

[Code of Federal Regulations]
[Title 22, Volume 1, Parts 1 to 299]
[Revised as of April 1, 1999]
From the U.S. Government Printing Office via GPO Access
[CITE: 22CFR228.01]

TITLE 22--FOREIGN RELATIONS

CHAPTER II--AGENCY FOR INTERNATIONAL DEVELOPMENT

PART 228--RULES ON SOURCE, ORIGIN AND NATIONALITY FOR COMMODITIES AND SERVICES FINANCED BY USAID--Table of Contents

Subpart A--Definitions and Scope of This Part

Sec. 228.01 Definitions.

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

(a) Commodity means any material, article, supply, goods, or equipment.

(b) Commodity-related services means delivery services and/or incidental services.

(c) Component means any good that goes directly into the production of a produced commodity.

(d) Cooperating country means the country receiving the USAID assistance subject to this part 228.

(e) 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.

(f) Delivery service means any service customarily performed in a commercial export transaction which is necessary to effect a physical transfer of commodities to the cooperating 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 services" may also include work and materials necessary to meet USAID marking requirements.

(g) Implementing document means any document, such as a contract, grant, letter of commitment, etc., issued by USAID which authorizes the use of USAID funds for the procurement of services or commodities and/or

commodity related services, and which specifies conditions which apply to such procurement.

(h) Incidental services means the installation or erection of USAID-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment.

(i) Mission means the USAID Mission or representative in a cooperating country.

(j) Origin means the country where a commodity is mined, grown or produced. A commodity is produced when, through manufacturing, processing, or substantial and major assembling of components, a commercially recognized new commodity results that is significantly different in basic characteristics or in purpose of utility from its components.

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

(l) Source means the country from which a commodity is shipped to the cooperating country, or the cooperating country if the commodity is located therein at the time of the purchase. 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.

(m) State means the District of Columbia or any State, commonwealth, territory or possession of the United States.

(n) Supplier means any person or organization, governmental or otherwise, who furnishes services, commodities and/or commodity related services financed by USAID.

(o) 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.

(p) USAID means the U.S. Agency for International Development or any successor agency, including when applicable, each USAID Mission abroad.

(q) USAID Geographic Code means a code in the USAID Geographic Code Book which designates a country, a group of countries, or an otherwise defined area. The principal USAID geographic codes are described in Sec. 228.03.

(r) USAID/W means the USAID in Washington, DC 20523, including any office thereof.

Sec. 228.02 Scope and application.

This part is applicable to goods and services financed directly with program funds under the Foreign Assistance Act of 1961, as amended, unless otherwise provided by statute or regulation. If different conditions apply to a USAID-financed procurement, by statute or

regulation, those conditions shall be incorporated in the implementing document and shall prevail in the event of any conflict with this part 228. The implementing documents will indicate the authorized source of procurement. The terms and conditions applicable to a procurement of goods or services shall be those in effect on the date of the issuance of a contract for goods or services by USAID or by the cooperating country.

Sec. 228.03 Identification of principal geographic code numbers.

The USAID Geographic Code Book sets forth the official description of all geographic codes used by USAID in authorizing or implementing documents, to designate authorized source countries or areas. The following are summaries of the principal codes:

(a) Code 000--The United States: 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.

(b) Code 899--Any area or country, except the cooperating country itself and the following foreign policy restricted countries: Afghanistan, Libya, Vietnam, Cuba, Cambodia, Laos, Iraq, Iran, North Korea, Syria and People's Republic of China.

(c) Code 935--Any area or country including the cooperating country, but excluding the foreign policy restricted countries.

(d) Code 941--The United States and any independent country (excluding foreign policy restricted countries), except the cooperating country itself and the following: Albania, Andorra, Angola, Armenia, Austria, Australia, Azerbaijan, Bahamas, Bahrain, Belgium, Bosnia and Herzegovina, Bulgaria, Belarus, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia,* Malta, Moldova, Monaco, Mongolia, Montenegro,* Netherlands, New Zealand, Norway, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, Serbia,* Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan,* Tajikistan, Turkmenistan, Ukraine, United Arab Emirates, United Kingdom, Uzbekistan, and Vatican City.

*Has the status of a ``Geopolitical Entity'', rather than an independent country.

[61 FR 53616, Oct. 15, 1996; 61 FR 54849, Oct. 22, 1996]

Subpart B--Conditions Governing Source and Nationality of Commodity

Procurement Transactions for USAID Financing

Sec. 228.10 Purpose.

