

Federal Communications Commission.

Marlene Dortch,

Secretary.

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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 (PSCs)

AGENCY: U.S. Agency for International Development.

ACTION: Final rule.

SUMMARY: The rule amends the AIDAR's provisions that pertain to incentive awards for personal services contracts with individuals.

DATES: *Effective Date:* December 16, 2019.

FOR FURTHER INFORMATION CONTACT:

Richard E. Spencer, Procurement Analyst, Telephone: (202) 567-4781 or email: rspencer@usaid.gov for clarification of content or information pertaining to status or publication schedules. All communications regarding this rule must cite AIDAR RIN No. 0412-AA93.

SUPPLEMENTARY INFORMATION:

A. Proposed Rule and Requests for Comment

USAID published a proposed rule in the **Federal Register** at 84 FR 9739 on March 18, 2019. The public comment period ended May 17, 2019, and the Agency received no comments on the proposed rule. Therefore, USAID is publishing this final rule without change.

B. Background

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 United States and overseas. USAID awards PSCs with individuals based on multiple authorities: (1) Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended (FAA, Section 2396 of Title 22 of the United States Code [U.S.C.]), for personal services abroad; (2) annual appropriations for Foreign Operations for a maximum number of PSCs in the United States (*e.g.*, Section 7057(g) of Division K of 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 authorizes the use of a broad range of implementation authorities toward those programmatic purposes “notwithstanding any other provision of law” (*e.g.*, FAA Section 491, Section 2292 of Title 22 of the U.S.C., which authorizes international assistance “to alleviate human suffering caused by natural and manmade disasters . . .”).

As of September 2015, approximately eight (8) percent of USAID's total workforce 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.

Since the Agency depends on PSCs as part of its workforce for its operations, USAID seeks to recognize and motivate excellence in the performance of their contracts. 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 incentive-awards program for PSCs, distinct from the Agency's incentive awards program authorized by OPM for the Agency's U.S. Direct-Hire (USDH) employees (see 5 U.S.C. 4501 *et seq.* regarding incentive-awards programs for “superior accomplishment” by employees within the definitions of 5 U.S.C. 2105 and 5 CFR part 451). The Administrator approved a deviation from Appendix D of the AIDAR to expand the non-monetary incentive-awards program for PSCs to include limited monetary awards such as “On The Spot” or Special Act cash and Time-Off awards. The Agency implemented the revised monetary incentive-awards program for PSCs 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 programs managed by USAID's Missions, Bureaus, or Independent Offices (M/B/IOs).

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

similar to those provided to USAID's USDH employees.

To implement the incentive-awards programs for PSCs as approved by the Agency in 2004 and 2015, this final rule revises Appendices D and J of the AIDAR to replace the deviations approved in 2004 and 2015 and make them permanent.

C. Discussion

This final rule amends the AIDAR to establish a separate monetary and non-monetary incentive-awards program to recognize and reward individual PSCs for their contributions to the accomplishment of USAID's mission, goals, and objectives.

Based on Statute—Section 636(a)(3) of the FAA, as amended; and by regulation—Appendices D and J of the AIDAR, PSCs are not allowed to participate in any program administered by OPM. Recognition of individual accomplishments by PSCs has been limited to non-monetary incentive awards and certificates of appreciation. However, based on deviations and policy directives signed by the Administrator and Acting Administrator in 2004 and 2015, respectively, USAID established an interim, separate incentive-awards program to make PSCs eligible to receive incentive awards similar to those available under the Agency's incentive-awards program for USDH employees.

