Subpart B—Conditions Governing Source and Nationality of Commodity and Service Procurement Transactions for USAID Financing

§ 228.10 Purpose.

Sections 228.11 through 228.19 set forth the rules governing the eligible source of commodities and nationality of commodity and service suppliers for USAID Federal share financing under prime and subawards. These rules may be waived in accordance with the provisions in subpart D of this part.

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§ 228.11 Source of commodities.

The source of all commodities financed with Federal program funds appropriated under the Foreign Assistance Act of 1961, as amended, shall be Code 937 (unless Code 935 or 110 are designated in the implementing instrument). Procurements of agricultural commodities, motor vehicles and pharmaceuticals must also comply with the special procurement rules in § 228.19 of this part. Recipients and contractors are prohibited from engaging suppliers of commodities in an authorized country to import commodities from a country outside of the authorized principal geographic codes for the purposes of circumventing the requirements of this rule. Any violation of this prohibition will result in the disallowance by USAID of the cost of the procurement of the subject commodity.

§ 228.12 Nationality of suppliers of commodities and services.

The suppliers of all commodities and services financed with federal program funds appropriated under the Foreign Assistance Act of 1961, as amended, shall:

(a) If an individual, except as provided in § 228.15, be a citizen or lawful permanent resident (or equivalent immigration status to live and work on a continuing basis) of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument),

(b) If an organization,

(1) Be incorporated or legally organized under the laws of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument);

(2) Must be operating as a going concern in a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), and either

(3) Be managed by a governing body, the majority of whom are citizens or lawful permanent residents (or equivalent immigration status to live and work on a continuing basis) of countries in Code 937 (or other principal geographic procurement code designated in an implementing instrument), or

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(4) Employ citizens or lawful permanent residents (or equivalent immigration status to live and work on a continuing basis) of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), in more than half its permanent full-time positions and more than half of its principal management positions.

§ 228.13 Foreign government-controlled organizations.

Firms operated as commercial companies or other organizations or enterprises (including nonprofit organizations) in which foreign governments or their agents or agencies have a controlling interest are not eligible as suppliers of commodities and services, except if their eligibility has been established by a waiver approved by USAID in accordance with the provisions set forth in subpart D of this part. Government ministries or agencies of the cooperating/recipient country, including those at the regional and local levels, and government educational institutions, health care providers, and other technical entities of the cooperating/recipient country not formed primarily for commercial or business purposes, are eligible as suppliers of commodities and services.

§ 228.14 Construction procurement with foreign-owned local firms.

(a) When the estimated cost of a contract for construction is \$10 million or less and only local firms will be solicited, a local corporation or partnership which is a foreign-owned (owned or controlling interest by individuals not citizens or permanent residents, or equivalent immigration status, of the United States or the cooperating/recipient country) local firm will be eligible if it is determined by USAID to be an integral part of the local economy, see paragraph (b) of this section. However, such a determination is contingent on first ascertaining that no United States construction company with the required capability is currently operating in the cooperating/recipient country or, if there is such a company, that it is not interested in bidding for the proposed contract.

(b) A foreign-owned local firm is an integral part of the local economy provided:

(1) It has done business in the cooperating/recipient country on a continuing basis for at least three years prior to the issuance date of invitations for bids or requests for proposals to be financed by USAID;

(2) It has a demonstrated capability to undertake the proposed activity;

(3) All, or substantially all, of its directors of local operations, senior staff and operating personnel are lawfully resident (or equivalent immigration status to live and work on a continuing basis) in the cooperating/recipient country; and

(4) Most of its operating equipment and physical plant are in the cooperating/recipient country.

§ 228.15 Nationality of employees and individuals under contracts or sub-contracts for services.

The rules set forth in §§ 228.10 through 228.13 of this part do not apply to the employees of contractors, or individuals providing technical or professional services to recipients or contractors. However, such individuals must not be citizens or lawful permanent residents (or equivalent immigration status) of countries which are prohibited sources.

§ 228.16 Miscellaneous service transactions.

This section governs certain miscellaneous services.

(a) *Commissions.* The nationality rules of this part do not apply to the payment of commissions by suppliers.

(b) *Bonds and guarantees.* The nationality rules of this part do not apply to sureties, insurance companies or banks who issue bonds or guarantees under USAID-financed contracts.

(c) *Liability insurance under construction contracts.* The nationality rules of this part do not apply to firms providing liability insurance under construction contracts.

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§ 228.17 Special procurement rules for construction and engineering services.

Advanced developing countries, as defined in § 228.01, which USAID has determined to have attained a competitive capability in international markets for construction services or engineering services are not eligible to furnish USAID-financed construction and engineering services unless approved to do so under a waiver to Code 935 under subpart D of this part.

§ 228.18 Long-term leases.

Any commodity obtained under a long-term lease agreement as defined in § 228.01, including motor vehicles, is subject to the source and nationality requirements of this subpart B of this part, including the special procurement rules as set forth in § 228.19.

§ 228.19 Special source rules requiring United States manufacture or procurement.