Sections 228.11 through 228.14 set forth the rules governing the eligible source of commodities and nationality of commodity suppliers for USAID financing. These rules may be waived in accordance with the provisions in subpart F of this part.

Sec. 228.11 Source and origin of commodities.

(a) The source and origin of a commodity as defined in Sec. 228.01 shall be a country or countries authorized in the implementing document by name or by reference to a USAID geographic code.

(b) Any component from a foreign policy restricted country makes the commodity ineligible for USAID financing.

(c) When the commodity being purchased is a kit (e.g., scientific instruments, tools, or medical supplies packaged as a single unit), the kit will be considered a produced commodity.

(d) When spare parts for vehicles or equipment are purchased, each separate shipment will be considered a produced commodity, rather than each individual spare or replacement part. The parts must be packed in and shipped from an eligible country.

(e) Systems determination. When a system consisting of more than one produced commodity is procured as a single separately priced item, USAID may determine that the system itself shall be considered a produced commodity. When a determination is made to treat a system as a produced commodity, component commodities which originate from other than an authorized source country may be shipped directly to, and the system assembled in, the cooperating country, unless USAID specifically determines that assembly and shipment take place in an authorized source country. Transportation costs must still meet the requirements in subpart C of this part in order for them to be eligible for USAID financing. USAID, or the importer in the case of a Commodity Import Program, shall inform the supplier of any system determination.

(f) In order to be eligible for USAID financing, when items are considered produced commodities under paragraphs (c), (d), or (e) of this section, the total cost (to the system supplier) of the commodities making up the kit, spare parts, or system which were manufactured in countries not included in the authorized geographic code may not exceed 50 percent of the lowest price (not including ocean transportation and marine insurance) at which the supplier makes the final product available for export sale.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997, as amended at 63 FR 38751, July 20, 1998]

Sec. 228.12 Long-term leases.

Any commodity obtained under a long-term lease agreement is subject to the source and origin requirements of this subpart B. For purposes of this subpart B, a long-term lease is defined as a single lease of more than 180 days, or repetitive or intermittent leases under a single activity or program within a one-year period totalling more than 180 days, for the same type of commodity.

Sec. 228.13 Special source rules requiring procurement from the United States.

(a) 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)

(b) Motor vehicles must be manufactured in the United States to be eligible for USAID financing. Also, 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. (22 U.S.C. 2396) For purposes of this section, motor vehicles are defined as self-propelled vehicles with passenger carriage capacity, such as highway trucks, passenger cars and buses, motorcycles, scooters, motorized bicycles and utility vehicles. Excluded from this definition are industrial vehicles for materials handling and earthmoving, such as lift trucks, tractors, graders, scrapers, off-the-highway trucks (such as off-road dump trucks) and other vehicles that are not designed for travel at normal road speeds (40 kilometers per hour and above).

(c) Pharmaceutical products must be manufactured in the United States in order to be eligible for USAID financing. USAID shall not finance any pharmaceutical product manufactured outside the United States if the manufacture of such product in the United States would involve the use of, or be covered by, a valid patent of the United States unless such manufacture is expressly authorized by the owner of such patent. (22 U.S.C. 2356)

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997, as amended at 63 FR 72181, Dec. 31, 1998]

Sec. 228.14 Nationality of suppliers of commodities.

(a) The rules on nationality of suppliers of commodities relate only

to the suppliers, and not to the commodities they supply. The nationality of the supplier is an additional eligibility criterion to the rules on source, origin and componentry.

(b) A supplier providing commodities must fit one of the following categories for the transaction to be eligible for USAID financing:

(1) An individual who is a citizen or a lawfully admitted permanent resident of a country or area included in the authorized geographic source code, except as provided in paragraph (c) of this section;

(2) A corporation or partnership organized under the laws of a country or area included in the authorized geographic source code and with a place of business in such country;

(3) A controlled foreign corporation (within the meaning of section 957 et seq. of the Internal Revenue Code) as attested by current information on file with the Internal Revenue Service of the United States (on IRS Form 959, 2952, 3646, or on substitute or successor forms) submitted by shareholders of the corporation; or

(4) A joint venture or unincorporated association consisting entirely of individuals, corporations, or partnerships which are eligible under either paragraph (b) (1), (2) or (3) of this section.