USAID implements its incentive-awards program for USDH employees under parameters set in Chapter 491 of the Agency's Automated Directives System (ADS). The Agency will incorporate the new PSC incentive-awards program authorized by this final rule into Appendices D and J of the AIDAR and implement it as described in USAID's PSC policy in ADS Chapter 309. Where appropriate, this incentive-awards program will closely parallel the program for USDH employees. The Agency will make any incentive award payments from the same source of funding used for each individual PSC's contract, and in all cases separately from the pool of funds maintained for incentive awards for USAID USDH employees. Recognizing that PSCs receive an annual pay-comparability adjustment similar to what U.S. Direct-Hires receive, as well as an annual within-grade salary increase for work evaluated at the “satisfactory performance” level, Agency policy requires that these incentive awards be for performance or a special act that goes above and beyond the minimum satisfactory performance required under a contract. USAID will recognize and encourage exceptional performance by

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

The Agency's internal policies in ADS Chapter 309 describe the criteria for each incentive award, any cash or other limitations associated with each incentive award, how a PSC's supervisor(s) or others may nominate individuals, and how such nominations are reviewed and recommended for approval. Nominations for the annual Agency-level incentive awards generally follow the same procedures, and use the same documentation, as currently required for USAID's USDH employees.

Regulatory Basis

Since the Agency depends on PSCs and their contributions, and as the statute, Section 636(a)(3) of the FAA of 1961, as amended, and the regulation, Appendix D of the 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 incentive-awards program for its PSCs. This incentive-awards program is distinct and separate from the Agency's incentive-awards program for USDH employees described in ADS Chapter 491. Additionally, this final AIDAR rule establishes an incentive-awards program that is different from FAR Subpart 16.4 (Incentive Contracts), as the Agency's PSC contracts are with individuals, and these contracts do not provide profit or fees. The details of this incentive award program are available in a Mandatory Reference to ADS Chapter 309, 309mab—"Incentive Awards Program for Personal Services Contracts with Individuals," accessible on the Agency website.

D. Impact Assessment

(1) Regulatory Planning and Review. Under Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) has designated the final rule "not significant," and therefore it is not subject to review by the Office of Management and Budget (OMB). OMB/OIRA has determined that this 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 Section 804 of Title 5 of the U.S.C.

This rule codifies the Agency's deviations to date from the current rule in the Code of Federal Regulations (CFR). The costs calculated in this section are based on upper-end estimates to illustrate the potential impact of this final rule from the baseline costs of the current rule. Under this final rule, incentive awards paid to USPSCs at the level of USAID's Missions, Bureaus, and Independent Offices (M/B/IO), and TCNPSCs with exceptions to be paid on the General Schedule (GS) scale (*i.e.*, "excepted TCNPSCs") for FY 2014–2015 averaged \$86,158 per year based on historical data provided by the Office of the Chief Financial Officer (M/CFO) in the Bureau for Management. 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 "Agency-level" incentive awards issued from USAID headquarters, the total estimated amount that could be paid to all selected PSCs (U.S., TCN, and CCN) is \$160,000 per Fiscal Year, assuming nominations are approved for every incentive 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 incentive awards program is new, and there are no historical data for such incentive awards paid to PSCs, USAID used historical data for incentive 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 labor for nominations, selection panels, and the processing of incentive awards, plus the costs of ceremony events for a volume of PSC incentive awards equivalent to those given to USDH employees. Also, as PSCs are eligible for fewer categories of Agency-level incentive awards than are USDH staff, the Agency pro-rated the costs accordingly. Therefore, the total estimated cost for Agency-level incentive awards from headquarters is \$278,525 per Fiscal Year.

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

Note that for incentive awards at the Mission level for CCN and 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 final rule revises the title of the Mission incentive-awards program by using current terminology, this rule does not otherwise affect the authority for this long-established incentive awards program for CCN and TCN PSCs. Therefore, there are no increased cost implications for such incentive awards under this rule, as it only updates the title of the program under AIDAR Appendix J.

Overall, USAID's awards program affects approximately 5,200 individual PSCs based on USAID's staffing numbers for FY2015 (*i.e.*, 775 PSCs and more than 4,470 CCN and TCN PSCs). The costs to implement this rule are justified, as the Agency depends on PSCs as large part of its workforce. Given that USAID PSCs are an important and flexible supplement for the Agency's dynamic operations, this rule provides the Agency the ability to recognize and motivate excellence in the performance of its contractors. Additionally, because these incentives were previously approved at the highest levels of Agency management, USAID deemed the costs to implement this rule as a necessary business decision to promote excellent performance by PSCs.