(a) Certain agricultural commodities and products thereof must be procured in the United States if the domestic price is less than parity, unless the commodity cannot reasonably be procured in the United States in fulfillment of the objectives of a particular assistance program under which such commodity procurement is to be financed. (22 U.S.C. 2354). USAID maintains a list of restricted agricultural commodities and related policies, which is available in USAID's Automated Directives System, ADS 312.

(b) Motor vehicles must be manufactured in the United States to be eligible for USAID financing (22 U.S.C. 2396). Any vehicle to be financed by USAID under a long-term lease or where the sale is to be guaranteed by USAID must be manufactured in the United States. However, financing of transportation or driver services from an individual or commercial entity and not directly financing the purchase or lease of a vehicle, is subject to the requirements at § 228.12. Financing transportation or driver services means:

(1) The vehicle is independently owned or leased by the hired driver or company;

(2) The vehicle will be maintained by the individual or commercial entity

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and driven only by the hired driver(s); and

(3) The vehicle is not directly leased, either as a separate line item in the contract separate from the cost of the driver's services, or under a separate contract.

(c) Under section 606(c) of the FAA, USAID cannot finance any pharmaceutical product that is manufactured outside of the United States if the pharmaceutical is covered by a valid U.S. patent, unless the U.S. patent holder expressly authorizes the manufacture of the pharmaceutical. Without such express authorization, the pharmaceutical must be purchased from the U.S. patent holder. In addition, USAID shall not finance non-contraceptive pharmaceuticals without prior written approval as provided in USAID's Automated Directives System Chapter 312. Contraceptives may be financed in accordance with the procedures in ADS 312.

Subpart C—Conditions Governing the Eligibility of Commodity-Related Services for USAID Financing

§ 228.20 Purpose.

Sections 228.21 through 228.24 of this part set forth the rules governing the eligibility of commodity-related services, both delivery services and incidental services, for USAID financing. These rules, except for §§ 228.21 and 228.22, may be waived in accordance with the provisions in subpart D of this part. The rules on delivery services apply whether or not USAID is also financing the commodities being transported. In order to be identified and eligible as incidental services, such services must be connected with a USAID-financed commodity procurement.

§ 228.21 Ocean transportation.

When transporting commodities subject to the provisions of the Cargo Preference Act, 46 U.S.C. 55305, USAID will administer its programs in accordance with that act and its implementing regulations in 46 CFR part 381 (and any waivers applicable thereto). Subpart D of 22 CFR part 228 does not apply to this provision.

§ 228.22 Air transportation.

The Fly America Act, Title 49 of the United States Code, Subtitle VII, part A, subpart I, Chapter 401, 40118—Government-Financed Air Transportation, is applicable to all transportation of commodities subject to this part. Subpart D of 22 CFR part 228 does not apply to this provision.

§ 228.23 Other delivery services.

No source or nationality rules apply to other delivery services, such as export packing, loading, commodity inspection services, and services of a freight forwarder. Such services are eligible when provided as part of a commodity procurement financed by USAID.

§ 228.24 Incidental services.

Source and nationality rules do not apply to suppliers of incidental services specified in a purchase contract relating to equipment.

Subpart D—Waivers

§ 228.30 General.

USAID may waive the rules contained in subparts A, B and C of this part (except for prohibited sources as defined in § 228.01, and §§ 228.21 and 228.22), in order to accomplish project or program objectives. For any waivers authorized, the principal geographic code shall be Code 935, any area or country but excluding prohibited sources. All waivers must be in writing, and where applicable, are limited to the term established by the waiver. All waiver decisions will be made solely on the basis of the following criteria:

- (a) Waivers to permit procurement outside of Code 937 or 110 must be based on a case by case determination that
 - (1) The provision of assistance requires commodities or services of the type that are not produced in and available for purchase in Code 937 or 110, or;
 - (2) It is important to permit procurement from a country not specified in Code 937 or 110 to meet unforeseen circumstances, or;
 - (3) To promote efficiency in the use of United States foreign assistance re-

sources, including to avoid impairment of foreign assistance objectives

(b) Case by case waivers under paragraph (a) of this section may be made on the basis of a commodity or service type or category, rather than processing repeat, individual waivers for an identical or substantially similar commodity or service. Such waivers may be approved on a regional, country or program basis. For purposes of paragraph (a)(1) of this section, “produced in and available for purchase in” shall have the same meaning as the definition of “available for purchase” in § 228.01. A waiver under paragraph (a)(1) may also be based on the fact that a commodity is not available for purchase in Code 937 or 110 in sufficient, reasonable and available quantities or sufficient and reasonable quality that is fit for the intended purpose.

(c) A waiver to authorize procurement from outside the United States of agricultural commodities, motor vehicles, and pharmaceuticals must meet the requirements of § 228.19.

(d) Any individual transaction not exceeding \$25,000 (excluding those covered by special procurement rules in § 228.19 and excluding procurements from prohibited sources) does not require a waiver and is hereby authorized.

§ 228.31 Authority to approve waivers.

The authority to approve waivers of established policies under this regulation is delegated within USAID. Recipients or contractors shall request any necessary waivers through the USAID agreement or contracting officer.

PART 229—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

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