(c) Citizens of any country or area, or firms or organizations located in, organized under the laws of, or owned in any part by citizens or organizations of any country or area not included in Geographic Code 935 are ineligible for financing by USAID as suppliers of commodities. Limited exceptions to this rule are:

(1) Individuals lawfully admitted for permanent residence in the United States are eligible, as individuals or owners, regardless of their citizenship; and

(2) The USAID Procurement Executive may authorize the eligibility of organizations having minimal ownership by citizens or organizations of non-Geographic Code 935 countries.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997]

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

Sec. 228.20 Purpose.

Sections 228.21 through 228.25 set forth the rules governing the eligibility of commodity-related services, both delivery services and incidental services, for USAID financing. These rules may be waived in accordance with the provisions in subpart F of this part. Waivers granted pursuant to subpart F for individual shipments requiring ocean transportation which are not based on a determination of non-availability shall not reduce the requirement that the applicable

percentage of USAID cargoes be transported on U.S.-flag vessels pursuant to the Cargo Preference Act of 1954, Section 901(b)(1) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1241(b). 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.

Sec. 228.21 Ocean transportation.

(a) The Cargo Preference Act of 1954, Section 901(b)(1) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1241(b)(1), is applicable to ocean shipment of goods subject to this part. USAID's policy on implementation of the Cargo Preference Act is in USAID's Automated Directives System, Chapter 315.

(b) In addition to cargo preference requirements, ocean shipments of USAID-financed goods must meet the requirements in paragraph (c) of this section in order for the freight cost to be eligible for USAID financing.

(c) The eligibility of ocean transportation services is determined by the flag registry of the vessel.

(1) When the authorized source for procurement is Geographic Code 000 (U.S.A.), USAID will finance ocean transportation only on U.S. flag vessels.

(2) When the authorized source for procurement is Geographic Code 941 (selected Free World), USAID will finance ocean transportation on vessels under flag registry of any country in Code 935.

(3) When commodities whose eligibility is restricted to Geographic Code 000 are purchased under agreements which authorize Geographic Code 941 for the procurement of all other commodities, USAID will finance the ocean transportation in accordance with paragraph (c)(2) of this section.

(4) USAID will finance costs incurred on vessels under flag registry of any Geographic Code 935 country if the costs are part of the total cost on a through bill of lading that is paid to a carrier for initial carriage on a vessel which is eligible in accordance with paragraphs (c)(1), (2) or (3) of this section; provided that for shipments originating on a U.S. flag vessel with transshipment to a non-U.S. flag vessel, the supplier must obtain a determination that direct service on a U.S. flag vessel is not available from USAID's Office of Procurement, Transportation Division, 1300 Pennsylvania Avenue NW., Washington, DC 20523-7900.

[61 FR 53616, Oct. 15, 1996, as amended at 63 FR 38751, July 20, 1998]

Sec. 228.22 Air transportation.

(a) The eligibility of air transportation is determined by the flag registry of the aircraft. The term "U.S. flag air carrier" means one of a class of air carriers holding a certificate under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371) authorizing operations between the United States or its territories and one or more foreign countries.

(b) For air transport financed under USAID grants, there is a U.S. Government statute that requires the use of U.S. flag air carriers for all international air travel and transportation, unless such service is not available. When U.S. flag air carriers are not available, any Geographic Code 935 flag air carrier may be used.

(c) Different requirements may be authorized in the implementing document if the transaction is financed under a USAID loan.

(d) The Comptroller General's memorandum (B-138942), dated March 31, 1981, entitled "Revised Guidelines for Implementation of the Fly America Act", established criteria for determining when U.S. flag air carriers are unavailable. See 48 CFR 47.403-1, or USAID Optional Standard Provision on "Air Travel and Transportation" for grants and cooperative agreements.

(e) While the Comptroller General's memorandum does not establish specific criteria for determining when freight service is unavailable, it is USAID's policy that such service is not available when the following criteria are met:

(1) When no U.S. flag air carrier provides scheduled air freight service from the airport serving the shipment's point of origin and a non-U.S. flag carrier does;

(2) When the U.S. flag air carrier(s) serving the shipment's point of origin decline to issue a through air waybill for transportation at the shipment's final destination airport;

(3) When use of a U.S.-flag air carrier would result in delivery to final destination at least seven days later than delivery by means of a non-U.S. carrier;

(4) When the total weight of the consignment exceeds the maximum weight per shipment which the U.S. flag air carrier will accept and transport as a single shipment and a non-U.S. flag air carrier will accept and transport the entire consignment as a single shipment;

(5) When the dimensions (length, width, or height) of one or more of the items of a consignment exceed the limitations of the U.S. flag aircraft's cargo door opening, but do not exceed the acceptable dimensions for shipment on an available non-U.S. flag scheduled air carrier.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997]

Sec. 228.23 Eligibility of marine insurance.