As a regulatory matter, the cost of the rule-making process to incorporate this final rule into the regulation is also justified. The AIDAR appendices include all the compensation and benefits available under personal services contracts. Therefore, the Agency needs this rule to keep the regulation consistent, complete, and transparent to industry, other U.S. Government Departments and Agencies, and the general public.

(2) Regulatory Flexibility Act. This final rule will not have an impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, Section 601 of Title 5 of the U.S.C., *et seq.* Therefore, USAID has not performed an Initial Regulatory Flexibility Analysis.

(3) Paperwork Reduction Act. This final rule does not establish a new collection of information that requires the approval of OMB under the Paperwork Reduction Act (Chapter 35 of Title 44 of the U.S.C.).

List of Subjects in Appendices D and J 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:

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- 1. Appendix D is amended as follows:
 - a. In Section 4, by revising paragraph (f);
 - b. In Section 10 entitled, “Form USAID 1420–36, “Cover Page” and “Schedule”, in the Table of Contents under the heading General Provisions, reserve numbers 27 and 28, and add 29 to the list of provisions;
 - c. In Section 11 entitled, “Optional Schedule With a U.S. Citizen or U.S. Resident Alien”, in the Table of Contents, under the heading General Provisions, reserve numbers 27 and 28, and add 29 to the list of provisions;
 - d. In Section 12:
 - i. Revise the heading, “General Provisions”;
 - ii. Remove the heading, “Contract with a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad”;
 - iii. Amend the Index of Clauses by reserving clause numbers 27 and 28, and add clause 29, “Incentive Awards”;
 - iv. By adding a parenthetical authority citation at the end of the appendix.

The revision 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

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(f) *Incentive awards.* U.S. personal services contractors are not eligible to participate in, or be funded under, the incentive-awards program administered by the Office of Personnel Management (OPM) for USAID U.S. 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 Mission/Bureau/Independent Office (M/B/IO). The list of incentive awards and detailed eligibility, nomination, and approval processes are specified in internal Agency policies in Chapter 309 of Automated Directive System (ADS), available on the USAID website. These awards will be funded from the authorizations used to fund the specific contract.

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10. *Form USAID 1420–36, “Cover Page” and “Schedule”.*

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- 27. [Reserved]
- 28. [Reserved]
- 29. Incentive Awards

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11. *Optional Schedule With a U.S. Citizen or U.S. Resident Alien*

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- 27. [Reserved]
- 28. [Reserved]
- 29. Incentive Awards

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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*

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Index of Clauses

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- 27. [Reserved]
- 28. [Reserved]
- 29. Incentive Awards

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29. Incentive Awards

[Insert the following clause in all USPSC contracts.]

Incentive Awards (Date)

The contractor is eligible to receive certain monetary and non-monetary USAID incentive awards in accordance with the AIDAR and USAID internal policy.

* * * * *

(Authority: 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)

- 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,” 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,” removing the words “Contracting Officer,” and adding in their place the words “contracting officer.”

■ b. In 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 (OPM), 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 Department of 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, which consists of the local salary schedule including salary rates, statements that authorize 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,” sections (c) “Withholdings and Fringe Benefits,” (d) “Resident Hire U.S. Personal Services Contractors,” (e) “Determining Salary for Personal Services Contractors,” (f) “Incentive Awards,” (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 the 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 U.S. 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

[Insert the following clause in all CCN and TCN contracts paid under the local compensation plan.]

Incentive Awards (Date)

(a) CCN and 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 USAID internal policy.

(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: Section 621 of, Public Law. 87-195, 75 Stat. 445, (Section 2381 of Title 22 of the U.S.C. 2381), 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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