The eligibility of marine insurance is determined by the country in which it is "placed". Insurance is "placed" in a country if payment of the insurance premium is made to, and the insurance policy is issued by, an insurance company office located in that country. Eligible countries for placement are governed by the authorized geographic code. However, if Geographic Code 941 is authorized, the cooperating country is also eligible to provide such services, unless the implementing document specified otherwise based on the following:

(a) If a cooperating country discriminates against marine insurance companies authorized to do business in any State of the United States, then all USAID-financed goods for that country must be insured in the United States against marine risk. The term "authorized to do business in any State of the United States" means that foreign-owned insurance companies licensed to do business in the United States (by any State) are treated the same as comparable U.S.-owned companies.

(b) The prima facie test of discrimination is that a cooperating country takes actions which hinder private importers in USAID-financed transactions from making cost, insurance and freight (C.I.F.) or cost and insurance (C.&I.) contracts with United States commodity suppliers, or which hinder importers in instructing such suppliers to place marine insurance with companies authorized to do business in the United States.

(c) When discrimination is found to exist and the cooperating country fails to correct the discriminatory practice, USAID requires that all commodities procured with USAID funds be insured in the United States against marine loss. The decision of any cooperating country to insure all public sector procurements locally with a government-owned insurance agency is not considered discrimination.

Sec. 228.24 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 in connection with a commodity which is financed by USAID.

Sec. 228.25 Incidental services.

Source and nationality rules do not apply to suppliers of incidental services specified in a purchase contract relating to equipment. However, citizens or firms of any country not included in USAID Geographic Code 935 are ineligible to supply incidental services, except that individuals lawfully admitted for permanent residence in the U.S. are eligible regardless of their citizenship.

[61 FR 53616, Oct. 15, 1996; 61 FR 54849, Oct. 22, 1996]

Subpart D--Conditions Governing the Nationality of Suppliers of Services for USAID Financing

Sec. 228.30 Purpose.

Sections 228.31 through 228.37 set forth the nationality rules governing the eligibility for USAID financing of suppliers of services which are not commodity-related. These rules may be waived in accordance with the provisions in subpart F of this part.

Sec. 228.31 Individuals and privately owned commercial firms.

(a) In order to be eligible for USAID financing as a supplier of services, whether as a contractor or subcontractor at any tier, an individual must meet the requirements of paragraph (a)(1) of this section (except that individual personal services contractors are not subject to this requirement), and a privately owned commercial firm must meet the requirements in paragraph (a)(2) of this section. In the case of the categories described in paragraphs (a)(2) (i) and (ii) of this section, the certification requirements in paragraph (b) of this section must be met.

(1) An individual must be a citizen of and have a principal place of business in a country or area included in the authorized geographic code, or a non-U.S. citizen lawfully admitted for permanent residence in the United States whose principal place of business is in the United States;

(2) A privately owned commercial (i.e., for profit) corporation or partnership must be incorporated or legally organized under the laws of a country or area included in the authorized geographic code, have its principal place of business in a country or area included in the authorized geographic code, and meet the criteria set forth in either

paragraph (a)(2)(i) or (ii) of this section:

(i) The corporation or partnership is more than 50 percent beneficially owned by individuals who are citizens of a country or area included in the authorized geographic code or non-U.S. citizens lawfully admitted for permanent residence in the United States. In the case of corporations, "more than 50 percent beneficially owned" means that more than 50 percent of each class of stock is owned by such individuals; in the case of partnerships, "more than 50 percent beneficially owned" means that more than 50 percent of each category of partnership interest (e.g., general, limited) is owned by such individuals.

(With respect to stock or interest held by companies, funds or institutions, the ultimate beneficial ownership by individuals is controlling.)

(ii) The corporation or partnership:

(A) Has been incorporated or legally organized in the United States for more than 3 years prior to the issuance date of the invitation for bids or requests for proposals,

(B) Has performed within the United States administrative and technical, professional, or construction services, similar in complexity, type and value to the services being contracted (under a contract, or contracts, for services) and derived revenue therefrom in each of the 3 years prior to the date described in paragraph (a)(2)(ii)(A) of this section,

(C) Employs United States citizens and non-U.S. citizens lawfully admitted for permanent residence in the United States in more than half its permanent full-time positions in the United States and more than half of its principal management positions, and

(D) Has the existing technical and financial capability in the United States to perform the contract.

(b) A duly authorized officer of a firm or nonprofit organization shall certify that the participating firm or nonprofit organization meets either the requirements of paragraph (a)(2) (i) or (ii) of this section or Sec. 228.32. In the case of corporations, the certifying officer shall be the corporate secretary. With respect to the requirements of paragraph (a)(2)(i) of this section, the certifying officer may presume citizenship on the basis of the stockholders' record address, provided the certifying officer certifies, regarding any stockholder (including any corporate fund or institutional stockholder) whose holdings are material to the corporation's eligibility, that the certifying officer knows of no fact which might rebut that presumption.

Sec. 228.32 Nonprofit organizations.

(a) Nonprofit organizations, such as educational institutions, foundations, and associations, must meet the criteria listed in this section and the certification requirement in Sec. 228.31(b) to be eligible as suppliers of services, whether as contractors or subcontractors at any tier. Any such institution must:

(1) Be organized under the laws of a country or area included in the authorized geographic code;

(2) Be controlled and managed by a governing body, a majority of whose members are citizens of countries or areas included in the authorized geographic code; and

(3) Have its principal facilities and offices in a country or area included in the authorized geographic code.

(b) International agricultural research centers and such other international research centers as may be, from time to time, formally listed as such by the USAID Assistant Administrator, Global Bureau, are considered to be of U.S. nationality.

Sec. 228.33 Foreign government-owned organizations.

Firms operated as commercial companies or other organizations (including nonprofit organizations other than public educational institutions) which are wholly or partially owned by foreign governments or agencies thereof are not eligible for financing by USAID as contractors or subcontractors, except if their eligibility has been established by a waiver approved by USAID in accordance with Sec. 228.54. This does not apply to foreign government ministries or agencies.

Sec. 228.34 Joint ventures.

A joint venture or unincorporated association is eligible only if each of its members is eligible in accordance with Secs. 228.31, 228.32, or 228.33.

Sec. 228.35 Construction services from foreign-owned local firms.

(a) When the estimated cost of a contract for construction services is \$5 million or less and only local firms will be solicited, a local corporation or partnership which does not meet the test in Sec. 228.31(a)(2)(i) for eligibility based on ownership by citizens of

the cooperating country (i.e., it is a foreign-owned local firm) will be eligible if it is determined by USAID to be an integral part of the local economy. 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 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 country on a continuing basis for not less than 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 resident in the cooperating country;

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

Sec. 228.36 Ineligible suppliers.

Citizens of any country or area not included in Geographic Code 935, and firms and organizations located in, organized under the laws of, or owned in any part by citizens or organizations of any country or area not included in Geographic Code 935 are ineligible for financing by USAID as suppliers of services, or as agents in connection with the supply of services. The limited exceptions to this rule are:

(a) Individuals lawfully admitted for permanent residence in the United States are eligible, as individuals or owners, regardless of their citizenship, and

(b) The Procurement Executive may authorize the eligibility of organizations having minimal ownership by citizens or organizations of non-Geographic Code 935 countries.

Sec. 228.37 Nationality of employees under contracts or subcontracts for services.

(a) The rules set forth in Secs. 228.31 through 228.36 do not apply to the employees of contractors or subcontractors. Such employees must, however, be citizens of countries included in Geographic Code 935 or, if they are not, have been lawfully admitted for permanent residence in the United States.

(b) When the contractor on a USAID-financed construction project is

a United States firm, at least half of the supervisors and other specified key personnel working at the project site must be citizens or permanent legal residents of the United States. Exceptions may be authorized by the USAID Mission Director in writing if special circumstances exist which make compliance impractical.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997]

Sec. 228.38 Miscellaneous service transactions.

This section sets forth rules governing certain miscellaneous services.

(a) Commissions. The nationality rules in subparts C and D of this part, with the exception of Sec. 228.36, do not apply to the payment of commissions by suppliers. A commission is defined as any payment or allowance by a supplier to any person for the contribution which that person has made to securing 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.

(b) Bonds and guarantees. The nationality rules in subparts C and D of this part, with the exception of Sec. 228.36, 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 in subparts C and D of this part, with the exception of Sec. 228.36, do not apply to firms providing liability insurance under construction contracts.

Sec. 228.39 Special source rules for construction and engineering services.

Advanced developing countries, eligible under Geographic Code 941, which 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. There is no waiver of this provision. (22 U.S.C. 2354)

Subpart E--Conditions Governing Source and Nationality of Local Procurement Transactions for USAID Financing

Sec. 228.40 Local procurement.

Local procurement in the cooperating country involves the use of appropriated funds to finance the procurement of goods and services supplied by local businesses, dealers or producers, with payment normally being in the currency of the cooperating country. Unless otherwise specified in an implementing document, or a waiver is approved by USAID in accordance with subpart F of this part, local procurement is eligible for USAID financing only in the following situations:

(a) Locally available commodities of U.S. origin, which are otherwise eligible for financing, if the value of the transaction is estimated not to exceed the local currency equivalent of \$100,000 (exclusive of transportation costs).

(b) Commodities of Geographic Code 935 origin if the value of the transaction does not exceed \$5,000.

(c) Professional services contracts estimated not to exceed the local currency equivalent of \$250,000.

(d) Construction services contracts, including construction materials required under the contract, estimated not to exceed the local currency equivalent of \$5,000,000.

(e) Under a fixed-price construction contract of any value, the prime contractor may procure locally produced goods and services under subcontracts.

(f) The following commodities and services which are only available locally:

(1) Utilities, including fuel for heating and cooking, waste disposal and trash collection;

(2) Communications--telephone, telex, facsimile, postal and courier services;

(3) Rental costs for housing and office space;

(4) Petroleum, oils and lubricants for operating vehicles and equipment;

(5) Newspapers, periodicals and books published in the cooperating country;

(6) Other commodities and services (and related expenses) that, by their nature or as a practical matter, can only be acquired, performed, or incurred in the cooperating country, e.g., vehicle maintenance, hotel accommodations, etc.

Subpart F--Waivers

Sec. 228.50 General.

USAID may expand the authorized source in order to accomplish project or program objectives by processing a waiver. When a waiver is

processed to include a new country, area, or geographic code, procurement is not limited to the added source(s), but may be from any country included in the authorized geographic code. All waivers must be in writing.

Sec. 228.51 Commodities.

(a) Waiver criteria. Any waiver must be based upon one of the criteria listed in this section. Waivers to Geographic Code 899 or Code 935 which are justified under paragraph (a)(2) or (3) of this section may only be authorized on a case-by-case basis. A waiver may be authorized when:

(1) A commodity required for assistance is of a type that is not produced in or available for purchase in the United States; in addition, for waivers to any country or Geographic code beyond Code 941 and the cooperating country, the commodity is of a type that is not produced in or available for purchase in any country in Code 941 or the cooperating country.

(2) It is necessary to permit procurement in a country not otherwise eligible in order to meet unforeseen circumstances, such as emergency situations.

(3) It is necessary to promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives.

(4) For waivers to authorize procurement from Geographic Code 941 or the cooperating country:

(i) For assistance other than commodity import programs, when the lowest available delivered price from the United States is reasonably estimated to be 50 percent or more higher than the delivered price from a country or area included in Geographic Code 941 or the cooperating country.

(ii) For assistance other than commodity import programs, when the estimated cost of U.S. construction materials (including transportation and handling charges) is at least 50 percent higher than the cost of locally produced materials.

(iii) For commodity import programs or similar sector assistance, an acute shortage exists in the United States for a commodity generally available elsewhere.

(iv) Persuasive political considerations.

(v) Procurement in the cooperating country would best promote the objectives of the foreign assistance program.

(vi) Such other circumstances as are determined to be critical to the success of project objectives.

(b) Additional requirements. A waiver to authorize procurement from outside the United States of agricultural commodities, motor vehicles,

or pharmaceuticals (see Sec. 228.13, "Special source rules requiring procurement from the United States,") must also meet requirements established in USAID directives on commodity eligibility. (USAID's Automated Directives System Chapter 312.)

(c) Any individual transaction not exceeding \$5,000 (not including transportation) does not require a waiver. In no event, however, shall procurement be from a non-Code 935 source.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997, as amended at 63 FR 38751, July 20, 1998]

Sec. 228.52 Suppliers of commodities.

Geographic code changes authorized by waiver with respect to the source of commodities automatically apply to the nationality of their suppliers. A waiver to effect a change in the geographic code only with respect to the nationality of the supplier of commodities, but not in the source of the commodities, may be sought if the situation requires it based on the appropriate criteria in Sec. 228.51.

Sec. 228.53 Suppliers of services--privately owned commercial suppliers and nonprofit organizations.

Waiver criteria. Any waiver must be based upon one of the criteria listed in this section. Waivers to Geographic Code 899 or Code 935 which are justified under paragraph (b) or (c) of this section may only be authorized on a case-by-case basis. A waiver may be authorized when:

(a) Services required for assistance are of a type that are not available for purchase in the United States; in addition, for waivers to any country or Geographic Code beyond Code 941 and the cooperating country, the services are of a type that are not available for purchase in any country in Code 941 or the cooperating country.

(b) It is necessary to permit procurement in a country not otherwise eligible in order to meet unforeseen circumstances, such as emergency situations.

(c) It is necessary to promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives.

(d) For waivers to authorize procurement from Geographic Code 941 or the cooperating country:

(1) There is an emergency requirement for which non-USAID funds are not available and the requirement can be met in time only from suppliers in a country or area not included in the authorized geographic code.

(2) No suppliers from countries or areas included in the authorized

geographic code are able to provide the required services.

(3) Persuasive political considerations.

(4) Procurement of locally available services would best promote the objectives of the foreign assistance program.

(5) Such other circumstances as are determined to be critical to the achievement of project objectives.

[61 FR 53616, Oct. 15, 1996, as amended at 63 FR 38752, July 20, 1998]

Sec. 228.54 Suppliers of services--foreign government-owned organizations.

A waiver to make foreign government-owned organizations, described in Sec. 228.33, eligible for financing by USAID must be justified on the basis of the following criteria:

(a) The competition for obtaining a contract will be limited to cooperating country firms/organizations meeting the criteria set forth in Secs. 228.31 or 228.32.

(b) The competition for obtaining a contract will be open to firms from countries or areas included in the authorized geographic code and eligible under the provisions of Secs. 228.31 or 228.32, and it has been demonstrated that no U.S. firm is interested in competing for the contract.

(c) Services are not available from any other source.

(d) Foreign policy interests of the United States outweigh any competitive disadvantage at which United States firms might be placed or any conflict of interest that might arise by permitting a foreign government-owned organization to compete for the contract.

Sec. 228.55 Delivery services.

(a) Ocean transportation. A waiver to expand the flag eligibility requirements to allow the use of vessels under flag registry of the cooperating country, or Geographic Code 899 or 935 countries may be authorized under the circumstances provided for in this section. Any waiver granted under this section for a particular shipment which is not based on a determination of non-availability does not reduce the pool of cargo from which the applicable percentage required to be shipped on U.S.-flag vessels under the Cargo Preference Act of 1954, Section 901(b)(1) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1241(b), is determined. A waiver to expand the flag registry of any Code 935 country may be authorized when:

(1) It is necessary to assure adequate competition in the shipping market in order to obtain competitive pricing, particularly in the case

of bulk cargoes and large cargoes carried by liners;

(2) Eligible vessels provide liner service, only by transshipment, for commodities that cannot be containerized, and vessels under flag registry of countries to be authorized by the waiver provide liner service without transshipment;

(3) Eligible vessels are not available, and cargo is ready and available for shipment, provided it is reasonably evident that delaying shipment would increase costs or significantly delay receipt of the cargo;

(4) Eligible vessels are found unsuitable for loading, carriage, or unloading methods required, or for the available port handling facilities;

(5) Eligible vessels do not provide liner service from the port of loading stated in the procurement's port of export delivery terms, provided the port is named in a manner consistent with normal trade practices; or

(6) Eligible vessels decline to accept an offered consignment.

(b) Air transportation. The preferences for use of United States flag air carriers or for use of United States, other Geographic Code 941 countries, or cooperating country flag air carriers are not subject to waiver. Other free world air carriers may be used only as provided in Sec. 228.22.

Sec. 228.56 Authority to approve waivers.

The authority to approve waivers of established policies on source, origin and nationality are delegated authorities within USAID, as set forth in the Automated Directives System Chapter 103 and any redelegations. USAID contractors or recipients of assistance agreements shall request any necessary waivers through the USAID contract or agreement officer.